**Civ Pro II: Spring 2012; Glannon Text**

**FRCP, Statutes, and Amendments Outline in the Order Presented in the Text**

**Chapter 10: Constitutional Requirement of Notice and Methods of Service**

1. 14th Amendment: allows for states to adjust standards for types of judgment sought (in rem, personam, etc.)
   1. Due Process clause: at a minimum, requires that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case
      1. Notice reasonably calculated (given the circumstances) to notify interested parties and allow them to present objections
      2. Must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance
      3. If party being served is absent or unknown, then publication that may not succeed is an acceptable means
      4. Parties should be served in the manner most readily available
2. FRCP 4
   1. 4(e): 4 methods to serve on a person
      1. (2)(A): deliver in-hand where D can be found
      2. (2)(B): allows service by leaving the summons and complaint at the defendant’s dwelling house with a person of suitable age and discretion residing therein
      3. (2)(C): deliver to lawfully appointed agent of D
      4. (1): follow rules of state where court sits, or of state where service is made
   2. 4(c)(2): bars service of process by a party to the action
      1. Any person who is at least 18 years old and not a party may serve a summons and complaint
      2. P’s lawyer can do it
   3. 4(c)(1): complaint and summons must be served together
      1. Plaintiff is responsible for having the summons and complaint served
   4. 4(b): Summons and complaint must be served after complaint is filed
   5. 4(m): court must dismiss if service not made within 120 days after filing, but if P shows good cause then court must grant extension for appropriate time
      1. If no good cause is shown, then court still may extend, but has discretion to dismiss
      2. Dismissal for failure to timely serve does not bar P from filing new action
   6. 4(h): methods for serving corporation, partnership, or association
      1. (1)(B): deliver copies to officer, managing agent, or general agent of entity
      2. Or agent lawfully appointed to receive process
      3. (1)(A): (same as 4(e)(1), except for corporation)
   7. 4(j): service on municipality
      1. (2)(A): for a municipality, serve chief executive officer (i.e. Mayor)
      2. (2)(B): or method authorized by state law
   8. 4(i): federal agency
      1. (2): serve U.S. and send copy by mail to agency
   9. 4(f): process on individuals outside of the U.S. in federal cases
      1. (1): as provided by international agreements
      2. (2)(A): methods of service in country where service is made
      3. (2)(C)(i): personal delivery, unless prohibited by laws of the foreign country
      4. (2)(C)(ii): mail requiring signed receipt, unless prohibited by their laws
      5. (2)(B): seeking instructions from appropriate authority in the foreign country by letter of request
      6. (3): seeking court order for alternative means of service
   10. 4(d): waiver of service
       1. (1): send notice of action with 2 copies of waiver to D, and a prepaid envelope for returning waiver
       2. (2)(A): If D not return waiver, then they must pay costs of formal service, including attorneys’ fees
       3. (3): D gets 60 days to answer instead of the usual 21 if they waive
       4. (4): SoL period runs until waiver is filed (bad to try and get D to waive if SoL period is almost up)
3. FRCP 12
   1. (b)(4)-(5): authorizes defendants to move to dismiss an action based on improper service of process or insufficiency of the process
   2. (g)-(h): objections to service of process must be raised either by a pre-answer motion or in the answer to the complaint. If not properly raised, then waived.
4. FRCP 5
   1. (b)(2): documents after summons and complaint may be served on lawyers instead of parties, and may be served by first class mail
5. FRCP 45
   1. Separate provisions for service of subpoenas (which are court orders to give testimony or produce documents
   2. (b)(1): subpoenas must be served by in-hand delivery to the named person

**Chapter 11: Basic Venue**

1. 28 U.S.C. 1391: (a) applies to diversity cases; (b) to most other types of federal cases
   1. (a): diversity cases may be brought only in
      1. (1): District where any D resides, if all Ds reside in same state
      2. (2): District where substantial part of events for the claim occurred, or substantial part of property that is subject of action; **OR**
      3. (3): District in which any D subject to personal jurisdiction at time action is commenced, **IF** no other district where action could be brought
   2. (b): where jurisdiction not founded solely on diversity
      1. (1): same as (a)
      2. (2): same as (a)
      3. (3): district where any D may be found, if no other where action could be brought
   3. Sub-section 3 may only be applied if neither subs 1 or 2 apply
   4. Residence of individual is same test as applied to domicile
   5. (c): Corporation resides in every district where it would be subject to personal jurisdiction if that district were its own state
      1. Partnerships generally the same way
2. Some statutes have specialized venue, that is granted by Congress, for the specific statute

**Chapter 12: Challenges to Venue: Transfers and Dismissals**

1. 28 U.S.C. 1406: if D makes motion asserting case is in improper venue, then judge may dismiss or transfer to a federal venue where could have been brought
2. 28 U.S.C. 1404: D may make motion saying that venue is proper, but there is a more appropriate district or division
   1. If so, then court may transfer to the other district or division
3. *Forum non conveniens* dismissal
   1. No statute grants courts authority to dismiss case where there is proper venue
   2. Courts retain common law authority of FNC to grant dismissals
4. 1406 Transfers and Dismissals
   1. Courts tend to transfer, because it is in the interests of justice (saves time and expense)
   2. Courts only have authority to transfer to another court in the same system
   3. Transferee court must be one where case could have been brought (proper venue, personal J, and subj matter J)
5. Waiver of Venue
   1. Party must move to dismiss for lack of proper venue early in the case (FRCP 12(g)-(h)), or it is waived
   2. Venue motions can be waived through forum selection clauses
      1. Parties agree to litigate in a particular state or court
      2. Courts grant these a lot of weight
         1. Can enforce even if specify a forum that doesn't have PJ
6. 1404 Transfers
   1. Court can transfer to venue where case might have been brought, and the transferring court considers whether it would promote convenience of parties and witnesses as well as interests of justice
      1. Public interest factors
         1. Transferee's familiarity with governing laws
         2. Relative congestion of transferee and transferor
         3. Local interest in deciding local controversies
      2. Private interest factors
         1. P's choice of forum, unless balance strongly in favor of D
         2. D's choice of forum
         3. Whether claim arose elsewhere
         4. Convenience of parties and witnesses
         5. Ease of access to evidence
   2. Moving party bears burden of establishing transfer as proper
   3. Plaintiff can also move to transfer
      1. May do this if it discovers after filing that crucial evidence and witnesses are more closely connected to different forum
7. FNC Dismissals
   1. Permissible even when law of foreign forum would give P a less desirable remedy (*Piper*)
      1. Change in law may warrant against dismissal if remedy that would be provided in foreign would be clearly inadequate, in a way that it is no remedy at all
   2. If would be time-barred in other forum, then dismissing court may place conditions, such as that D can't argue SoL
   3. Factors for dismissal are pretty much the same as 1404 Transfer factors
      1. Courts usually will weigh the factors in favor of P, though

**Chapter 13: Basic Pleading**

1. FRCP 8
   1. (a): file a pleading asserting assertions that support jurisdiction and legal claims
      1. P files complaint, stating grounds for J (8(a)(1)), short and plaint statement of claim showing entitled to relief (8(a)(2)), and a demand for relief (prayer for relief, 8(a)(3))
   2. (b)-(c): D files answer, responding to factual allegations in complaint, and asserting defenses and claims by D
      1. If include cross- or counterclaim, then P may file answer to it
      2. (c)(1): court can grant motion to dismiss for SoL without D asserting in answer if it is apparent on the face of complaint
   3. (e): pleadings must be construed so as to do justice
   4. (d)(2): permits pleading in the alternative
   5. (d)(3): permits inconsistent claims, as long as pleader reasonably and in good faith believes that either might have evidentiary support
   6. Purpose of pleading is to provide notice
   7. P is entitled to relief only if substantive law would make D liable on facts alleged in complaint
2. FRCP 10(b): form of pleadings
   1. Numbered paragraphs limited to a single set of circumstances
   2. Each claim should be in a separate count, in order to promote clarity
      1. This does not automatically require dismissal, because FRCP 8(e) says to construe in order to promote justice
3. FRCP 12(b)(6)
   1. Motion to dismiss for failure to state a claim
      1. Permitted to file before having to answer
      2. Can't file later than answer
   2. Should not be dismissed unless appears beyond doubt that P can prove no set of facts in support of his claim that would entitle him to relief
   3. Reasonable doubts should be resolved in favor of the pleader
4. Heightened Pleading
   1. FRCP 9: a party must state with particularity the circumstances constituting fraud or mistake
      1. When, where, and how fraud committed
   2. Not a heightened standard for civil rights cases
   3. FRCP 9(g): special damages must be specifically stated
      1. Would not be normally anticipated, such as damages for a later miscarriage or higher blood pressure resulting from a car accident
5. *Twombly-Iqbal* Test
   1. Court should accept as true only the well-pleaded allegations
      1. More than conclusory statement
      2. More than threadbare recital of elements of cause of action
   2. If well-pleaded, then court must determine whether the allegations could plausibly give rise to an entitlement to relief
      1. More than just conceivable
   3. Rule 9(b): second part states that malice, intent, knowledge, and other conditions of a person's mind may be alleged generally
      1. Court construes this as meaning that the pleading doesn't have to be elevated, but it must still has to meet Rule 9
         1. Can't just be based off of conclusory

