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ISSUE #1: DISCOVERY OF FACTS

A. THE SCOPE OF DISCOVERY (WHAT KIND OF STUFF YOU CAN GET)

1. Basic principle of all discovery: “EQUAL ACCESS TO ALL RELEVANT INFORMATION”
 - a. “Discovery is the lifeblood of litigation.” – Prof. Molot 1/9/02
 - b. **FRCP 26 – 37** are the basic discovery provisions (to aid the search for evidence).
2. Purposes of discovery:
 - a. to preserve relevant information that might not otherwise be available at trial
 - b. to ascertain and isolate the issues that are actually in controversy btw the parties (narrow the scope)
 - c. to find out what testimony and other evidence is available on each side of the disputed factual issues (uncover information)
3. Requirements per **FRCP 26(b)(1)**:
 - a. Must be RELEVANT to the subject matter
 - i. FRCP 26 creates a broad presumption in favor of discovery of all relevant evidence; only express limitations on a litigant’s discovery request are found in **FRCP26(b)(1)** (extensive intrusion allowed into people’s business).
 - b. Must be RSBLY CALCULATED TO LEAD TO ADMISSIBLE EVIDENCE (doesn’t have to be admissible itself); need to have *some* evidentiary support to begin with (per **FRCP 11**) but pretty liberal (don’t need to have it all figured out b/c can figure it out via discovery).
 - i. **Lindberger v. G.M. Corp.** (Dist Ct WDVI 1972): P’s discovery request for subsequent design changes for an allegedly defective product were proper despite the fact that such evidence could not be introduced at trial. Requests need only be calculated *to lead to* admissible evidence (here, P could have learned the feasibility of alternative designs and then sought out independent confirmation once he knew what to look for).
 1. Public policy for why was inadmissible: b/c if evidence of design changes could be used against GM they wouldn’t make the changes and would be unsafe for people if products remained defective.
 - ii. Most effective evidence may be sought.
 1. **Cornet Stores v. Superior Court** (US 1972): P sought to discover the salaries of other emp’ees to prove that he was dismissed due to his high pay, not his misconduct (as D alleged). D was willing to stipulate that P was the highest paid emp’ee, but the court held that that stipulation would not be enough b/c P had the right to fashion his case however he found most satisfactory and compelling. He may not be forced to accept less powerful evidence.
 - iii. Financial disclosures are discoverable.
 1. **Renshaw v. Ravert** (EDPA 1979): P entitled to financial statements b/c complaint sought punitive damages and P needed to know what amount would actually punish D.
 2. **FRCP 26(a)(1)(D)** also requires Ds to turn over information on insurance policies even before receiving a discovery request.
 - c. Must NOT be PRIVILEGED.
4. Development of Discovery
 - a. Limiting Scope of Interrogatories (Old Rule):
 - i. **Kelly v. Nationwide Mutual Insurance Co.** (OH Ct Common Pleas 1963): Owner of a truck didn’t have to turn over evidence and information to the D b/c (1) it was hearsay and t/f inadmissible at trial (could only, per old rule, seek admissible evidence); and (2) it was not known to the P at the time of the accident and only found out as a product of the work in preparing for trial; and (3) the information was about the P’s strategy for trial, rather than issues relevant to a possible defense.
 1. Old rule was that could inquire into all material in own case if in common with adversary but could NOT inquire into what was the other side’s case exclusively (couldn’t anticipate the other side’s case at trial); must have been in opponent’s knowledge before their investigation for the suit (factual not opinion); could NOT ask for something that wouldn’t be admissible.

B. DISCRETIONARY LIMITATIONS ON THE SCOPE OF DISCOVERY AND THE REASONS WHY DISCOVERY MAY BE LIMITED (WHAT YOU CAN'T GET AND WHY)

1. FRCP 26 provides that relevant information is discoverable unless “otherwise limited by the court.” Limits imposed by FRCP 26(b)(2) include a ban on discovery (i.e., the judge may deny a discovery request) when:
 - a. Discovery would be unreasonably cumulative or duplicative.
 - b. The information could be more conveniently obtained from other sources.
 - c. Party could have obtained the information prior to request, but chose not to.
 - d. The burden or expense of the discovery outweighs the likely benefits (court may look at the needs of the movant, the amount in controversy compared to the expense of the discovery, the importance of the disputed issue, and the resources of the parties); see FRCP 26(b)(2)(iii).
 - i. Don't want shakedown that leads to settlement solely b/c too expensive to get to the truth/defend or to preventing Ps from bringing meritorious claims. Overly expensive discovery defeats the merits by having opposite effect from what wanted.
 - ii. Can limit questions, parties, etc (e.g., if more than 10 depositions need court permission).
2. **PROTECTIVE ORDERS** per FRCP 26(c):
 - a. A party may seek a FRCP 26(c) protective order, even if the information is clearly within the FRCP 26(b)(1) relevance std, “to protect a party or person from **annoyance, embarrassment, oppression, or undue burden or expense.**”
 - i. Left to judges' discretion.
 - ii. Also to protect secrecy (e.g., trade secrets).
 - iii. Why? Want to avoid abuses of discovery system (pushing parties to settle w/ threat of discovery).
 - b. There are **various approaches** that a court may take to protect the parties, including refusing discovery all together, setting the form and content of the discovery, sealing the discovery, partial protective orders, *in camera* review, and protecting trade secrets.
 - c. The court should **balance the concerns** of the parties:
 - i. MARRESE v. American Academy of Orthopaedic Surgeons (7th Cir 1984): P, denied admission to professional association, sued to contest the denial and sought to discover information about the association's membership and the votes of the membership committee.
 1. Held (Posner): Discovery is often used as a tactic to compel the other side to settle rather than release embarrassing or harmful information, so courts must balance the interests of the parties and find a middle ground on discovery by employing the broad discretion given to judges in determining how discovery may be had.
 - a. FRCP 26(c) empowers district court to make orders and FRCP 26(d) allows court to control timing and sequence of discovery (but majority said here discretion was abused when district court entered a broad protective order allowing P to see D's files and depose those named within).
 - b. Court recognized the interest of a professional organization in keeping membership voting confidential to ensure the sincerity of the votes (private interests are given less weight in balance than social values, e.g., First Amendment protection of freedom of association, which protects D's membership files here).
 2. Dissent (the view that is seen most often): Would direct district court (on remand) to look at D's files in camera and consider redaction before enforcing any discovery order; didn't see any abuse of discretion b/c very broad. Could also control sequencing with FRCP 26(d): Do the other non-sensitive discovery first and then this.
 - d. Constitutional considerations
 - i. Seattle Times Co. v. Rhinehart (US 1984): Newspaper (D) sued for libel by religious organization (P). As part of discovery, D requested the names of all donors and the amount of the donations. SC upheld a protective order that allowed D to discover the information, but prohibited it from publishing it (per a FRCP 26(c) protective order). SC reasoned that the system's interest in avoiding abuses that force the parties into unwanted settlements outweighs D's claim of First Amendment rights. SC wants to avoid discovery being turned into a tool to abuse the justice system.