**Chapter 14: Responding to the Complaint (or Not?)**

1. FRCP 55: authorizes default judgments if the non-defaulting party and the court carefully follow the prescribed procedures
   1. (a): D must plead or otherwise defend
      1. Must plead or defend within time set by rules (FRCP 4, etc.)
      2. P make motion for entry of default
         1. Clerk shall enter the default only if there has been a default **AND** that faillure is shown by affidavit or other evidence
   2. (b): enter default judgment after entry of default if judge finds that complaint states a claim for relief
      1. Not mandatory; courts can enter judgment or decline
      2. If D has appeared (even if not respond as required by rules), then they are entitled to at least three days' written notice of a hearing on entry of judgment, at which it can argue against judgment and also to set aside entry of default
         1. 55(c): Court examine many factors in determining whether they should enter it or allow the D to defend late, such as amount of money, public importance, technical default, or default because of good faith mistake or excusable neglect, or if delay did not cause prejudice to P
      3. (b)(1): all cases other than claims for sum certain, non-defaulting party must apply to the court for a default judgment
      4. (b)(2): if it is necessary to take an account, determine damages, establish truth of evidence, or investigate any other matter, then the court may conduct such hearings or order such references as it deems necessary and proper
         1. **No requirement** that hearing be conducted to fix appropriate level of damages
            1. Where amount of dmgs is a sum certain, or adequate record made by evidence to show statutory damages, then no evidentiary hearing is required
   3. Courts insist on proof of proper service in the record before they will entertain a motion for a default judgment
   4. While courts do not favor default judgments, they are appropriate when the process has been halted because of an essentially unresponsive party
      1. Especially if intentionally or recklessly not respond
   5. A default is only an admission of the facts in the complaint, and is not an absolute confession by the D
      1. Default not stand on a complaint that fails to state a claim
2. FRCP 4
   1. Time limits apply
   2. (e)(2)(B): applies in that complaint must be served on someone of suitable age and discretion
   3. All the methods of proper service apply, actually
3. FRCP 54
   1. (c): ties default judgment to the complaint by using amount or kind of relief set out in complaint as a maximum
      1. Grant a party the relief to which it is entitled
4. FRCP 60
   1. (b): grants defaulting party ability to move for relief in the case of default judgment being entered
      1. Courts almost always consider whether the default was wilful, if setting aside would prejudice P, and whether D has any meritorious defenses
      2. Courts set aside judgments as "void" I they find that service was never made or that the court that entered the judgment lacked personal jurisdiction
   2. (c)(1): 60(b) places time limits on the motion for certain causes, like mistake or excusable neglect
5. FRCP 12
   1. (a):
      1. (a)(4)(A): if pre-answer motion fails, then D must file an answer within 10 days after notice of court's action
   2. (b): no defense or objection is waived by joining it with one or more others in a motion
      1. (b)(5): defense of insufficient service of process
      2. (b)(6): Failure to state a claim
         1. Courts must allow plaintiffs to amend their complaint unless amendment would be futile
         2. Judge accepts as true all of factual allegations contained in the complaint
            1. P must allege facts that raise a right to relief above the speculative level on the assumption that the allegations in the complaint are true
         3. Courts usually look to the four corners of the complaint when evaluating (b)(6) motion
            1. Two exceptions

12(c) motion

Parties may present matters outside the pleadings

FRCP 12(d): If court accepts these matters, then it can treat the (b)(6) motion as a motion for summary judgment, as long as it informs the parties

* 1. (c): motion for judgment on the pleadings filed after D has answered
     1. Court considers well-pleaded allegations of all the pleadings, answers, replies, and the complaint
  2. (e): party may move for a more definite statement of a pleading, if it is so vague or ambiguous that the party cannot reasonable prepare a response
     1. Must point out defects
     2. May be granted where a complaint fails to adequately link a cause of action to its factual predicates
        1. I.E. bare-bones complaint
  3. (f): court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter
     1. Motion will be denied unless it can be shown that no evidence in support of the allegation would be admissible
     2. Repugnant allegations, or those with superfluous descriptions may also be stricken
     3. Court has a large amount of discretion
        1. Disfavored
     4. Stricken matter is treated as if it was not there
        1. Sometimes also stricken from record
  4. (g)
     1. (g)(2): a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion
        1. Must raise all Rule 12 motions at the same time
  5. (h)
     1. (h)(1): objections to personal jurisdiction, venue, and service of process must be raised in a party's first responsive pleading (applies to all 12(b)(6) motions)
     2. **(h)(2): does not allow a party to present a second pre-answer motion for failure to state a claim or for failure to join a party (FRCP 19), but they may raise these by a post-answer motion at any time prior to close of trial**
        1. Can waive if you fail to assert these defenses before close of trial
     3. **(h)(3): impliedly permits a motion to dismiss for lack of subject matter jurisdiction at any time**
        1. SMJ is never waived
  6. Rule 12 defenses must be asserted prior to filing an answer, and must be asserted together

1. FRCP 10
   1. (b): promotes separation of claims by counts in order to promote clarity
      1. Does not have to be a "literary gem"; D just needs to be able to figure it out
   2. (c): authorizes incorporation by reference in a complaint
2. FRCP 7
   1. (a): Counterclaims and crossclaims require answers; for any claim that is not dismissed, an answer is allowed
      1. (a)(7): if the court orders one, a reply to an answer is allowed
   2. (b)(1): request for a court order must be made by motion
      1. This applies for 12(g)-(h) especially
         1. Must make the motion, rather than simply trying to assert or reserve the defenses
3. FRCP 8
   1. (a): affirmative defenses must set forth a short and plain statement of the basis for the defense
      1. Must include either direct or inferential allegations as to all elements of the defense asserted
   2. (b)
      1. (b)(1)(B): answer must admit or deny factual allegations of complaint
      2. (b)(6): if a responsive pleading is not required, an allegation is considered denied or avoided
   3. (c): lists illustrative affirmative defenses
      1. Requires a responding party to admit a complaint's allegations but then permits the responding party to assert that for some legal reason it is nonetheless excused from liability, or from full liability
      2. Failure to timely plead an affirmative defense waives the defense
      3. D can be allowed to amend its complaint to add affirmative defenses as long as it still gives P sufficient notice to prepare for trial
         1. If aff defense raised at trial, then judge may allow it as long as it doesn't result in unfair surprise
      4. Not an exhaustive list
   4. Three-part test for sufficiency of affirmative defense
      1. Whether matter is appropriately pled as affirmative defense
      2. Whether defense is adequately pled under FRCP 8 and 9
      3. Can only grant motion to strike affirmative defense if court is convinced that there are no unresolved questions of fact, that any questions of law are clear, and that under no set of circumstances could the defense succeed
         1. In diversity cases, must verify that is sufficient to meet state law

**Chapter 16: Amending Pleadings**

1. FRCP 15: variances between pleadings and proof are allowed
   1. (a): 2 types of amendment before trial
      1. (a)(1): amendments as a matter of right, which are made without needing the court's permission
         1. (a)(1)(A): may amend once without leave within 21 days of serving of that pleading (applies to complaints and answers)
         2. If original is one to which a response is required, then party may amend original within 21 days after service of the responsive pleading
         3. If a party files a motion under Rule 12(b) to dismiss, or files a 12(e) motion, or makes a motion under 12(f), then the pleader may amend within 21 days after the motion is served
         4. These 21 day periods are not cumulative
      2. (a)(2): amendments by leave of court or written consent of the adverse party
         1. Leave shall be freely given when justice so requires
            1. In the absence of reasons such as undue delay, bad faith, bad motives, repeated failure to cure by earlier amendments, prejudice to opposing party by amendment, futility of amendment, etc.
            2. Burden is on party opposing amendment to show prejudice
      3. (a)(3): when court grants leave to amend to add an adverse party, that party is given 14 days after service of the amended pleading to plead in response
   2. (b): amendments during or after trial have a harder standard than those pre-trial because more likely to prejudice opponent
      1. May be granted if evidence is presented on an issue beyond the scope of the pretrial order, so as to amend the PTO
      2. Even where there is no consent, and objection is made at trial that evidence is outside of scope, amendment may still be allowed unless objecting party satisfies court that he would be prejudiced
         1. If not expressly consent when evidence is offered, then may impliedly consent even though not raised in original pleadings
      3. If the issue was tried by consent without objection, the answer must be treated as if the defense had been raised
   3. (c): amendments after SoL has run and whether they can relate back to the date of a timely original pleading if they amend
      1. Relates back to original filing whenever the claim or defense asserted in amendment arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading
         1. Issue is whether original gave notice of the claim now being asserted
      2. (c)(1)(A): if the law supplying the SoL also provides for relation back, then the court must apply that law
      3. (c)(1)(C): changing the party
         1. Test is whether new D knew or should have known that it would have been named as D but for an error
            1. What D knew or should have known, not what P knew or should have at the time of filing of original complaint
         2. Amending party's diligence is not a requirement for relation back
         3. If new D had constructive notice within 4(m) period, then they should have known they would have been named as D
            1. Only need to show that they had actual notice, instead of providing formal service

**Chapter 17: Joinder of Claims and Parties**

1. FRCP 18
   1. (a): A party asserting a claim, counterclaim, crossclaim, or third-party claim may join as many claims they have against an opponent, whether related or not
2. FRCP 42
   1. (b): trial judge may order separate trials for one or more claims in an action
      1. May do this for convenience, avoid prejudice, or expedite and economize
3. FRCP 21
   1. Any claim against a party may be severed and proceeded with separately
      1. Broad discretion of judge
4. Claim preclusion
   1. If P sues D on a K claim, and later sues in another action on a claim arising from the K issue, then most court would bar P from doing so
      1. Barred if could have joined in first suit
5. FRCP 20
   1. (a): limits who P may name as Ds, and who can join as Ps
      1. (a)(1): Ps may sue together if they assert claims that arise out of the same transaction, occurrence, or series of transactions or occurrences; and if claims involve any ? Of law or fact common to all Ps
         1. Not required to join in same action
         2. Liberally applied when convenient
      2. (a)(2): Ds may be sued together if the same criteria for (a)(1) are met
         1. Not required to sue multiple Ds together in same action
   2. Right to join parties does not confer SMJ or PJ; must still meet those for all parties
6. FRCP 13: counterclaims and crossclaims
   1. (a)
      1. (a)(1)(A): counterclaim is compulsory if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim
         1. Not all state courts have the same rule, as illustrated by *Leinendecker*
            1. Not apply to occurrence; only same transaction
            2. Not all states even have compulsory counter rules
         2. Counterclaim is only compulsory if it is ripe, meaning that a cause of action exists for which a lawsuit may properly be commenced and pursued
      2. Four tests for arising out of same transaction or occurrence (courts vary on which they use)
         1. Are the issues of fact and law raised in the claim and counter largely the same?
         2. Would res judicata bar a subsequent suit on the party's counter, absent the compulsory counter rule?
         3. Will substantially the same ev support or refute the claim as well as the counter?
         4. Is there a logical relationship b/t claim and counter?
            1. Broadest test
      3. More overlap in legal in factual issues, more likely to allow joinder
   2. (b): some counterclaims are permissive, not compulsory
      1. Not raising them does not bar from later bringing action to recover
      2. Mirrors FRCP 18, in that may assert unrelated claims together
      3. Probably will be separated under FRCP 42
   3. (g): crossclaims against coparties are authorized
      1. If arises out of same transaction or occurrence as original action or counter, or if claim relates to any property that is subject matter of original action
      2. Crossclaims are permissive, not compulsory
      3. Ps may also assert crosses
   4. (h): may add additional parties to both crosses and counters
      1. Bring strangers into lawsuit
      2. If brought stranger in without adding to cross or counter, then could only be able to by impleading them under FRCP 14(a)(1)
7. 28 U.S.C. 1367: supplemental jurisdiction
   1. If a federal court has SMJ over a case, it may also hear certain other related claims in the action, such as compulsory counterclaims
   2. Permissive counterclaims are not related to the main claim and often must have their own basis for SMJ
8. FRCP 14: impleader
   1. (a)
      1. (a)(1): D may, as 3rd party P, serve a summons and complaint upon a nonparty who is or may be liable to it for all or part of the claim against it
         1. Right of D to be reimbursed for part or all of P's claim by someone else
         2. D must allege that the new party is or may be liable to the D for all or part of any judgment P recovers from D
         3. 3rd party D may be impleaded without leave of court within 14 days of service of answer to complaint; if later, then must get leave of court
      2. Factors for deciding FRCP 14 motion:
         1. Timeliness of motion, potential for complication of issues at trial, probability of trial delay, and whether P may be prejudiced by the addition
      3. May not join a person who is or may be liable **solely** to the P
      4. May not join a person who is liable for a loss that is separate from P's; can't expand parties based on a claim for D's own losses
      5. Typical 3rd party claims are for contribution or indemnification
      6. 3rd party D may or must assert counters, and may assert crosses against coparties
      7. (a)(5): "fourth party claim": May also bring in additional parties who may be liable to reimburse for all or part of D's claim against them
      8. (a)(2)(C): 3rd party D may assert against the P any defense that the 3rd party P has to the P's claim
      9. Court must also have jurisdiction over 3rd party
      10. (a)(2)(D): 3PD may assert any claims against P arising from transaction or occurrence of main claim
      11. (a)(3): P may assert claims against 3PD that arise from transaction or occurrence of main claim
          1. This triggers counterclaim provisions, also

**Chapter 18: Complex Joinder: Intervention, Interpleader, and Required Parties**

1. FRCP 19: situations in which a person has not been made a party to the action, but should participate for the court to fairly and adequately resolve the dispute
   1. No such thing as "misjoinder"
   2. (a): whether absentee is a person who should be joined if feasible, and if they should be, can they be
      1. Person should be joined if feasible, if one of several conditions is met:
         1. (a)(1)(A): in that person's absence, the court can't accord complete relief among existing parties
            1. I.E. if P would not be able to collect all damages they are entitled to
         2. (a)(1)(B): absentee claims an interest relating to subject of action and if disposing of action in the person's absence may:
            1. Impair or impede ability to protect that interest; **OR**

I.E. if P orders employer to pay a part of absentee's wages as a result of divorce because this would take away absentee's money without them being able to protect

* + - * 1. Leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest

I.E. if citizens sued seeking clean-up of landfill, then EPA should be joined because EPA might impose different requirements for remediation than the court, which would leave D subject to inconsistent obligations

* + 1. If FRCP calls for joinder, P can't be ordered to appear if not subject to PJ of court
       1. May also destroy SMJ or venue
  1. (b): if should be joined but can't be, then this determines what court should do
     1. Court must consider risk of prejudice to absentee or existing parties if case goes forward, ways to lessen prejudice by fashioning judgment, whether judgment rendered in person's absence will be adequate, and whether P will have an adequate remedy if action is dismissed for nonjoinder
  2. FRCP 12 allows D to raise failure to join a party even before answering complaint
     1. Under FRCP 12, party may raise objection later in the suit, even if fails to do it before or at the time of first answer

1. FRCP 24: non-parties may intervene if their interests might be affected by the action
   1. A party might be allowed to intervene for limited purposes or only on certain claims in the case
      1. Even if not allowed to intervene, parties can file amicus curiae briefs in support of one party or another
   2. (a): intervenors of right
      1. (a)(1): Right to participate if a federal statute authorizes intervention
      2. (a)(2): Right to participate if claims interest relating to property or transaction that is subject of action, and if disposing of action may impair or impede movant's ability to protect, unless existing parties adequately represent that interest
         1. Must have interest,
            1. Close cases should be resolved in favor of recognizing an interest
            2. Must implicate some significantly protectable interest; not just a mere betting interest
         2. Must be risk that will be impaired without participations, and
            1. Applicant must show only that impairment of its substantial legal interest is possible if intervention is denied
            2. Minimal burden
         3. Parties already involved adequately protect
            1. Applicants not required to show that the representation will in fact be inadequate

May be enough to show that existing party who seeks the same outcome will not make all of the applicant's arguments

* + - * 1. Applicants need only show that there is a potential for inadequate representation
  1. (b): permissive intervenors
     1. (b)(1): court may grant permission if applicant has a claim or defense that shares with main action a common ? Of law or fact
     2. (b)(3): Judges should only allow if determine that person's interest merits participation and allowing to participate will not unduly delay or prejudice adjudication of original parties' rights
  2. (c): applicant for intervention must attach a pleading to its motion that sets out the claim or defense for which intervention is sought
  3. Courts generally hold that denial of an application to intervene as of right is a final decision that is immediately appealable
     1. An order granting intervention is generally held to be an interlocutory decision that is not immediately appealable
        1. Even if appeal after final judgment, appellate won't review; usually say harmless error