1. Protective order valid b/c entered with a good cause (per 26(c)), restricted to the context of discovery, and didn't restrict information obtained from other sources (if D could get info from another source, could publish as long as no actual malice per the normal libel std).
- e. "Too-sensitive" information:
 - i. Some information is confidential and t/f not available at discovery: **Palmieri v. New York** (2d Cir 1985): A party may only modify an existing protective order controlling the discovery of sensitive material when it can show some extraordinary circumstance or compelling need for disclosure of the information.
 - ii. Corpse exhumation: **Mutual of Omaha Ins. Co. v. Garrigan** (Ohio Ct Common Pleas 1971): Discovery rules are not liberal enough to allow a party to exhume a corpse if it is not probable that it will lead to valuable evidence in the party's case.
 - iii. HIV and donor names: **Rasmussen v. South Florida Blood Services** (FL 1987) and **Snyder v. Mekhjian** (NJ 1991): Opposing cases. One (NJ) allows limited discovery of the HIV status of third parties when relevant to the case, the other (FL) regards such information as confidential.
 - iv. Abortion information: **Williams v. Thomas Jefferson University** (EDPA 1972): Discovery rules not liberal enough to let a party to demand confidential list of women who had abortions.
3. **WORK PRODUCT** per **FRCP 26(b)(3)** [use **both WP and ACP analysis on exam**]
 - a. WP enjoys qualified immunity from civil discovery. Why qualified immunity for WP?
 - i. Anti-parasitic (want people to do their own work). If knew people could "rip you off" might be discouraged from using discovery procedures (counter-productive b/c want people to be prepared, keep records/files) and would destroy the fabric of discovery (which is critical to an attorney's ability to render service to a client).
 - ii. Lawyers need privacy. If intrusion were allowed, lawyers wouldn't write things down and attorney's thoughts wouldn't be her own.
 - b. BUT if the opposing party CANNOT otherwise gain access to the information (e.g., b/c the witness is dead/foreign/hostile), the basic principle of discovery (equal access to all information) trumps WP.
 - c. What IS work product?
 - i. **MATERIAL PREPARED IN ANTICIPATION OF LITIGATION**
 1. Includes notes, written statements, etc.
 2. Information that is compiled by a party "in anticipation of litigation" is not discoverable under most circumstances. Courts are split whether and when FRCP 26(b)(3) covers documents containing the results of a party's investigation made prior to hiring an attorney or the initiation of litigation.
 - a. **Thomas Organ Co. v. Jadranska Slobodna Plovidba** (NDIL 1972): Insurer conducted investigation in damaged-goods case several months before P hired attorney. Court allowed discovery b/c not made for litigation purposes (report of insurer's investigation was made in the course of ordinary business).
 - b. **Almaguer v. Chicago RI & PR** (DNB 1972): RR emp'ee sued RR for work-related injuries but court denied discovery of an eyewitnesses' statement taken by the RR claims agents two months before P hired an attorney (b/c was prepared with the *expectation* of litigation).
 - ii. **BY ANY AGENT OR REPRESENTATIVE FOR THE CLIENT** (includes attorney, investigators, consultants) or in response to a request from an agent or representative (see survey in Upjohn).
 - iii. **Must be CLAIMED and not WAIVED**:
 1. FRCP 26(b)(5): Must expressly claim WP when don't give something up and describe nature of withheld items so other parties may assess whether WP privilege applies.
 2. Majority rule is that voluntary disclosure to a third party (if increases the chance of opponent getting to it) or adversary waives protection, but this is limited ONLY to the disclosed materials (does NOT extend to all work product of the same subject matter).

- d. **WP doctrine protects materials but never facts.** Facts are ALWAYS discoverable.
- i. Distinguishing btw fact and WP:
 1. **Shelton v. American Motors** (8th Cir. 1986): In-house counsel claimed WP protection for info re: the existence of certain docs b/c her list would sort by relevance, thus indicating her opinion of importance. Held: protected as WP.
 - ii. Can pierce WP doctrine if can show that no attorney's thoughts contained (i.e., that all fact).
- e. **Oral vs. Written Materials:** It is much harder for a party to get oral materials, which will often be protected by the work-product doctrine b/c they will contain the thoughts and impressions of the opposing attorney. Written materials are usually easier to get.
- i. Where MIX of facts and work product, a written document goes to a judge to redact (edit out) any WP and the remainder goes to the discovering party.
 - ii. **An oral statement to attorney is NOT discoverable** (even if reduced to writing by attorney) b/c would make the attorney a witness (no way to edit out attorney's mental stuff). Mental impressions are sacrosanct.
 - iii. Category of information that is close to absolutely immune (higher level of protection that would require extraordinary justification to obtain) is "lawyer work" (strategy, tactic, opinion).
 1. Don't want to convert advocate into witness (shouldn't be able to depose lawyers) b/c would break down the adversary model AND might put the attorney in a position to say things that are not in the client's best interest (would damage the attorney-client relationship).
- f. **LIMITS:** A party may, however, discover WP information, pursuant to FRCP 26(b)(3), if she:
- i. **Has "SUBSTANTIAL NEED"** of the materials in preparation of a case AND
 1. **Snead v. American Export** (EDPA 1973): P suing for personal injury wanted D to answer interrogatories re: whether D had possession of any "secret motion pictures" (surveillance tapes) of P that would bear on the scope of P's injuries. Held: The only time that this would be substantially necessary would be where there was a major discrepancy btw P's testimony and what tapes will show, t/f only purpose would be to show P whether his potential lies would be revealed by the tapes BUT would also be necessary for P to see if misleading tapes that made seem like a discrepancy. If D is going to use the tapes to impeach at trial, then P should get them (after P deposed). Otherwise no.
 2. Judge must balance the need for disclosure against any harm or unfairness that the disclosure might cause.
 - ii. **Cannot obtain the materials** (or their substantial equivalent) w/o "UNDUE HARDSHIP" (need "good cause").
 1. Where the information sought by discovery is readily obtainable elsewhere by the seeker, the court will protect the opposing attorney's WP.
 - a. **HICKMAN v. Taylor** (US 1947): Tugboat sank in Philly and almost everyone dead except for some crew, whose statements were taken at a public hearing. Later, D boat owners privately interviewed survivors, witnesses, etc and made transcripts (in anticipation of trial). Ps wanted (by interrogatory) the transcripts, but no good b/c (although calculated to lead to admissible evidence) could get the info elsewhere (from own interviews of witnesses, prior interviews, by fact-specific interrogatories). "Forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness."
 - b. **UPJOHN**: Foreign witness not SO inconvenient for IRS to get to as to trump WP doctrine (privileged). "Considerations of convenience do not overcome the policies served by the attorney-client privilege [and WP privilege]."
 2. BUT where a witness is dead or hostile and cannot get the information otherwise, court may allow (but only when shady stuff is going on?).
 - a. **Xerox Corp. v. Int'l Business Machines** (SDNY 1974): Court ordered the production of counsel's notes of interviews with D's emp'ees (hostile

witnesses) who “could not recall” crucial information at their depositions even where it was not feasible to redact out the attorney’s mental impressions. “A party should not be allowed to conceal critical, non-privileged, discoverable information, which is uniquely within the knowledge of the party and which is not obtainable by any other source, simply by imparting the information to its attorney and then attempting to hide behind the work product doctrine after the party fails to remember the information.”

- h. WP is broader than ACP: Protects attorney materials even if undisclosed to client and even if created by another agent, as long as prepared in anticipation of litigation BUT narrow in the sense that doesn’t apply to day-to-day communications (ONLY to materials prepped in anticipation of litigation).

- i. See page 10, *infra* (“Expert Testimony” section) for more re: work product.

4. ATTORNEY-CLIENT PRIVILEGE

- a. Absolute privilege btw lawyer-client (**federal common-law**) or against self-incrimination (Constitution) and conditional privilege re: info from collateral sources to lawyer-client (common-law).
 - i. Purpose is to encourage full and frank communication btw attorney and client b/c advocacy and advice require that attorney be fully informed (this can only happen when communication free from the consequences of full disclosure).
- b. Under certain circumstances, the communications of an attorney and a client will be sacrosanct and untouchable and NOTHING can compel their discovery (absolute privilege).
 - i. **Protects communications (including notes) but never facts.**
 - ii. Absolute privilege cannot be vitiated even if information otherwise unavailable.
- c. Need ALL of these four criteria fulfilled (construed narrowly, so courts lean against when in doubt) to claim the absolute privilege of ACP (determination depends on client’s understanding):

- i. THE COMMUNICATION MUST BE WITH A CLIENT.**

- 1. Disclosures made by corporate emp’ees to corporate attorneys are within the ACP (any lower emp’ee is a “client” in the corporate setting).

- a. **UPJOHN Co. v. United States** (US 1981): Multinational company discovered bribery of foreign officials by one of its foreign subsidiaries did internal investigation, which IRS later wanted. D claimed ACP and WP and SC said privileged. SC rejected corporate “control-group test” (test that would only allow a company’s upper level management to be considered as clients of the company’s attorneys such that lower-level workers could not claim the privilege) as too restrictive as far as getting workers to come forward about company violations. When a lawyer writes something down, it is sacrosanct.

- ii. **THE ATTORNEY** (or attorney’s subordinate, e.g., paralegal or investigator) **MUST BE ACTING AS SUCH** (not the lawyer you know at the squash court in a casual conversation).

- iii. **The COMMUNICATION MUST BE BY THE CLIENT for the PURPOSE OF OBTAINING LEGAL ADVICE** or assisting in a legal investigation or proceeding (cannot be advice on how to break the law but doesn’t have to be advice for litigation) **and the communication MUST BE MEANT TO BE CONFIDENTIAL and W/O THE PRESENCE OF STRANGERS.**

- 1. Telling a third person opens Pandora’s box and waives privilege.

- iv. ACP **MUST BE CLAIMED** and **CANNOT HAVE BEEN WAIVED.**

- 1. TO CLAIM: Per FRCP 26(b)(5), must expressly claim attorney-client privilege when refusing to turn over information and describe the nature of withheld items so that other parties may assess applicability of the privilege (and support assertion).
 - 2. IF WAIVED: If waived/breached, can be forced to disclose ALL communications re: the subject matter.

C. THE MECHANICS AND METHODS OF DISCOVERY (HOW TO REQUEST/GET INFORMATION)

1. Want to use all methods (mandatory disclosure, depositions, interrogatories, document production) in conjunction to obtain information.
 2. Cannot **start** discovery before file suit. No discovery prior to complaint.
 - a. **Simpson v. Traum** (NY 1978): P denied a “pre-suit” discovery order that would have helped him determine whether there was a COA and if so, against whom. Can’t use discovery to determine potential Ds.
 1. BUT under FRCP 27, a deposition may sometimes be taken before a complaint is filed IF the court is satisfied that failure to depose the witness immediately would lead to a delay or miscarriage of justice.
 - b. Per FRCP 26(d), cannot commence discovery until all parties have conferred, arranged for mandatory discovery per FRCP 26(a), and developed a discovery plan (unless deponent expected to leave the country or if get leave from the court to do so).
 3. **End** of discovery? Usually when one party asks for SJ or if set by judge (in EDVA, within 1 year).
1. **MANDATORY DISCLOSURE** per FRCP 26(a)(1)
 - a. A party **MUST turn over certain information prior to a discovery request** (within 14 days of the FRCP 26 meeting btw parties unless different time set by stipulation/court order) so that the opposing party may make an informed decision re: which docs might need to be examined (although needn’t be actual docs themselves at initial stage b/c if only description given can obtain docs via FRCP 34).
 - b. **Mandatory disclosure (FRCP 26) applies to every type of case EXCEPT** those eight types listed in FRCP 26(a)(1)(E), which have little need for discovery:
 - i. Action for review of administrative record;
 - ii. Petition for habeas corpus or other proceeding to challenge a criminal conviction/sentence;
 - iii. Action brought w/o counsel by a person in government (US/state/local) custody;
 - iv. Action to enforce/quash an administrative summons/subpoena;
 - v. Action by the US to recover benefit payments;
 - vi. Action by the US to collect on a student loan guaranteed by the US;
 - vii. Proceeding ancillary to proceedings in other courts; and
 - viii. An action to enforce an arbitration award.
 - c. Information for mandatory disclosure includes:
 - i. **Names**, addresses, & phone numbers of people likely to have information about disputed facts (e.g., witnesses).
 - ii. Copy or description of **all documents**, data compilations, and tangible things in the that are relevant to the disputed facts.
 1. **RELEVANCY** is the key to determining what must be turned over and what may be withheld. Parties will often not turn over info by claiming it to be “not relevant,” but you **MUST** turn over anything relevant.
 - iii. **Computation of damages** claimed and the documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered.
 - iv. Any **insurance agreement** under which may be liable to satisfy part or all of a judgment.
 - d. A party shall make its initial disclosures based on the **info then rsbly available** to it and is not excused from making its disclosure because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party’s disclosures or because another party has not made its disclosures.
 2. **DEPOSITIONS** per FRCP 30
 - a. Witness’ out-of-court testimony that is reduced to writing (usually by a court reporter) for later use in court and for discovery purposes (also: session at which such testimony is recorded). Advantageous b/c allow lawyers to probe unknown areas.
 - i. FRCP 29 allows parties to stipulate in writing to take deposition “before any person, at any time or place, upon any notice, and in any manner.”
 - ii. Depositions usually proceed without any court involvement. Attorney schedules deposition by serving notice on opposing counsel.

- b. Per FRCP 30, a party may take a deposition of **any person**, including the opposing party, without permission of the court (unless the party to be deposed is in prison).
 - i. When the court must grant leave to depose a party:
 - 1. If the party seeking the deposition has already taken 10 depositions (and the parties have not stipulated that more may be had). FRCP 30(b)(6) limits to **10 depositions**.
 - 2. If the person to be deposed has already been examined.
 - ii. Nonparties (people not parties to the action at hand) can be deposed w/o the court's permission
 - 1. No requirement to subpoena but b/c notice is insufficient to *compel* a nonparty's appearance, subpoena advisable.
 - 2. **Less v. Taber Instrument Corp.** (WDNY 1971): Nonparty director of nonparty corporation required to submit to deposition but b/c can't impose undue burden or expense on nonparty, must depose at corporation's PPOB.
 - 3. To depose corporation/association, they (corporation) must produce person with knowledge of the subject matter at hand per FRCP 30(b)(6) BUT the First Circuit has held that FRCP 30(b)(6) doesn't alter the right of a party taking a deposition to choose who they want to talk to.
 - a. A lack of knowledge by the chosen corporate opponent is tantamount to failure to appear per FRCP 37(d).
 - c. The party taking the deposition must provide **notice** to every other party of the name and address of the person(s) to be deposed per FRCP 30(b).
 - d. The deposed person is **under oath** while testifying per FRCP 30(c).
 - e. **Objections**: Parties may not stop the testimony with objections. Rather, objections are made and recorded so that they may be raised again at trial, but the testimony continues (unless atty-client privilege), per FRCP 30(d).
 - f. **Time/timing**: Limited to one 7-hour day per FRCP 30(d)(2). Under FRCP 27, a deposition may sometimes be taken before a complaint is filed. If the court is satisfied that failure to depose the witness immediately would lead to a delay or miscarriage of justice it may allow discovery.
 - g. If the party taking the deposition does NOT serve a **SUBPOENA** on the witness and the witness then does not come, that party will be responsible for the rsbl expenses of the other parties who came for the deposition, per FRCP 30(g).
 - h. **Videotaping**: The modern trend is to allow videotaped depositions. See Carson v. Burlington Northern (D. Neb 1971): D's motion to videotape P's deposition at the accident scene (where P injured by a steel press) granted per FRCP 30(b)(4).
3. **INTERROGATORIES** per FRCP 33
- a. Written Qs (usually part of a set) submitted to an opposing party as part of discovery.
 - i. Can be accomplished by mail.
 - b. Lack spontaneity of depositions b/c answers can be carefully considered BUT the answers must be more detailed and thorough (may require research by answering party) t/f good for groups (e.g., corporations) and advantageous in that can use to establish concrete background elements and ferret out personal histories; also simple and less expensive.
 - c. A party may serve a list of **up to 25 written Qs** (more than 25 only w/ court's permission or stipulation of the other party) on **any other party to the suit**.
 - i. Qs **must be completely answered** in writing **under oath** (unless there is an objection, at which time the party must state the reason for the objection) within a specified period of time (30 days unless otherwise stipulated). Cannot say "I don't know" in response to an interrogatory.
 - 1. **Riley v. United Airlines** (SDNY 1962): Crew members all died in crash; D must answer all interrogatories and "furnish whatever information it now has, regardless of when or from whom it acquired it." The Kelly rule is gone.
 - 2. **Rich v. Martin Mariette Corp.** (10th Cir 1975): Promotions discrimination suit where decision to dismiss for lack of evidence was reversed where trial court denied interrogatories for statistical information, which would have been cogent/relevant to the case (and crucial in establishing prima facie case), as burdensome (held: not burdensome enough to be ruled out).
 - ii. CANNOT use interrogatories to obtain information from nonparties (only deposition for that).

- d. Answers to the interrogatories may be used at trial as the FRE permit.
- e. Answering party has the option of turning over documents to answer questions where the documents contain the information that the question seeks.
 - i. FRCP 33(d) addresses burdensome problem by allowing party to produce business records in lieu of answering BUT the information must be easy to find in the file(s)/document(s).
 - 1. **In re Master Key Antitrust Litigation** (DCT 1971): Didn't like that could turn over docs b/c shifts burden to dig.
 - 2. See also FRCP 34 (below).

4. DOCUMENT / PROPERTY PRODUCTION per FRCP 34

- a. A party may request that **any other party** (whether party to the suit or not) produce any real evidence (e.g., accounts, photos, documents [for inspection or copying], land inspection) at any time during discovery.
 - i. If the request for production of documents or inspection of premises is addressed to a **nonparty**, the litigant must serve **subpoena** pursuant to FRCP 45 (w/in 100 miles of the court).
 - ii. A party may also request to enter and inspect the land of the other party or to undertake other *rsbl* investigation in preparation for trial.
 - 1. **Belcher v. Basset Furniture** (4th Cir 1978): No permission granted to do 5-day inspection w/ interviews of random workers b/c too much potential for disruption.
- b. **Broad or narrow interpretation**: The party of whom the documents are requested may seek to thwart the request by either interpreting it narrowly, giving the opponent only a few documents, or broadly, giving the opponent numerous irrelevant documents.
- c. Data must be produced in a "reasonably usable form." Cannot give a needle in a haystack.
 - i. **Kozlowski v. Sears Roebuck** (DMA 1976): Flaming-pajamas case. Sears cannot "frustrate discovery by creating an inadequate filing system and then claiming undue burden" to defeat purposes of discovery rule (gave haystack and hoped wouldn't find needle; no good).
- d. Cannot withhold the smoking gun.
 - i. Although per FRCP 26(a)(1)(B) party must identify relevant docs yet needn't turn over unless requested, can't withhold the good stuff and surprise with it later.
 - 1. **Selton v. Smith** (DDE 1986): Wanted info from GM re: design studies but GM didn't turn over info that didn't specifically mention X-body cars (was for all cars) but info was relevant t/f sanctions (b/c withheld the smoking gun).
 - ii. If withhold smoking gun, cannot use it at trial.
 - 1. **Coalition of Black Leadership v. Doorley** (DRI 1972): Civil-rights action against city police department, which wanted to introduce photos of P from night of arrest to show no signs of physical abuse. Ps objected b/c Ds didn't give photos per FRCP 34 and Ds argued that Ps never asked. Can't use the smoking gun at trial.
- e. May have to turn over docs even if not CLEARLY in your "possession, custody, or control."
 - i. **Hart v. Wolff** (AK SC 1971): Bowling-alley fund misappropriation and defamation case where D wanted P to produce docs of a corporation where P had been an officer and was now an emp'ee in a position of power. P required to at least TRY to use his "influence" to produce docs. DISSENT sees no reason to adopt "influence" test in substitution for "possession, custody, and control" statutory std.
 - ii. **Societe Internationale v. Rogers**: Had to turn over docs from Switzerland. Had "control."