1. Interpleader: person faced with conflicting claims to property may also join all claimants in a single action to obtain a judgment resolving those claims
   1. 28 U.S.C. 1335(a): Statutory Interpleader
      1. Party may file a federal interpleader action if:
         1. It has possession of money or property worth more than $500;
         2. There are 2 or more adverse claimants to the money or property; and
         3. P has deposited the money or property in the court or given a bond for compliance with the court's eventual order for payment
      2. Minimal Diversity: stakeholder may file interpleader as long as 2 or more adverse claimants are diverse
         1. SMJ for federal courts as long as 2 claimants are from different states
      3. 28 U.S.C. 2361: Nationwide personal jurisdiction over the claimants
         1. Court may issue its process for all claimants wherever they are found
            1. Nationwide service of process
   2. FRCP 22: Rule Interpleader
      1. Claimants must be subject to personal jurisdiction
         1. PJ to the same extent as the courts of the state in which the federal court sits (4(k)(1)(A))
      2. SMJ must be based on one of the usual bases of SMJ, being either diversity or federal question
         1. Measured by comparing citizenship of stakeholder to that of the claimants
      3. Amount in controversy must exceed $75,000
      4. Venue as usual
   3. 28 U.S.C. 2361: Authorizes injunctions against other actions
      1. Court may restrain claimants from instituting any proceeding in any court affecting the property, instrument, or obligation involved in the interpleader action until further order of the court

**Chapter 19: Class Actions**

1. Due Process
   1. Judgment in a class action, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it
   2. Failure of due process only in cases where it can't be said that the procedure adopted fairly insures the protection of the interests of absent parties who are to be bound by it
      1. Court must reconcile the principle that only parties can be bound with the fact that in class actions absentee class members do not participate as parties
   3. How a class action binds absent class members:
      1. Efficiency or impracticality
      2. Interests of absentees must be of same class as interests of those who are joined (the class reps)
      3. Absentees' interests must in fact be adequately represented by parties who are present
      4. Courts must adopt procedures that insure interest and representations requirements are satisfied, and that litigation insures full and fair consideration of the common issue
   4. Personal jurisdiction
      1. Different due process protections from those given to Ds under law of PJ
         1. Forum state may exercise J over claim of absentees, even though they may not possess minimum contacts with the forum which would support PJ over a D
         2. Due process is satisfied in a 23(b)(3) action for damages in which each member received notice with an opportunity to opt out of the class
2. FRCP 23
   1. Two part analysis for certifying
      1. Court must decide whether party moving for certification has proposed a class that meets general requirements for any class (23(a))
      2. Court must decide which type of class to certify under 23(b), which sets out specific requirements for 3 different types of classes
   2. Class must meet all requirements of 23(a)
   3. (a)(1): court must certify the lawsuit as a class action, provided party seeking certification show that joinder of all members is impracticable
      1. Requires that the class be so numerous that joinder of all members is impracticable
         1. Factors to consider for numerosity: number of persons in class, type of action at issue, monetary value of individual claims, and inconvenience of trying each class alone
            1. Need to shoot for somewhere more than 20 members
   4. (a)(2)-(3): require that rep parties share interests of absent class members
      1. (a)(2): commonality; each class member's claims must contain ? Of law and fact common to the class
         1. Not necessary for every ? To be common to each member
         2. Must be substantially related to resolution of case
      2. (a)(3): typicality; proponent of certification must show that claims or defenses of rep parties are typical of claims/defenses of class
         1. Established if claims of all members arise from a single event or share same legal theory
         2. Presence of common legal theory doesn't establish typicality when proof of violation requires individualized inquiry
            1. If claims turn on individual facts, then requirement not met
   5. (a)(4): requires reps fairly and adequately represent the class
      1. Two relevant factors:
         1. Whether reps and counsel are willing and competent to pursue litigation; and
         2. Whether interests of reps are antagonistic to the interests of others in the class
   6. (b): additional requirements for some kinds of classes (for efficiency of class action)
      1. Party seeking certification must satisfy all factors in 23(a) and at least 1 one of the conditions enumerated in 23(b)
      2. (b)(2): authorizes maintenance of class where party opposing class has acted or refused to act on grounds generally applicable to class, making appropriate equitable relief for whole class
         1. If also seeking incidental damages, then cert may still be proper
      3. (b)(2): classes must be cohesive, or that members be bound through preexisting or continuing legal relationships or by a significant common trait, like race or gender
      4. (b)(3): ? Of law or fact common to members predominate over ? Affecting only individual members, and class action is superior to individual
         1. Most class actions seeking damages are certified under (b)(3)
         2. Predominance: most important is whether issue is common to class, or whether issue unique to each member
         3. Superiority: 4 non-exclusive factors
            1. Interest of members of the class in individually controlling the prosecution or defense of separate action
            2. Extent and nature of any litigation concerning the controversy already commenced by or against members of class
            3. Desirability of concentrating litigation of claims in particular forum
            4. Difficulties likely to be encountered in management of class action
      5. (b)(5): authorizes creation of subclasses
         1. Must ensure that court can determine who is in class and bound by ultimate ruling
   7. (c): to get class action, must make motion for a certification order from the court
      1. (c)(1): court may modify or decert class as litigation progresses
         1. Court in cert order must appoint class counsel under 23(g), which directs court to consider lawyers' abilities
      2. (c)(2): members of (b)(3) damage action are entitled to best notice practicable under the circumstances, including individual notice to all members who can be reasonably identified
      3. (c)(5): definition in complaint is often refined in cert process, and court can cert a different class or set of subclasses
   8. (e): requires that notice of proposed settlement be sent to all members who would be bound
      1. Applies to every type of class
      2. Court must hold a fairness hearing on proposed settlement, at which objections from members can be heard
      3. Court must approve settlement only if it finds it to be fair, reasonable, and adequate
         1. Factors:
            1. Strength of plaintiffs' case
            2. Risk, expense, complexity, and likely duration of further litigation
            3. Risk of maintaining class status throughout trial
            4. Amount offered
            5. Extent of discovery completed and state of litigation
            6. Experience of counsel
            7. Presence of govt as participant; and
            8. Reaction of members to proposed settlement
      4. Allows a court to require a second opt-out opportunity in 23(b)(3) damages actions
   9. (f): class certification are authorized for interlocutory appeal, instead of awaiting final judgment
   10. In addition to factors in Rule 23, courts also recognize 2 implicit prereqs
       1. Class definition is drafted to ensure that membership is capable of ascertainment under some objective standard; and
          1. Ensure that the court can determine objectively who is in the class
       2. All class reps are in fact members of the proposed class
          1. Must be able to establish crucial facts with objective certainty
3. Diversity Jurisdiction
   1. Only the rep party's citizenship needs to be diverse from that of the D
   2. Must meet amount in controversy
      1. Courts have supplemental J over claims that arise out of the same transaction as a claim over which court has original SMJ
      2. As long as any rep's claim meets amount-in-controversy requirement, that claim anchors supplemental J over other members' claims
4. CAFA
   1. Original SMJ over class actions in which:
      1. Aggregated amount in controversy exceeds $5 million
      2. If any class member is a citizen of a state different from any D
      3. Or if any P member is a foreign state or subject and D is a citizen of a state, or the reverse
      4. Act requires only minimal diversity, and it overrules common law that can't aggregate
   2. Permits removal from state to federal that satisfy the amended diversity requirement
      1. By citizens of forum state, and
      2. Even more than a year after action was filed in state court
   3. Gives court discretion to decline J if it finds that 1/3 to 2/3 of P class members are from same state as primary Ds and action has various attributes identifying it with a particular state
5. Discovery
   1. Ordinarily directed at class reps
      1. Absent class members are not parties who must respond to discovery by interrogatories, requests for documents, or requests for admissions
         1. Some courts have allowed when information sought is relevant to resolution of common ?, requests are made in good faith and are not unduly burdensome, and info is not available from reps

**Chapter 21: Informal Investigation and the Scope of Discovery**

1. FRCP 26
   1. (a)
      1. (a)(2)(B): parties must disclose identity of each testify expert and provide written report of opinions and basis, qualifications, and a listing of other cases in which has testified in previous 4 years
   2. (b)
      1. (b)(1): authorizes discovery of any nonprivileged matter that is relevant to any party's claim or defense, even if not admissible at trial, as long as appears reasonable calculated to lead to discovery of admissible ev
         1. Not entitled to discover communications b/t party and their lawyer that were made in furtherance of lawyer-client relationship, because they are privileged
         2. Not entitled, unless special showing, to discover memoranda to the file prepared by lawyer in preparation for litigation
         3. Can obtain many types of ev, as long as it is not protected by evidentiary privileges, it is relevant to any party's claim or defense, and it is reasonably calculated to lead to admissible ev
         4. Privileged info is usually a communication made in confidence during the course and in furtherance of a relationship, such as lawyer-client, that society has chosen to promote and protect
      2. (b)(3): compilation and selection of work product info is protected, not the underlying facts themselves
         1. Protects just documents and tangible things prepared in anticipation of litigation
            1. May be discovered if party shows substantial need for the materials to prepare its case and can't, without undue hardship, obtain equivalent by other means
         2. Some courts require that the person invoking work product show that documents must have been prepared with a specific claim supported by concrete facts which would likely lead to litigation in mind
         3. Some courts only evaluate specific claim as one factor of many
         4. Some courts say that the primary motivation for preparing the putative work product must assist in preparing for possible litigation
         5. Even when substantial need and hardship are shown, courts protect against disclosure of attorneys' opinions
      3. (b)(4): distinguishes b/t experts who may testify at trial and those who are employed only to help a party prepare for trial and not to testify at trial
         1. Effective cross-x of expert witness requires advance prep
            1. Testifying experts may be discoverable to make cross-x and rebuttals fair
         2. If other experts have same knowledge and expertise as a non-testifying expert, then the party seeking discovery can just get their own, rather than getting free info from one party's expert
         3. Not all facts and opinions of experts that are protected, but only those learned or held in anticipation of litigation (work product)
      4. (b)(5): when a party wishes to resist discovery by invoking a privilege, this rule requires that the party make the claim expressly and describe nature of docs, comms, or tangible things not produced or disclosed, and do so in a way that will allow others to assess claim, without revealing privileged or protected info
   3. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had
2. Informal Investigation
   1. Prior to filing suit, P's lawyer must conduct reasonable inquiry into facts on which he will rely in drafting complaint
      1. Ask P what they know
      2. Interview others involved in incident
      3. Etc.
   2. Ethics rules address much of pre-filing investigation
      1. Lawyer of one party may not communicate about subject of rep with a party the lawyer knows to be rep'd by another lawyer in the matter, unless the lawyer has consent of the other lawyer or is authorized by law to do so
         1. Can't communicate concerning matter in rep with persons whose act or omission in connection with the matter in rep may be imputed to organization for purposes of liability or whose statement may constitute an admission on the part of the org
         2. Should reach agent or employee of a corporate party when its liability will be predicated on agent's actions
         3. This is based off of Alabama's Rules of Prof Conduct, demonstrating that you should check applicable rules of professional conduct before investigating
      2. Most courts hold that this does not prohibit interviews with former employees
         1. Unless they're protected from disclosure by stature or by an established evidentiary privilege
   3. Lawyer shouldn't use methods of obtaining ev that violate legal rights of people
      1. Unconsented tape-recording is usually a big no-no, unless there is a prior court order
3. FRCP 30 and 31
   1. In regards to depositions, limitations arise when it can be shown that examination is being conducted in bad faith or in such a manner as to annoy, embarrass, or oppress the person subject to the inquiry
   2. Trial judge has discretion to make a judgment as to whether discovery should be allowed as to written statements secured from witnesses
4. FRCP 45
   1. (c): Unretained experts have duty to give evidence, but forcing them to testify without paying them is not allowed
      1. (c)(3)(B): subpoena on them requires discoverer to show a substantial need for testimony or material that can't be met without undue hardship, and ensures that the expert will be compensated

**Chapter 22: Discovery Tools**

1. FRCP 26
   1. (a)
      1. Must disclose, without awaiting formal discovery requests, info they may use to support claims or defenses, including names, addresses, and phone numbers of fact witnesses, copies or descriptions of docs, and materials underlying computations of damages
      2. (a)(1)(A): without waiting for a request and unless otherwise stipulated or directed by order
         1. Court has authority to stay all initial disclosure pending resolution of a motion to dismiss, if the D makes a strong showing that the P's claim is unmeritorious
      3. (a)(2): requires timely disclosure of expert trial witnesses and their reports at least 90 days before trial
      4. (a)(3): at least 30 days before trial, parties must make mutual pretrial disclosures by exchanging lists of witnesses they expect to call and exhibits they intend to introduce at trial
   2. (b)(2)(B): provides express authority for limitations on electronic data
      1. Court is authorized to use a cost-benefit analysis to specify conditions for discovery
   3. (b)(2)(C): court may limit the scope of relevant discovery if such discovery is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, and the importance of the issues at stake
   4. (e): requires party to supplement answers with info that makes its answer materially incomplete or incorrect, if that info has not already otherwise been made known to the other parties
   5. (f)
      1. (f)(2): parties must meet and confer to prepare a discovery plan at least 21 days before a scheduling order is due
         1. Order is due within 90 days after appearance of D, or 120 days after complaint served on D
         2. Disclosures are due within 14 days after meet and confer, unless a party asserts that required initial disclosures are inappropriate
      2. (f)(3)(C): at discovery conference, discovery plan must address any issues about disclosure or discovery of electronically stored info, including the form or forms in which is should be produced
   6. (g): lawyer must sign a discovery response certifying that she has made a reasonable inquiry before submitting response to interrogatory
2. FRCP 37
   1. (c)(1): provides a self-executing sanction against a party who fails to make required disclosure w/o substantial justification
      1. The party is precluded from using the undisclosed ev or witness
      2. Court may also impose additional sanctions, if there is a motion for it
3. Interrogatories
   1. Lawyer seeking discovery prepares and serves a party with up to 25 written ?s
      1. Responding party must answer or object within 30 days
         1. Answers are made in writing under oath by the party, who signs them
         2. Objections made in writing by party's lawyer
      2. Party seeking more than 25 can seek agreement of other parties or leave of court
4. FRCP 33
   1. (a)(2): interrogatory is not objectionable just because it asks for an opinion or contention that relates to fact or the application of law to fact
      1. Allows court to postpone the time for answering until such discovery has been completedx
      2. Interrogatory that asks for pure legal conclusion or opinion, not applied to facts of case, is objectionable
   2. (b)(1)(B): duty imposed on corporations is to furnish such info as is available to the party
      1. Info known to employees and agents, including lawyers
   3. (d): if answers are in business records, and burden of searching is not greater on discovering party, then corporation may make them available instead of answering
5. FRCP 34
   1. (a)
      1. (a)(1): Documents and things in the responding party's possession, custody, or control are available for discovery
      2. (a)(1)(A): producing party has an obligation to search available electronic systems for the info demanded (electronically stored data)
   2. (b): requires producing party to produce docs as they are kept in the usual course of business or to organize and label them to correspond to the categories in the request
6. FRCP 30
   1. (b)
      1. (b)(3): notice of time and place of depo on a non-institutional party-deponent, with copies to other parties in action, is normally sufficient to secure that party's depo
         1. Notice must specify method of recording; audio and video are permitted
   2. (c)
      1. (c)(2): objections to ?s may be made by opposing counsel, but examination still proceeds; testimony is taken subject to any objection
         1. If depo used at trial, judge will rule on all objections before admitted in ev
         2. Objections made at exam are noted on the record
         3. Most evidentiary objections other than privilege are preserved until trial and need not be made at the depo
            1. As per 32(d)(3)(A)
         4. If deponent answers after objection that ? Calls for privileged comms, he loses the protection
            1. a court ruling that sustains the privilege may keep the comms out of ev but can't restore confidentiality
         5. 32(d)(3)(B) provides a class of objections that are waived unless made at depo
            1. Any objection that relates to the manner of taking the depo, form of a ? Or answer, oath or affirmation, conduct, or other matters that may be corrected at the time of the depo
   3. (d)
      1. (d)(1): objections must be stated concisely in a nonargumentative and nonsuggestive manner
7. FRCP 45
   1. (a)(2) and (b)(2): subpoenas must be issued by the court for the district where the depo is to be taken
8. FRCP 32: Depos Generally
   1. 2-layered evidentiary problem if used at trial or a hearing
      1. Depo is hearsay so must consider whether depo meets procedural requirements, and
         1. 32(a) permits depo only to be used under limited circumstances
      2. Whether contents qualify as admissible evidence
   2. Admitted against any party who was rep'd at the depo or had reasonable notice of it, for impeaching the deponent as a witness at trial or hearing
   3. Admission by a party-deponent or the institutional party for whom deponent was an officer or agent; or
   4. When deponent is unavailable by reason of death, illness, infirmity, or location beyond range of trial subpoena
9. FRCP 29 and 35
   1. Rule 29: Authorizes examination of a party by the other for injuries
      1. Because it is invasive, requires agreement of parties or court order if no agreement reached
         1. Most consent, because will happen anyways
   2. Rule 35
      1. (a): court may order physical exam when condition of a party is in controversy and good cause is shown
         1. Exams of a party who has not made an issue of mental or physical condition are not to be automatically ordered merely because the person has been involved in an accident
         2. Must show good cause for requesting exam
      2. Exams not available against mere witnesses outside the custody or control of the parties
10. FRCP 36
    1. Best discovery tool for narrowing issues for trial is a request for admission
       1. A party may request that an opposing party admit or deny the truth of statements in the request or the authenticity of documents attached to it
    2. (b): an admission conclusively establishes the matter admitted, for the purposes of the particular case
       1. Fact-finder takes it as a given