5. PHYSICAL AND MENTAL EXAMINATIONS per FRCP 35

- a. The only discovery device that requires a motion.
- b. A party may request a medical examination of a party to the case (P or D but never a nonparty) BUT these exams are ONLY allowed if the requesting party can meet a heightened std (as compared to the rest of discovery):
 - i. Exam must lead to **evidence of something that is in "real and genuine controversy"** (i.e., the physical/mental well-being of party to be examined must be in question) AND
 - ii. There must be "**good cause**" for the examination.
 - 1. More than mere relevancy. Closer to "necessity."
 - iii. The **scope** must be **limited and rsbl**.

1. **Schlagenhauf v. Holder** (US 1964): Greyhound-bus accident where extent of exams ordered (9) was excessive (though dissent wrote “is he blind or crazy?” in defending mental and eye exams).
- c. The test for when an exam may be allowed on a P may be less stringent than the test for a D b/c the P waives his/her rights of privacy upon bringing the suit, whereas the D does not.
- d. The party who undergoes the exam may get a copy of the doctor’s report in exchange for any past records of exams, or any future reports made.
 - i. Reciprocity of medical records relating to same condition: after P asks and D gives, then P has to give.
 1. **Benning v. Phelps** (2nd Cir 1957): P voluntarily examined pre-suit by D’s doctor; P later refused to have second exam and D moved to have P do so. Granted and D ordered to give P first report, which D did. D then moved (per 35(b)(1)) to require P to give D reports from P’s doctors. Denied b/c D only entitled to receive if P previously requested/rec’d from D, not if ordered.

6. EXPERT TESTIMONY

- a. The extent of discovery permitted re: reports/opinions of expert witnesses depends largely on whether the expert is to be called at trial as a witness per FRCP 26(b)(4).
- b. **Expert testifying at trial:**
 - i. An expert testifying at trial must be **identified** (per FRCP 26(b)(4)(A)) and **provide the other party a copy of his report** (mandatory disclosure per FRCP 26(a)(2)).
 - ii. Facts and opinions are discoverable (FRCP 35), t/f experts **may be deposed** by opposing counsel IF they will be testifying at trial (otherwise deposition not allowed unless info not otherwise available) per FRCP 26(b)(4).
- c. **Expert not testifying at trial (who are not witnesses):**
 - i. Opponent usually **cannot depose non-testifying expert or even force disclosure of their name**. Even though FRCP 26(b)(1) allows parties to discover “the identity and location of parties having knowledge of any discoverable matter,” it is limited by FRCP 26(b)(4)(B).
 1. UNLESS the party can show some “exceptional circumstance” where the information is impossible to gain elsewhere (e.g., there is no other expert on the subject).
 - a. **Perry v. WS Darley Co.** (EDWI 1971): Identity of expert who was not a witness to the fire-truck accident and not going to testify need NOT be revealed in the absence of any exceptional circumstance.
 - ii. Don’t need to disclose identity of every expert talked to b/c (1) don’t want piggy-backing and (2) dips into work product b/c shows attorney’s logic in who chosen/rejected. This is why you’d want to label the person an “expert.”
- d. Tension btw **experts as “witnesses”** (if they are going to testify at trial) and experts as “representative/consultant” for **WP** purposes (especially if not going to testify and working confidentially with attorney to develop case).
 - i. **KRISA v. Equitable Life Assurance Society** (MDPA 2000): P sought docs created by D’s experts. Docs NOT protected by WP b/c counsel’s thoughts not represented therein. FRCP 26(b)(3) (WP doctrine) is subject to FRCP 26(b)(4) and FRCP 26(a)(2) (if it wasn’t, expert documents would be WP, but not).
 - ii. Mix of expert info and attorney WP?
 1. Core attorney WP shared with experts is not discoverable (although not all courts agree and the SC has not resolved the split). When WP is mixed in with expert work:
 - a. Can redact out WP or not compel disclosure; OR
 - b. Full disclosure (treats experts as witnesses rather than as consultants).

7. REQUESTS FOR ADMISSIONS per FRCP 36

- a. A party may serve another party with a list of requested admissions. The receiving party may **admit, deny, or claim** that after investigation the party still **does not know** the answer (and say why).
 - i. Any matter admitted will be conclusively established unless the court later permits the withdrawal or amendment of the answer.
 - ii. Each matter for admission must be set forth separately (see Form 25 on S198).

- iii. Admissions are good only for THIS lawsuit and NOT for any subsequent proceeding, even if re: the same issue(s).
 - b. **Effect of failure to admit/deny:**
 - i. Failure to answer sufficiently is often deemed to be an admission (FRCP 36 is the only self-executing discovery rule). Therefore, requests to admit must be answered clearly and promptly or objected to immediately to avoid implied admission.
 - ii. If person denying believes denial, won't be sanctioned for telling mistruth. Otherwise, refusal to admit later deemed wrongful meets with sanctions.
 - c. What is a "rsbl inquiry" when information is not "readily available" to the answering party?
 - i. Lumpkin v. Meskill (DCT 1974): Ds in school-segregation case required to admit/deny accuracy of statistics re: racial composition of schools determined by P's expert (not unrsbl).
 - ii. Cannot just say "I don't know" (the Kelly approach is dead).
 - d. The least-used discovery device (generally seen as part of trial preparation, not discovery). Saves time at trial b/c certain issues can be stipulated once admitted; narrows scope.
 - i. Not a "true" discovery device in that responding party not required to disclose information.
 - 1. Responses are conclusive evidence, whereas responses to other discovery devices are not conclusive proof and may be contradicted at trial.
- 8. DUTY TO SUPPLEMENT per FRCP 26(e)**
- a. If a party cannot comply with a discovery order at the time it is given, but later is able to, that party has a duty to supplement the original information given. Where:
 - i. New info shows the answer to be incomplete or incorrect and
 - ii. The extra info is unknown to opposing parties.
 - b. For example, if a party first fails to turn over a document during document production b/c it does not have it, and later comes into possession of the document, it must at that time turn it over.
 - i. Also, where the identity of a witness is discovered after an answer has been given to interrogating party (or where an expert witness is engaged subsequent to an original response) there is an obligation to disclose such information).
 - c. This duty to supplement goes against the grain of the adversarial system (b/c doing the other party's job and then need to continue to update as progresses).
- 9. USES OF DISCOVERY AT TRIAL:** Governed by FRE and FRCP. Three uses:
- a. Impeachment of false testimony.
 - b. IF using opposing party's deposition, can use for any purpose (b/c fear that anything at discovery will be used against you, many coached/evasive/terse answers at discovery)
 - i. Recall Bill Gates at MS trial BUT videotaped deposition was then played at trial and made him look sinister/shady.
 - c. IF a person is unavailable, can use their deposition at trial in their absence in lieu of live testimony.
 - i. Richmond v. Brooks (2nd Cir. 1955): Loan-repayment case where P, who lived over 100 miles from courthouse, could use deposition instead of appearing in person. Trial delayed and would have been prejudicial to make P travel cross-country.
 - 1. **P had not "procured her own absence"** with malevolent intent per FRCP 32(a)(3)(B), which is designed to prevent hiding of relevant testimony that might be revealed in live cross-examination, therefore lower court should have allowed her deposition as her proof upon her complaint.
 - 2. "Procedural rules are not to be construed in such a fashion as to impose conditions on litigants which in their practical effect amount to a denial of jurisdiction."
 - 3. Can only subpoena (per FRCP 45) within 100 miles of the courthouse.
 - 4. Can apply to Ps and Ds. Unusual here for P not to travel to trial in person (usually applies to Ds).
 - ii. Colonial Realty Co. v. Brunswick (SDNY 1971): Q'd whether Brooks decision ought to apply automatically where no hardship to P and P's credibility a vital factor.
 - iii. Eferakeva v. Twin City State Bank (KS 1989): Refused to follow Brooks (okay b/c in 10th Cir. not 2nd) and deemed voluntary absence as "procured."

D. THE DUTY TO COOPERATE IN AN ADVERSARIAL SYSTEM (DISCOVERY ENFORCEMENT: SANCTIONS AND JUDICIAL SUPERVISION OF DISCOVERY)

1. Discovery gets to the trial court (as an issue) either b/c:
 - a. Protective order is requested per FRCP 26(c) (or FRCP 30(d)) OR
 - b. Compliance is refused and the opposing party moves to compel per FRCP 37(a).
2. **Content of Discovery Requests:** Discovery requests, like filing complaints, must follow certain formats. FRCP 26(g) is like FRCP 11 in that it defines those requirements (but for discovery):
 - a. A request must be signed by the attorney of the party seeking the disclosure (that to best of signer's knowledge, info, and belief, formed after a rsbl inquiry, request, response, or objection is consistent with the law, proper purpose, not unrsbly expensive, etc).
 - b. All disclosures must be complete.
 - c. All requests must be relevant to the case.
 - i. Irrelevant requests or failure to completely disclose could result in the offending party paying the rsbl expenses incurred by the opposing party.
3. Realities of Discovery: Tactics, Undue Burden, and Harassment
 - a. Monetary burden: substantial financial outlay
 - b. "Freezing" testimony: tactical advantage to be gained by being the first party to depose an important witness (but the race is often won by the party with the most money and the largest legal staff)
 - c. Obtaining valuable business information: BUT see FRCP 26(c) re: protection of business secrets
4. **Failure to cooperate in discovery per FRCP 37** (if evasive/non-responsive)
 - a. If a party is trying to thwart the discovery efforts of another party, or just generally not complying, there are methods under FRCP 37 to enforce discovery orders. Why?
 - i. To prevent a party from profiting from its own failure to comply.
 - ii. To secure compliance.
 - iii. As a specific deterrent to failure to comply.
 - iv. As a general deterrent (where the party is "at fault").
 1. Most severe sanctions in this scenario.
 - b. The **party that is seeking discovery may move to compel** it (i.e., go to court and get an order). The party must first, however, give notice to the other side of his intention to move to compel. Upon receiving the motion to compel, the court can either:
 - i. Issue an order compelling the discovery; or
 - ii. Refuse to issue an order; and
 - iii. Impose sanctions for the rsbl cost of the motion, to be given to the winning party.
 - c. For more serious violations, such as **failing to comply with a court-compelled discovery order**, the court may impose more serious penalties, such as:
 - i. FRCP 37(b)(2)(A): Holding the undisclosed facts against the party refusing the disclosure as established;
 - ii. FRCP 37(b)(2)(B): Waiving/disallowing the claims or defenses of the party relating to the discovery (make certain evidence inadmissible);
 - iii. FRCP 37(b)(2)(C): **Striking** parts of the **pleadings**, dismiss action, enter default judgment;
 - iv. FRCP 37(b)(2)(D): Holding the deviant party in **contempt** of court and award the opposing party rsbl **attorney's fees**.
 - d. Steps to take:
 - i. Must negotiate before the court is involved.
 - ii. Move to make mandatory disclosure per FRCP 37(a)(2)(A) and move to compel cooperation with document requests/depositions/interrogatories per FRCP 37(a)(2)(B).
 - iii. If motion granted, shall be made to pay rsbl expenses AND disclose information. If motion denied, may get protective order and may grant attorney's fees to non-movant (unless substantially justified in making the motion).
 1. This is a fee-shifting regime for discovery (unlike the rest of the American system).
 - iv. Sanctions (see (c) above).
 - v. If attorney uncooperative during discovery but then complies with order, court may sanction (per FRCP 37(c)(1)) including the above big merit-based sanctions in FRCP 37(b)(2)(A-C).

1. Can jump the gun even if not at a stage where can violate order and sanction if really dragging feet and court keeps getting pulled in (court has to be harsh and keep the parties honest).
 - a. In actual litigation, courts are reluctant to use harsh penalties and usually restrict penalty to monetary reimbursement of the opposing party's expenses incurred as a result of the refusal to cooperate.
2. **Justification for severe sanctions:** Grossly negligent failure to obey an order to compel discovery justifies imposition of the most severe disciplinary measures available.
 - a. **Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures** (2d Cir. 1979): P secured D's consent to defer discovery on damages issue until could get certain expert but still hadn't done so after 2 years (and answers in the interim were inadequate); 1 year after that, magistrate held that P's noncompliance with orders to compel discovery was willful and recommended dismissal. "At fault" includes more than just willfulness and bad faith (includes gross negligence as here).
 - (A) Policy is to deter counsel from ignoring responsibilities owed to the court and opponents. Gross professional negligence places significant and unnecessary burdens on the legal system and it the proper object of harsh sanctions.
 - (B) Although the P may suffer as a result, a litigant chooses his counsel at his own peril.
 - (C) To allow parties to wait to respond (without sanction) until the trial court is fed up would "embroil trial judges in day-to-day supervision of discovery, a result directly contrary to the overall scheme of federal discovery rules."

ISSUE #2: CHOICE OF LAW

A. ERIE AND THE RULES OF DECISION ACT

1. The Rules of Decision Act (**28 USC § 1652**): A statute passed by Congress that required federal courts sitting in diversity suits to follow the “laws of the several states, except where the Constitution or Treaties of the US or Acts of Congress otherwise require or provide.” In other words, federal courts had to follow state laws.
 - a. “Rules of Decision” substantive, not procedural.
 - i. Federal diversity jx provides alternative forum for adjudication of state-created rights but does NOT carry with it generation of rules of substantive law; except in matters governed by the Constitution or Acts of Congress (i.e., federal-question cases), the applicable law is thus state law (i.e., in ALL diversity cases).
 - b. The Problem: What is a “state law”? What should the federal courts do in the case of a conflict (apply P’s state, D’s state, state where COA arose, federal common law)? Choice of law problematic in federal diversity litigation.
 - c. The Goal: To discourage forum shopping (the conscious choice of one court over another for reasons of more favorable substantive legal doctrines when either of two possible court systems has jx and venue) b/c conflicts with the general rule that procedure should not be determinative of outcome.
2. **Swift v. Tyson** (US 1842): Early case interpreting the Rules of Decision Act. NY resident gave promissory note to Maine land speculator in exchange for a piece of land; speculator then gave the note to another man, who tried to cash it in; NY man, however, refused to pay the note because the land deal had been a fraud; suit brought in federal court in diversity. Issue: Should court apply *federal* common law (required the payment of the note if the third party was an innocent party) or should NY *state* common law (would not allow the note to be paid)? Court applied the federal law b/c wanted to create a general law for the whole country to follow, saying that Rules of Decision Act only applied to state *statutory* law, not state decisional law (logic was that case law was just evidence of what the law is and not the law itself; still had to apply longstanding state common law that was “established local custom” though). Therefore, federal courts sitting in diversity only had to apply state statutes and not state common law. Ruling effectively required federal procedure to duplicate state procedure but allowed federal substantive law to exist apart from state substantive law.
3. **ERIE v. Tompkins** (US 1938): SC reconsidered its decision in Swift and came out the other way (Swift overruled). T was injured while walking alongside RR tracks in PA. Under federal common law, the RR owed a duty of care to T, but under state common law, no such duty. Held: RR did *not* have a duty to T (SC followed state law and thereby expanded the interpretation of the Rules of Decision Act).
 - a. **Where a federal court has diversity jurisdiction, federal substantive law should NOT be applied in resolving the merits of the case; use the substantive law of the forum state.**
 - i. “State law” is both case law *and* statutory law.
 - ii. Still use federal procedural law in federal courts.
 - iii. BUT where matter is governed by a specific federal statute or involves a federal question, federal law will apply to diversity cases.
 - b. There were a number of problems with the Swift decision:
 - i. No uniformity of law was created after Swift (as envisioned) b/c different rules could apply to the same controversy in different courts;
 - ii. There isn’t any “federal common law” anymore;
 - iii. Citizens of one state may be denied the benefits of their own law by an adverse party who gets the suit moved to federal court where federal law would trump state law;
 - iv. Swift led to unfair forum shopping;
 1. Forum shopping is alien to the theory of civil procedure; want courtroom choice to have as little influence on outcome as possible.
 2. Erie addresses this problem by compelling federal courts to reach the same result in non-federal-Q cases as state courts would have reached.
 - v. Congress intended “state law” to mean both statutes and case law; and
 - vi. Application of Swift infringed on the independence of the states.