**Chapter 24: State Law in Federal Courts: The *Erie* Doctrine**

1. Rules of Decision Act
   1. Laws of state, except where Constitution, treaties, or statutes otherwise require or provide, shall be rules of decision in civil actions in the courts of the US, in cases where they apply
   2. Fed court apply fed law if it governs the issue, but state law otherwise
2. Early application of RDA
   1. *Swift v. Tyson*
      1. Fed courts apply state statutes, but not bound to follow common law rulings of state judges
         1. Judges should look at all common law cases to divine the true common law rule on issue before it
   2. *Taxicab*
      1. K law based on what it determines as right
         1. Look at decisions from many states
      2. ?s of general law allow for fed courts to exercise own independent judgment, while giving some deference to decisions of courts in state where cause of action arose
3. *Erie* case and implications
   1. RDA means that fed law should only be applied in fed ? Cases
      1. Fed courts must apply state law in diversity cases
   2. *Swift* caused Ps to choose fed if it had better law than state
      1. Also caused judges to rule on personal views
   3. There is no federal general common law
      1. Constitution does not give this power to fed courts
   4. Common law is controlled by states
      1. State is only authority for it
      2. Law of state is what should be used by fed courts
4. Guessing State Law
   1. State supreme court predictive approach
      1. Fed court should follow intermediate state court precedents, unless convinced that state's highest court would rule otherwise
      2. Determine how would come out today by supreme court
   2. Court may apply a rule that goes against state law in a case that very clearly goes against following the law of the state
   3. Fed courts may certify questions of state law to the state supreme court for decision
      1. State court has discretion to accept or decline the cert
      2. Most hold that cert is not appropriate where there is any kind of state precedent on point
      3. Cert is rarely used
   4. Case should be decided under the law of the state as it stands at time of trial, or afterwards, at time of appeal
      1. If district court rules under state law, then while pending appeal a state case overturns the precedent DC ruled on, the appellate court will apply the new state law, and most likely reverse the case and remand for retrial
5. State choice of law rules
   1. All states have these to determine which body of substantive law to apply in cases with connections to more than 1 state
      1. I.E. In torts cases, some cases apply place of the accident rule for substantive law, while others consider interests of states involved or enforce a strong preference for the place of suit
   2. Conflict of laws rules to be applied by fed courts are those of the state in which the court sits
6. Federal common law
   1. Some areas require law to be federal, even though Congress hasn't enacted a governing statute
      1. Example: *Hinderlider*
         1. Court decided that whether water of an interstate stream should be apportioned between the 2 states involved in the suit was a federal ? Claim
            1. Neither statutes nor decisions of states could be conclusive
      2. Shows that there is still federal specific common law
      3. Federal fiscal policy does not default to laws of states
         1. Important to be decided at federal level
         2. Not of special concern to states or their citizens
   2. Fed court must find that a fed interest requires application of fed law before it can apply a fed common rule
      1. Will defer to Congress on many issues requiring application of fed law
   3. In deciding that governing rule should be federal, and if there is no real guidance from other federal courts
      1. The fed court may choose to use local state law for the decision, where state law would serve relevant purpose and no frustrate objectives of fed law
         1. Appropriate where fed rule needed, but rule doesn't have to be uniform in all fed cases

**Chapter 25: Substance and Procedure Under the *Erie* Doctrine**

1. When should a federal court apply state or federal law?
   1. Substance vs. Procedure
      1. Outcome-determinative test: if applying a fed procedural rule instead of state rule would affect outcome, the fed court should use the state rule
         1. This is a bad test b/c state be used in pretty much every case, for even the most trivial things
         2. Suggests that fed courts should sometimes choose to follow state practice to further policy of uniform outcomes in diversity cases, even if there is constitutional authority for the fed court to go its own way
         3. Retrospective test
      2. *Byrd*  *v. Blue Ridge* puts limits on test
         1. State laws can't alter essential character or function of fed court
            1. The functions are not a local matter, and state laws which would interfere with appropriate performance of function aren't binding upon fed court
         2. Court says that fed should still ordinarily defer to state law even in matters of form and mode (procedurals)
            1. In some cases, policy of uniform outcomes has to give in to affirmative countervailing considerations
   2. FRCP vs. state rules
      1. *Hanna v. Plumer*
         1. Outcome-determinative test must be measured against discouragement of forum-shopping and avoidance of inequitable administration of the laws
            1. *Erie*  sought to eliminate these
         2. Choices between law are made based on these, rather than an automatic test
            1. In this case, difference between state rule and FRCP 4(d) is that if court uses state rule, then respondent wins, and if FRCP, then petitioner wins

This would make every procedural variation O-D, though

* + - * 1. Differences between these rules is not relevant to choice of forum

Not violate *Erie* policy

* + - * 1. FRCP promote uniformity in courts, and much better than changing up rules based on state rules
      1. When a case is covered by one of FRCP, then it is not a standard *Erie* test
         1. Because fed courts are supposed to apply FRCP, and can only refuse to do so if Committee, SCOTUS, or Congress determines that the particular FRCP goes too far
         2. Congress has power to make rules for fed courts, even if different from state rules
      2. FRCP must be used even if alters mode of enforcing state-created rights because Constitution granted the power of courts and congress to determine fed procedure
      3. Prospective approach to outcome determination
         1. Whether difference b/t Rules of fed and state would lead lawyer to choose one court system over another
    1. FRCP created under the Rules Enabling Act, which allows SCOTUS to make rules of practice and procedure for fed courts, as long as the rules created don't change any substantive rights.
       1. Laws in conflict with rules were to no longer be in force
          1. FRCP trumps
    2. If the FRCP was validly made, then it always trumps contrary state law in the federal courts
  1. *Hanna* Part I Test
     1. Ask whether there is a direct conflict b/t state rule and FRCP
        1. If there is, then analysis must be under *Hanna* part II
        2. If no conflict, then you apply FRCP
           1. Can determine no conflict based on rule affecting only commencement of an action's time periods
           2. Conflict can be found where Rule goes to substance of the law
     2. Effect of conflict
        1. Whether ignoring state rule would lead to forum shopping or inequitable administration of the laws
  2. *Shady Grove*'s Bullshit
     1. If FRCP applies to case, then it governs unless invalid
     2. *Hanna* Part II FRCP Validity Test
        1. Does Rule regulate procedure?
        2. Whether applying it against law of state would affect substantive rights

1. Breakdown of Test for Choosing Law
   1. Step 1: determine whether a state rule is clearly substantive.
   2. Step 2:
      1. (a): if clearly substantive, then state law applies
      2. (b): if it is not, the court will invoke *Hanna* analysis
   3. Step 3: *Hanna* analysis
      1. For conflicts that don't involve a federal statute or rule, apply Part I
      2. For conflicts that do involve fed statute or rule, apply Part II
         1. Part II:
            1. Whether there is a direct conflict b/t Rule and state law
            2. Whether fed rule abridges, enlarges or modifies any substantive right
   4. In sum, charlie-foxtrot
2. No clear test for determining if a procedural Fed Rule abridges, enlarges, or modifies a substantive right
   1. Some tests
      1. If the rule affects a state right that is granted for 1 or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process
      2. Right is substantive if the parties, in stating claims and defenses to each other before suit, would refer to that right in making strongest case for their position on the merits.
         1. If they would, then right is substantive
      3. If would alter existing remedial rights conferred as integral part of law, such as arrangement of attorney's fees.
      4. State law should govern "primary private activity" (Justice Harlan concurring in *Hanna*)
         1. Primary decisions respecting human conduct are different from litigation-related matters, such as service of process methods
   2. No Supreme Court case has held a Federal Rule invalid because it abridges, enlarges, or modifies a substantive right
      1. No clear method of determining

**Chapter 27: Dispositions Without Trial**

1. FRCP 41
   1. (a): authorizes a party to voluntarily dismiss a complaint without prejudice to suing on the same claim or claims at another time or in another court under some circumstances
      1. Without prejudice generally means the claim can be sued on again, without suffering from claim preclusion
      2. With prejudice means can't be brought again in same jurisdiction
      3. (a)(1)(A): may dismiss w/o court order by filing:
         1. Notice of dismissal before opposing party serves either an answer or a motion for SJ; **OR**
         2. A stipulation of dismissal signed by all parties w/o prejudice
            1. It is a notice, and its effect is automatic, so no answer or order needed
            2. D has 2 options for ending P's right to end by notice:

Serving answer on P; OR

Motion for SJ

* + 1. (a)(1)(B): a timely notice of voluntary dismissal is without prejudice
       1. If P previously dismissed any fed or state action based on or including same claim, notice of dismissal operates as adjudication on the merits (same as with prejudice)
    2. There is a bright-line test to limit right of dismissal to early stages of litigation
       1. D's options to end are the time
       2. 12(b)(6) motions before answer do not end P's right to dismiss by notice
    3. (a)(2): allows for voluntary dismissal at P's request by court order
       1. Can't notice, but must move for dismissal
       2. Discretionary w/ the judge and may be granted conditionally on terms that the court considers proper
          1. Purpose is to prevent dismissal that unfairly causes prejudice to opposing party
          2. Legal prejudice has been found where D has spent significant time, effort, and expense in defending the suit
          3. Some conditions made by courts are that P must pay D's expenses and attorney's fees

Usually if at the point where it cost D a lot

* + - 1. Dismissals w/ court order are w/o prejudice unless court states otherwise
    1. (b): two grounds for involuntary dismissal beyond 12(b) motions: P's failure to prosecute and a party's failure to comply w/ the Rules
       1. Involuntary dismissal operates as an adjudication on the merits
          1. Claim preclusion

1. FRCP 56: summary judgment
   1. If after discovery a party can show by supporting materials and undisputed evidence that they are entitled to judgment as a matter of law, then the court can grant judgment
      1. Typically based on written ev and decided w/o live testimony or trial
      2. Ev for SJ must be ev that would be admissible at trial
   2. Substantive law defines what facts are material, and only ev that might affect outcome of suit under that law will preclude SJ
   3. (a): if movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law, then burden switches to nonmovant
      1. Must show genuine issue of material fact by citing to record
         1. If fail to do this, then judge grant SJ
      2. Authorizes SJ on a part of a claim of defense
         1. Partial SJ
   4. (b): motion for SJ may be filed any time up until 30 days after close of discovery
   5. (c):
      1. (c)(1)(A): adverse party may not rest on its pleading, but response, by affidavits or other things, must set forth specific facts showing genuine issue for trial
         1. If not, then SJ is appropriate
      2. (c)(1)(B): party may prove absence of genuine dispute by showing that adverse party can't produce admissible ev to support the facts
      3. (c)(2): opposing party may object that material can't be presented in a form that would be admissible in ev at trial
      4. (c)(4): ev by affidavit or declaration is appropriate, even though not admissible at trial in that form, because can't have live witness testimony for adjudication of SJ motion
         1. Affidavit or declaration must be made on personal knowledge and set out facts that would be admissible in ev
   6. (d):
      1. If nonmovant has ev that is not yet in admissible form, but is key to genuine issue, then nonmovant may move for a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had
      2. (d)(2): SJ may be granted on a part of a claim
         1. Often easier to obtain than full SJ
   7. (e): non-movant may not rely merely on allegations or denials in own pleading to defeat motion for SJ
   8. (f): if party unable to present by affidavit facts that are essential to justify their opposition to Sj, the party must file an affidavit and state the reasons for that inability
      1. Must resort to 56(f) when opposing SJ and unable to present sufficient affidavit b/c necessary facts or ev are possessed or controlled by moving party
   9. Standard of proof is generally preponderance of the ev
      1. P carries burden of convincing fact finder that ev on each element of claim preponderates in his favor
         1. Judge deciding SJ must decide whether ev presented is such that a reasonable jury could not find by preponderance for non-movant
      2. SJ governed by standard of proof applicable to issue in case
         1. May vary
   10. Judges occasionally deny SJ and make parties go to trial because a fuller record may clarify correct legal analysis
       1. Typically where correct law to be applied is not clearly established in the jurisdiction
   11. The mere existence of a scintilla of ev in support of the nonmovant's position will be insufficient
       1. Must be ev on which a jury could reasonably find for nonmovant
   12. Different from Rule 12(b)(6) motion to dismiss for failure to state a claim
       1. 12(b)(6) decided on factual allegations in complaint, which are presumed true in the motion
       2. SJ decided on record of facts contained in all supporting materials, and any opposing materials, that would be admissible at trial
   13. Movant bears burden to establish nonmovant has failed to raise genuine issue of material fact, and may satisfy by either:
       1. Submit ev docs that negate existence of some material element of nonmovant's claim or defense; **OR**
       2. If crucial issue is 1 on which nonmovant will bear burden of proof at trial, demonstrate that the ev in record insufficiently supports an essential element of nonmovant's claim or defense

**Chapter 28: The Right to Jury Trial**

1. Seventh Amendment: Right to jury trial in civil actions at common law
   1. Does not create right to jury in equity or admiralty cases
   2. Only applies to fed courts
      1. State free to create right to jury in own courts
   3. Parties are not required to try their cases to juries even if they have right to a jury trial
      1. Case can be tried to judge if neither party requests jury
   4. Preserves the right to trial by jury in common law actions
      1. Preserves right as it existed in England
   5. Applies to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in courts of law
      1. Statutes may give enforcement to an admin process or specialized court of equity
      2. If enforcement allowed in civil action in courts, though, a jury trial must be available if action involves rights and remedies of the sort typically enforced in an action at law
         1. Not blanket grant of jury trial to all damages actions
         2. It is based on language of the statute
            1. Back-pay, as characterized as equitable, does not create right to jury trial
   6. In determining whether right to jury trial for newly created statutory claims, the Court focuses on:
      1. Is the claim analogous to 1 that would have been brought in equity or at law under traditional practice?
      2. Does the P seek relief that was traditionally available at law or in equity?
   7. Where 7th not grant jury trial, Congress may still authorize jury trial by statute
2. FRCP 38
   1. (a): right of jury trial given by 7th amend or by state shall be preserved to the parties inviolate
   2. (b): a party demanding jury trial must file a demand with the court and serve it on all parties no later than 14 days after the last pleading directed to the issue on which a jury is sought
      1. Best to include demand in complaint or answer
3. FRCP 39
   1. (b): allows the judge to order a jury trial if parties let time for demanding pass, on any issue for which a jury might have been demanded
      1. No set standard for granting; only gives power
   2. (c): authorizes fed judges to use an advisory jury in cases in which there is no right to jury trial
      1. Court makes a jury which hears and decides issues
         1. Judge not bound to follow findings; may accept or not
      2. Usually only done if judge believes will help make the best decision, based on experiences and knowledge of the jurors
4. Right to Jury in Actions with both law and equity
   1. Only under the most imperative circumstances can the right to a jury trial of legal issues be lost through prior determination of equitable claims
      1. Applies whether legal issues are incidental to equitable issues or not
      2. Any legal issues for which a jury trial is timely and properly demanded should be submitted to a jury
   2. Right to jury trial doesn't depend on choice of words used in pleadings
   3. In order to maintain a suit on a cause of action cognizable at law, party not wanting jury trial must be able to show that accounts between the parties are of such a complicated nature that only a court of equity can satisfactorily unravel them
   4. If issues of law are common with those of equity, then the legal claims must be determined prior to any final court determination of equitable claims
      1. Shouldn't have to do twice, so judgment on legal claims binds judge on equitable if same issues
      2. Jury decide common issue, and judge use jury finding to consider equitable relief
5. Evolving nature of right to jury trial
   1. Juries with as few as 6 members is permissible under 7th
   2. Substance of common law right to jury trial, rather than form or procedure, that must be preserved
      1. Courts can grant partial new trial because this is only a matter of form that wasn't present in England
   3. Questions of law and fact
      1. Some mixed issues that involve application of principles of law to particular facts, may be allocated to judges in some situations or to juries in others
         1. Depends on particular issue
6. FRCP 48
   1. Jury verdicts in civil cases must be unanimous
7. Administering Jury Trial
   1. Parties may waive jury trial before a dispute arises by K
   2. Selecting jury
      1. Large number of potential jurors are summoned (venire) to courthouse for duty
         1. Randomly chosen
      2. State courts likely to choose from county
      3. Federal courts likely to choose from a broader geographic area
      4. Through voir dire, potential jurors are questioned
         1. In some courts, judges question jurors, either individually or as a group, perhaps asking some ?s submitted by the lawyers
         2. In others, counsel for parties may be allowed to ask additional ?s
         3. Lawyers have opportunity to challenge jurors for cause based on some info suggesting juror may be biased
            1. Can also issue peremptory challenges, which strike jurors without explanation

Can't be based on discriminatory reasons

* + 1. Jury trials must be tried in 1 continuous sequence
       1. Trials to judge can be episodic

1. Current perspectives
   1. Complexity of cases can be difficult for juries
   2. Juries are allowed to hear them, but some courts change the way they are conducted
      1. May structure trials differently, narrow issues, and/or educate jurors so that cases are better suited for jury trial