4. The problem in application of this is whether something is substantive (e.g., everything you learn in law school except for civ pro and evidence), and thus governed by state law in a diversity suit, or procedural, and thus governed by federal rules. Hence, the “**outcome-determinative**” test was born.
 - a. **Guaranty Trust Co. v. YORK** (US 1945): Y brought a diversity suit in federal court, but the D objected because the state SOL had run. Erie Rule refined by holding that “state laws” are only those that are substantive and federal courts are allowed to apply their own procedural laws. The difference btw substance and procedure is decided by an **outcome-determination test** (if the decision would change the outcome of the case, then it is a substantive decision and state law must apply; if the decision is just a procedural matter, the federal courts can apply their own rules and laws). Where the adoption of a federal procedural rule in federal court will lead to a substantially different outcome than if the case had been brought in state court (as here), do NOT follow the federal procedural rule.
 - i. **If outcome-determinative, then substantive, so should follow state law.**
 - ii. Don’t want inequitable administration of law and forum shopping (tries to make a federal court sitting in diversity like another court sitting in the same state).
 - iii. Under York, federal courts must follow state practice in such quasi-procedural areas as effect of res judicata, sufficiency of minimum contacts, conflict-of-law rules, BOP, etc.
 - iv. Different philosophies btw Erie and York:
 1. Erie was constitutional decision (lack of fed judicial power to create substantive law).
 2. York written from perspective that key issue is whether federal court would achieve same outcome as would state court in same forum.
 - b. **Ragan v. Merchants Transfer and Warehouse Co.** (US 1949): There was a seeming conflict between the Kansas SOL and FRCP 3. D argued that Kansas had a 2-year SOL that required service within those 2 years in order for the SOL to be tolled. P argued that according to FRCP 3 the suit was commenced when filed. Held: FRCP 3 was not intended to govern the tolling of a SOL or displace state tolling rules (only governs date from which various FRCP timing requirements begin to run) and t/f state law controlled. **Cannot give a COA a longer life in federal court than would have had in state court** w/o adding something to the COA.
 - c. **Cohen v. Beneficial Industrial Loan** (US 1949): Federal ct applied NJ statute requiring bond posting even though not required by FRCP b/c NJ law did not contradict FRCP (addressed different concerns).
 - d. **Woods v. Interstate Realty Co.** (US 1949): TN company not qualified to do business in Mississippi couldn’t file diversity case there where state courts were closed to it.

B. ERIE AND THE RULES ENABLING ACT

1. The Rules Enabling Act (**28 USC §2072**): Congress passed a statute saying that the SC could proscribe general rules of procedure and practice and rules of evidence for the federal courts (FRCP and FRE) but these rules could not abridge, enlarge or modify any substantive right. New Q: What happens in the case of a conflict between the FRCP and a state law? FRCP (arguably procedural) trumps any contrary state law.
2. **HANNA v. Plumer** (US 1965): OH resident was injured in a car accident in SC by a MA resident. OH resident sued MA resident in MA. D moved to dismiss the suit for lack of proper service b/c the P served the notice on the D’s wife at his residence, rather than the D himself, which was not in conformity with MA law. P replied that according to the FRCP 4(d), service could be made on a responsible adult at the D’s place of residence. The Court did several things in finding that the service could stand. Held:
 - a. The York outcome-determination test was NOT appropriate to decide between substantive and procedural law b/c *everything* (every procedural variation) is in *some* way outcome determinative.
 - b. The correct test to decide btw substance and procedure (if the conflict is between federal common law and state law) is whether the decision would lead to either (1) **forum shopping** or (2) **inequitable administration of the law** (the **MODIFIED OUTCOME-DETERMINATIVE TEST**).
 - i. Might have made counsel forum shop at the outset (e.g., caused P to choose federal court)?
Would application of state law have such an important effect upon the fortunes of one or both litigants that failure to apply it would unfairly discriminate against citizens of the forum state?
 - c. This test is not even applicable in this case b/c the conflict here is btw the FRCP and a state law. The correct **test in a case that pits a federal statute against a state law** is whether the rule is **arguably procedural**. Any applicable federal procedural rule (per §2072) **TRUMPS** state practice, even if it IS outcome-determinative (e.g., can have class action per FRCP 23 even in states where cannot file state class-action suit). Federal sovereignty is more powerful than state sovereignty.

3. **Sibbach v. Wilson** (US 1941): FRCP 35 (physical exam) procedural even though invades substantive right. Justice Frankfurter (in dissent) argued that FRCP 35 is different from other procedure rules.

C. CONTEMPORARY ERIE DOCTRINE (AFTER HANNA)

1. THE TEST FOR CHOICE OF LAW IN FEDERAL DIVERSITY ACTIONS TODAY

- a. Q1: **What are the state and federal approaches in dispute?**
 - b. Q2: **Is there a federal rule, statute, or constitutional provision on point (i.e., in direct conflict with the state law)?**
 - c. Q3a: **If yes, is that federal rule, statute, or constitutional provision arguably procedural?**
 - i. **If yes, federal law is valid** (per the Rules Enabling Act is a statute or per the Constitution as the supreme law of the land) **and trumps state law.**
 1. This is a LIBERAL test: don't dig in as much as York's "outcome determinative" std b/c the rule has already been checked by Congress and the SC.
 - d. Q3b: **If no (just common-law approach), apply the "modified outcome-determinative test" and ask whether the difference is outcome-determinative such that it would lead to (1) forum shopping OR (2) inequitable administration of the law?**
 - i. **If yes, state law is valid.**
 - ii. **If no, judge uses discretion and can do what she wants to (i.e., follow either federal common law or state common law).**
2. Ascertaining when there is a conflict btw federal statutes and state law can be difficult. When is the law common law and when is it statutory? When is state law in **DIRECT CONFLICT** with a federal statute?
- a. **Where there is NO conflict btw federal statute and state law.**
 - i. **Walker v. Armco Steel Corp.** (US 1980): OK carpenter injured on the job and brought suit against the foreign mfr of an allegedly defective nail. D moved to dismiss the suit b/c state SOL, which tolled at the moment of service, elapsed. P replied that according to FRCP 3, SOL tolled when suit filed. SC made an important distinction in this case to hold that the SOL had not been tolled. It held that the conflict here was NOT btw FRCP 3 and state law, but rather btw federal common law and state law. The rationale was that FRCP 3 did not address the tolling of a SOL, t/f the interpretation by federal courts that the SOL would be tolled upon filing of a suit was merely federal common law built on top of the FRCP. Since this was federal common law, and b/c it would lead to inequitable administration of the laws (although NOT forum shopping b/c only one forum to go to), the federal court must follow the state law on tolling SOL.
 1. **What does "inequitable administration" mean?** Really unfair.
 - a. **Want to be able to relax and know that you won't be sued.**
 2. Ragan was NOT overruled by Hanna (b/c in Hanna the federal rule had to be applicable to particular issue before the court) but FRCP 3 (although deals with commencement) doesn't deal with state SOL timeframes.
 - a. In fact, might violate Rules Enabling Act if federal court tried to promulgate a rule that amounted to a state SOL (would hit York problems b/c quasi-procedural/substantive and problems with §2072 text)?
 3. FRCP 3 ("a civil action is commenced by filing a complaint with the court") doesn't replace the policy determinations found in the state SOL law, i.e., that (1) actual service on or actual notice to the D establishes deadline after which the D may have peace of mind and (2) after a certain period of time it is unfair to require D to attempt to piece together a defense to an old claim. Therefore, FRCP 3 and state statute are NOT in direct conflict (t/f no federal rule "on point" and a Hanna analysis does NOT apply).