**Chapter 29: Judgment as a Matter of Law (Directed Verdict and JNOV)**

1. FRCP 50: judge should only grant when a party has failed to offer a legally sufficient ev basis to support judgment in their favor
   1. (a): Directed Verdict; may move for judgment as a matter of law, arguing that no reasonable jury could find facts necessary for nonmovant to win and that judgment should be entered as a matter of law for movant
      1. Two important functions
         1. Notify nonmovant that they failed to offer ev concerning key element of case, giving nonmovant opportunity to correct the omission
            1. Ensures that a case turns on merits and not on inadvertent omission of testimony
         2. If nonmovant actually doesn't have any good ev, then it saves movant time and expense, as well as the risk of a verdict in favor of nonmovant, and it also makes court more efficient
      2. (a)(1): judge may grant judgment when a reasonable jury would not have a legally sufficient ev basis to find for nonmovant
         1. Motion can't be made until a party has been fully heard on an issue
      3. (a)(2): motion must specify the judgment sought and the law and facts that entitle movant to the judgment
         1. Movant has initial burden of production, aka burden to specify judgment sought and the law and facts that entitle movant to judgment
         2. A motion for Rule 50(a) judgment may be made at any time before case is submitted to jury
      4. Judges will usually only grant when arg for doing so is strong, and there is little likelihood of reversal
   2. (b): JNOV; authorizes the judge to grant renewed motion for judgment as a matter of law
      1. Allows judges to revisit decision to deny 50(a) motion after the verdict
      2. Most courts prefer these to 50(a), because if they are reversed then the district court doesn't have to retry the case: it only has to enter judgment
      3. If the court does not grant a motion for judgment under 50(a), the court is considered to have submitted action to jury subject to court's later deciding legal ?s raised by motion
   3. P's case has to be based upon more than inferences
      1. Case fails upon proof of undisputed facts inconsistent with such inferences
   4. Where the ev is so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury
      1. Scintilla rule is a no go
   5. Courts examine both D's and P's ev when deciding whether to grant Rule 50 judgment
      1. Will typically consider movant's evidence only to the extent that it is uncontradicted and unimpeached
   6. Method of determining if ev is legally sufficient is whether ev is such that, w/o weight the credibility of witnesses or otherwise considering weight of ev, there can be but one conclusion as to the verdict that reasonable persons could have reached
   7. Courts consider all of the ev (nonmovant's ev and the movant's uncontradicted and unimpeached ev) when deciding if Rule 50 judgment is appropriate
   8. Circumstantial ev can be sufficient to justify verdict for nonmovant
      1. Must determine strength of movant's ev
2. Scintilla rule (only in some state courts)
   1. Court only considers nonmovant's ev
      1. Deny motion if nonmovant has offered a mere scintilla of ev in support of its position
   2. Judge need only determine whether nonmovant offered any ev to support a jury verdict in its favor
3. Technicalities
   1. Rule 50 motions do not have to be in writing
   2. 50(a) motion can be made either:
      1. After nonmovant has been fully heard on an issue;
      2. After both parties have presented all of their ev; or
      3. At both times
   3. If a party fails to make a Rule 50(a) motion, the party has waived the opportunity to make a Rule 50(b) motion
      1. Must make the motions on the same legal ?s
   4. A party's Rule 50(a) motion can't be appealed unless motion is renewed pursuant to Rule 50(b)

**Chapter 31: New Trial and Relief from Judgment**

1. FRCP 59: court may grant a new trial for any reason for which a new trial has before been granted in a jury case
   1. (a)
      1. (a)(1): can grant new trial on all or some of the issues, and to any part
         1. If issues are inseparable, then they should be tried together
      2. (a)(2): a judge in a nonjury trial can correct her own error, or often simply re-open the record to take more ev to cure the error
   2. (b): may grant within 28 day period after entry of a judgment that the Rule allows for filing a motion for a new trial
      1. Time limit for appeal does not start running until court rules on motion for new trial and enters final judgment
   3. (c): courts must conditionally rule on any motion for new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed
      1. If appellate court reverses judgment, verdict winner may assert grounds entitling it to a new trial should the appellate court conclude that trial court erred in denying the motion
   4. (d): authorizes new trial on court's own initiative, within 28 days after entry of judgment, for any reason for which a party could have sought new trial
      1. However, failure to move for a new trial on weight of ev grounds in district court precludes granting of that remedy on appeal
   5. (e): to alter or amend judgment
   6. Trial judge has discretion to grant new trial in jury case if judge finds that the verdict is clearly erroneous, would result in manifest injustice, or leaves judge w/ a definite and firm conviction of error
   7. Courts can't grant new trial simply because the court would have come to a different conclusion than the jury did
2. FRCP 60: authorizes party to ask trial judge for relief from a judgment for a discrete number of listed reasons, including newly discovered ev that, with reasonable diligence, could not have been discovered in time to move for a new trial under 59(b)
3. New trials for weight of evidence errors
   1. Court may grant new trial if convinced jury verdict was against weight, or that jury reached seriously erroneous result
      1. Whether verdict is a miscarriage of justice
      2. Court is free to weigh ev and need not view it in light most favorable to verdict winner
      3. Even if court finds there is substantial ev to support verdict, a new trial may be warranted
         1. Where resolution of issues depended on assessment of credibility of witnesses, it is proper for court to refrain from setting aside verdict and granting new trial
4. Remittitur
   1. Process by which a court compels a P to choose b/t reduction of an excessive verdict and a new trial
      1. Must first determine if verdict is excessive
         1. If it shocks judicial conscience, judge should remit award to max amount that would not be excessive
         2. There is an upper limit for damages, and if it has been surpassed is a ? Of law for judge to decide
         3. Verdict can't stand if grants windfall to P w/o regard for actual injury
      2. In determining if excessive, must look to awards in similar cases
         1. Determine if award is within reasonable range
         2. Must examine particular facts and circumstances of other cases and compare them to current case
      3. Must also look to whether there is adequate ev to support the award on particular issue
         1. Court can reduce award if there is sparse ev with respect to magnitude of injury
   2. 3 different approaches to deciding right verdict with remittitur:
      1. Awarding lowest amount supported by the record
      2. Awarding highest legal amount of damages
      3. Awarding an amount the court deems reasonable
   3. When grant new trial as alt to remittitur, must determine whether to grant new trial on all issues, or a discrete issue
      1. Partial new trial may not properly be resorted to unless it clearly appears that issue to be retried is so distinct and separable that a trial of it alone may be had w/o injustice
   4. Federal courts do not allow additur
      1. Additur is amount by which verdict would need to be increased to be supported by weight of ev
5. New Trials for Process Errors
   1. Three issues for the court
      1. Did an error occur?
         1. Jurors may not impeach their own verdict and are not competent to testify about any aspect of their thought processes or deliberations
            1. A court may inquire as to whether extraneous prejudicial info was improperly brought to jury's attention

If it was, the court can't inquire as to whether and to what extent such info affected their deliberations

Court must determine whether such extraneous info was prejudicial by determining how it would affect an objective typical juror

* + 1. (Rule 61) Did the error probably or to a substantial degree affect the right to a fair trial or the jury verdict?
       1. Litigant is entitled only to a fair, not a perfect, trial
       2. Court must disregard all errors and defects that do not affect any party's substantial rights
    2. Did the party affected make a timely and specific objection to the error?

1. FRCP 46
   1. Requiring party to state grounds for a request or objection
2. FRCP 51
   1. (c)-(d): Permitting a party to raise error in jury instructions only if objection or request was made as provided in the Rule, subject to court's authority to consider plain errors
3. FRCP 61
   1. Unless justice requires otherwise, no error in admitting or excluding ev--or any other error by the court or a party--is ground for granting a new trial
      1. New trial only if error affected any party's substantial rights
      2. Errors can be made both by the court and by a party
4. FRCP 60: Relief from Judgment
   1. Courts don't like to grant this, and it is construed narrowly, with courts definitely enforcing time limits
   2. Interests of people acting on judgments (relying) are protected by Rule 60:
      1. Limits bases for relief from judgment
         1. Narrower in scope than grounds for new trial, JMOL, or appeal
      2. Even the listed grounds will warrant relief only if Rule 60(b) motion is brought within reasonable time, and no later than 1 year after entry of judgment for the first 3 grounds
   3. (c)
      1. (c)(2): does not affect the judgment's finality or suspend its operation
   4. (b)
      1. Requires movant to demonstrate that he possesses a meritorious cause of action
      2. (b)(4): motion for relief from a default judgment
         1. Most likely to be granted of the 60(b) motions
         2. Often challenged on grounds of court lacking PJ over D or that service was never properly made
            1. Either of these renders judgment void