- ii. **GASPERINI v. Center for Humanities** (US 1996): P sued in a NY District Court for damages for loss of 300 photos after lent them to D. Jury awarded P \$450K for the slides. Per NY state law, the appellate court can review a jury's \$ award made to determine whether it deviates materially from rsbl compensation. Although the District Court denied the D's motion for a new trial without comment, the appellate court reviewed the decision as required by NY law and found that the decision *did* materially deviate from the appropriate compensation. SC heard the P's appeal and determined that:
 1. NO conflict btw FRCP 59 (specifies that new trials may be granted for reasons heretofore granted) and a state statute that set a specific, stringent std for review of damage awards.
 2. The NY law was both substantive *and* procedural and that the substantive part (the objective of the "materially deviates" std) must be applied by the federal courts, while the procedural part (that the appellate court apply the "materially deviates" std and make a decision) cannot be used in the federal system b/c the 7th Amendment (Constitutional provision on point) directly conflicts by forbidding the appellate courts from re-examining certain verdicts unless a "shocks the conscious" std is used (can only review for abuse of discretion).
 3. Statutory cap on damages would supply substantive law for Erie purposes.
- b. **Where there IS a conflict btw federal and state laws.**
 - i. **Burlington v. Woods** (US 1987): D had to pay unsuccessful-appeal penalties per AL state law. D challenged this penalty on the grounds that FRCP 38 allowed the appellate courts discretion to award damages if they believed the appeal was frivolous. Q to SC: Whether FRCP 38 was in **direct conflict** with the AL law requiring a 10% penalty. Held: If there was no conflict, then the state law is not a problem and the federal courts should go ahead and apply it BUT here there is a **direct collision so federal law trumps**. To determine whether there is a direct conflict between the laws, the courts must decide:
 1. Whether Congress intended to cover/control the issue that the court is confronting (YES); and
 2. Whether the statute is a valid exercise of Congress's power under the Constitution (YES; the statute arguably procedural).
 - ii. **Stewart Organization Inc. v. Ricoh Corp.** (US 1988): K btw two parties went sour and the P filed suit in a AL District Court despite a NY forum-selection clause. D moved for a venue transfer, but P objected that under AL law, forum-selection clauses in Ks were disfavored such that the suit should not be transferred. SC confronted with an issue similar to the one in Burlington: what to do when a state law appears to limit the discretion of the court that was given under a federal law.
 1. SC applied the Burlington test and determined that there *was* a **direct conflict** btw the state law and §1404 (federal venue transfer statute) b/c §1404(a) was sufficiently broad to cover the issue. In a federal diversity suit, federal (not state) rules should apply for motion for change of venue. State laws that prevent federal courts from exercising their statutory discretion are in **direct conflict** with the federal law, even though the particular exercise of discretion was not enumerated under the federal law.
 - iii. District Court ordered to use its discretion, regardless of state practice, to decide whether the suit should be transferred.

D. ASCERTAINING WHICH STATE LAW GOVERNS

1. When a suit is brought, the courts must determine which state's laws apply. SC has given states great leeway in establishing choice-of-law rules by holding that **states may apply their own substantive laws** as long as the state has significant contacts with the parties and the transaction.
 - a. **Klaxon Co. v. Stentor Electric Mfg.** (US 1941): Federal courts must apply the conflict-of-law rules from the states where they sit (forum states). The proper function of the federal courts is to ascertain what the state law *is*, not what it *should be*. The federal court must refrain from "making" state law by reinterpreting state opinions or superimposing own prejudices over those of the state's highest court.
 - i. The federal court must apply the law of the state as the law is either:
 1. Declared by statute and interpreted by the state's highest court OR
 2. Judicially declared by the state's highest court.
 - b. **BUT federal courts are not obliged to apply state law** (e.g., to determine tort liability) as it stands **where decisions are very old or nonexistent**; in this case, federal court should apply state law as it would stand if the case was today before a state court.
 - i. **Predict or certify**
 1. **Mason v. American Emery Wheel Works** (1st Cir 1957): P injured by a defective emery wheel that was mfr'd by D and then sold to P's company. Suit brought in a District Court in RI, but MS law was controlling on the issues because the injury happened in MS. The problem for the P was that MS was one of the few states still to hold that a product liability suit must be btw parties in privity (w/o privity the mfr owed no duty to the P). The District Court held that the P could t/f not recover, but the Appeals Court reversed, holding that the job of the federal courts is not to strictly follow the precedents of the MS state courts, but rather to try and rule as a MS court would if it were hearing the case NOW. Appeals Court observed that the MS courts seemed poised to follow the trend of the rest of the country, t/f federal court was to follow what a state court would do.
 - a. Certification can get around this dilemma (such that no longer looking at what state court would do hypothetically): case certified to state's highest court to decide when state law not on point, outdated (as very old case law was here), poorly reasoned, nonexistent. Without certification, may lead to Erie problems of forum shopping.
 2. **McKenna v. Ortho Pharmaceutical Corp.** (3rd Cir 1980): When a state has not authoritatively ruled on a particular issue, the federal court must predict how that state would rule (e.g., by looking at state decisions in analogous situations, reasoned dicta, lower state court decisions).
 - ii. **In the absence of state authority on an issue, follow the federal court authority of the circuit that the state is in.**
 1. **Factors v. Pro Arts** (US 1982): NY federal court required to apply TN state law to Q of whether Elvis Presley's right of publicity survived his death, but TN had never decided the issue. In the absence of TN authority on the issue, 2nd Circuit (NY) followed the 6th Circuit (where TN sits) view of TN law. SC said okay but dissent said no reason to follow 6th Circuit b/c unlikely that knew TN law any better than any other circuit (big circuit).
 - iii. **In Re Agent Orange Product Liability Litigation**: Where there was a suit btw many Ps from different states involving the same T&O, the federal court should apply a uniform law, not that of each of the different states where the Ps are residents.

ISSUE #3: DISPOSITION BY MOTION

12(b)(6): Failure to state a claim
FRCP 41(a): Voluntary Dismissal*

FRCP 56:
Summary Judgment

FRCP 50(a):
JML

FRCP 50(b): RJML
FRCP 59: MNT

DISCOVERY	TRIAL	JURY DECISION	NEW TRIAL
SJ and 12(c)-(d) motions can be emp'd for the same purpose (to terminate litigation w/o a trial) BUT are radically different approaches:			
Motions for Judgment on the Pleadings (12(c)) attack the legal sufficiency of the pleadings on their face w/o considering anything outside the pleadings (assuming facts to be true). * P must move for VD before D files answer or motion for SJ.	Motion for Summary Judgment attacks the basic merits of the opponent's case (designed to "pierce the pleadings" and show that the case is without merit, regardless of what the pleadings say). May support by discovery and affidavits.		RJML must be moved for within 10 days after judgment entered.

A. SUMMARY JUDGMENT (Resolution by the Judge Based on the Evidence Revealed in Discovery)

1. **FRCP 56** governs summary judgment and provides in relevant parts that:
 - a. Either a P or a D can move for SJ. **Can grant PARTIAL SJ.**
 - b. The court may grant a party's motion for SJ if all the evidence (including evidence turned up in discovery and rendered in the pleadings) shows that there is **no genuine issue of material fact** and that the **movant entitled to favorable judgment as a matter of law** per **FRCP 56(c)**.
 - i. Judge only looks at the evidence that would be admissible at trial (in **light most favorable to nonmovant**).
 - ii. Don't want to waste time having a trial if no GIMF exists (b/c no rsbl juror could find for P).
 - iii. Need to know the legal std before can decide "as a matter of law."
 - iv. Remember: SJ is a motion addressed to the discretion of the court, so even if seems like *should* be SJ, if something is nagging at the judge, she can exercise discretion and deny SJ (e.g., movant has strong documents but affiants are all related to or emp'd by the movant or have been convicted of perjury, or if there is a gap in the record or a missing witness).
 - c. The court may order a continuance to allow a party to respond to the motion.
 - d. The requirements of moving for SJ and responding to motion change depending on which party is doing what. **Ask: Does party moving for SJ bear BOP at trial?**
 - i. The burden of establishing that no factual dispute (i.e., no GIMF) exists is on the movant.
- e. **RULE 56: WAYS TO SATISFY THE REQUIREMENTS (TO GET SJ OR PREVENT SJ)**

Party	Movant (motion)	Non-Movant (response)
Party with the burden (usually P , unless D has affirmative defenses)	MOVANT P: MUST per FRCP 56(c) put forth <u>evidence</u> that there is no GIMF (slam-dunk, air-tight, bullet-proof evidence; enough for the BOP such that a <u>rsbl jury could come to only one conclusion</u>) and that entitled to favorable judgment as a matter of law .	<ol style="list-style-type: none"> 1. Must present <u>evidence</u> under FRCP 56(e) that shows there <u>is a GIMF</u> (and that jury might find in own favor, t/f still a dispute). 2. Can ask for additional time under FRCP 56(f) (motion to delay: "we're working on it but aren't done with discovery") to get FRCP 56(e) evidence.
Party without the burden (usually D)	MOVANT D: <ol style="list-style-type: none"> 1. Can allege that party w/ burden does <u>not</u> have sufficient evidence to support claim and bear BOProduction @ trial (look to pleadings, discovery, etc); hard to prove a negative but must show why what P may have falls short of what P needs (per Celotex). 2. Can present own <u>evidence that there is no GIMF</u> (disprove material element of opposing case) per FRCP 56(e). 	<ol style="list-style-type: none"> 1. Can put forth own rebuttal <u>evidence</u> under FRCP 56(e) that shows there <u>is a GIMF</u> (and that jury might find in own favor, t/f still a dispute that may win at trial). 2. Can allege that movant's evidence fails to meet FRCP 56(c) burden of showing no GIMF. Poke holes ("I see ambiguity in <i>your</i> evidence"). 3. Can ask for additional time under FRCP 56(f) (Motion to delay: "we're working on it but aren't done with discovery") to get FRCP 56(e) evidence.

2. If the BOProduction lies with a party: to make it past the SJ phase, that party must put forth evidence for each element of the case.
 - a. Burdens:
 - i. BOPleading: 12(b)(6) if not met (no claim stated).
 - ii. BOProduction: SJ if no rsbl jury could find for you.
 1. Need to produce enough evidence that judge says you can get to a jury.
 2. If one hasn't met their BOProduction after discovery, SJ is granted against that party; if one hasn't met their BOProduction during trial, JML is granted against that party; if one hasn't met their BOProduction after the verdict the court can grant a RJML.
 - iii. BOPersuasion: at trial; jury given instruction on how to weigh the evidence (e.g., preponderance).
3. SJ has all of the res judicata effects of a full adjudication on the merits.
4. Three contexts where SJ likely to be granted:
 - a. Appropriate where P's case is without legal basis (not a recognized wrong, e.g., "she looked at me funny"), even if all allegations are true.
 - b. Where all material applicable to the motion sings the same song; where there is no GIMF.
 - c. If there is an iron-clad defense (e.g., res judicata, run SOL), no matter what P has on the table there is no triable GIMF b/c D stops the case.
 - i. The more that a case is documentary (e.g., K or property) the more likely SJ will be, whereas cases with credibility at issue (e.g., torts) have a greater chance to get to a jury b/c courts have negative discretion to deny SJ if anything fishy or if there are issues of credibility or missing witnesses.
5. SJ is appropriate where one party's affidavits and exhibits are conclusive and uncontested by the other party.
 - a. **LUNDEEN v. Cordner** (8th Cir 1966): D moved for SJ on basis of admissible affidavits of insurance broker, doctor, advisory attorney, emp'ees of insurance company (all to the effect that the deceased insured changed forms naming her as beneficiary). Only the administrative matter of mailing the formal notice was left undone before the insured's death, and per state law the change was effective when the insurance company rec'd the changes (which it had). P presented no evidence undermining the credibility of the affidavits and submitted no counter-affidavits in opposition to the obvious conclusion to be drawn from D's docs (that D proper beneficiary), t/f SJ granted.
 - i. This is NOT to say that the credibility of an affiant cannot be challenged when her affidavit supports a motion for SJ (FRCP 56 provides for penalty whenever it seems that a sworn affidavit filed in bad faith) BUT the opposing party must show *some* basis for challenging validity. P's argument that she should be able to cross-examine affiants ineffective here b/c she could show no reason to doubt their veracity (should have crossed in deposition first).
 - b. This is reinforced by **FRCP 56(e)**.
6. It is **improper to grant SJ based on P's explanation of his intent**, which was disputed by D but not contradicted by D's evidence. Burden on the P is greater than burden on the D when moving for SJ.
 - a. **CROSS v. US** (2nd Cir 1964): P (language professor) sought income-tax refund for "business skills" honed on his vacation to Europe. P moved for SJ on basis of IRS code and personal affidavit that sole purpose of trip was to improve language skills. Held: P's affidavit didn't preclude the possibility that triable issues were presented (interpretation of IRS code unclear re: whether applicable and rsbl ppl could differ) t/f SJ inappropriate. Where "personal motives, intent, and feeling" are central to the proceedings, SJ should not be used b/c rsbl interpretations can differ and the likelihood of a P showing a right to relief on those grounds is small. P failed to show that no GIMF here. That D filed no counter-affidavits is immaterial b/c P didn't show by OWN affidavits that he deserved SJ.
 - i. *Is Cross still good law after **FRCP 56(e)**?*
 1. *Or does other side need concrete evidence to rebut?*

7. **Adickes v. SH Kress** (US 1970): White teacher not served at restaurant with black students, then was arrested as a vagrant; needed to show conspiracy btw restaurant and arresting officer to sue. Both racist, so had motive, and both had opportunity to conspire. D failed to meet its initial BOProduction (that there is no GIMF) t/f P (non-movant) does NOT have to rebut. GIMF so goes to a jury. D said that had evidence of no conspiracy but P said that presence of cop gives opportunity and had motive t/f D did NOT bring evidence of no conspiracy. “Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, SJ must be denied EVEN IF NO OPPOSING EVIDENTIARY MATTER IS PRESENTED [by the non-movant].”
8. The **BURDEN** on a D (unless he is asserting an affirmative defense) is much less when he moves for SJ.
 - a. Celotex, Anderson, and Matsushita breathed new life into the SJ motion (changed the tone and strengthened).
 - b. **CELOTEX Corp. v. Catrett** (US 1986): The unburdened D may move for SJ by simply pointing to the fact that the P has not met his burden of production. Here, the movant need not come forward with evidence that no GIMF where the non-movant cannot prove an essential element of her COA at trial (just allege).
 - i. However, sometimes it is difficult to determine whether a party has met his burden. The question is also out there re: what the difference is btw the burdens that a party must meet at trial and the burdens they must meet for SJ. The Court has ruled that **a judge considering a motion for SJ should consider the burden that the party will face at trial** (and courts are less likely to grant SJ to the party with the BOP at trial [which determines the BOP at SJ] b/c if jury doesn’t believe the other side wins).
 1. The substantive evidentiary stds that apply to the case at trial guide determination of whether a GIMF exists for SJ purposes. The evidentiary std should be taken into account. To decide BOProduction, must look at BOPersuasion (b/c could raise BOProduction threshold).
 - c. **Anderson v. Liberty Lobby** (US 1986): When considering the party w/ the burden’s (usually P’s) burden, the **court must ask whether any rsbl jury could find for that party given the burden that that party will face at trial**. D moved for SJ in a libel suit, claiming that the P could not meet its burden of “clear and convincing evidence.” Court not only considered whether the P could produce evidence for each of the elements (BOProduction), but also whether any rsbl jury could be persuaded by C&CE that the D had actual malice in its publication of the articles (BOPersuasion).
 - i. Although SJ and JML are verbalized differently, the stds are basically the same (with different timing). Looking at the evidence in light most favorable to non-movant, would this be taken from the jury at trial for lack of a GIMF (i.e., a triable factual issue)?
 - d. **Matsushita Electric Industrial Co. v. Zenith Radio Corp.**: Where there is an absence of motive (here no motive for predatory pricing), the P generally will not be able to meet his BOPersuasion b/c no rsbl juror could find in his favor (D gets SJ b/c P would not be able to prove Japanese businessmen conspired against him).

B. POST-TRIAL MOTIONS (Resolution by the Judge Based on the Evidence at Trial)

1. **MOTION FOR JUDGMENT AS A MATTER OF LAW** per **FRCP 50** (JML and RJML)
 - a. **JML** (aka “directed verdict”): During trial if the jury has heard all the evidence on an issue (but hasn’t yet been asked to decide) and there is no legally sufficient evidence that could lead a rsbl jury to find for a party (no rsbl jury) when considering the evidence most favorably to the non-movant, a **judge should enter judgment as a matter of law** against that party per **FRCP 50(a)(1)**. Must be that “rsbl people could not differ that the moving party deserves judgment.”
 - i. This takes the case away from the jury.
 - ii. **FRCP 50(a)(2)**: JML motion can be made (by either P or D) at any time before submission of the case to the jury.
 1. D generally moves after P’s case closes or after the close of all the evidence.
 2. JML usually pro-D (b/c if there is a gap in the evidence, judge decides, not jury, and whoever bears the BOP will lose and b/c P usually bears the BOP).
 - iii. JML is granted where there is (1) **INSUFFICIENT EVIDENCE** or (2) **CONTROVERSY OVER THE LEGAL STD** (e.g., if X or Y and X law you win and Y law you lose, let judge pick X or Y).

- iii. **NO EVIDENCE vs. CONFLICTING EVIDENCE**: When there is NO evidence for which an inference could be drawn then the party that bears the BOP loses; when there is CONFLICTING evidence from which a rsbl inference could be drawn, it goes to the jury.
1. A problem is presented when there are **GAPS IN THE EVIDENCE**:
 - a. **GALLOWAY v. United States** (US 1943): P (“moron, low grade”) tried to get the gov’t to pay for his disability (insanity), claiming that it was brought on by his time in the military. To prove his claim, P had to show that he was continuously insane since his time in the military. P had proof that he was insane in the military and at the time of trial but could not offer evidence that he was insane for the five years in the interim. **Held**: Too large of an evidentiary gap to allow the jury to bridge by inference that the P had been continually insane, t/f JML against P.
 - i WHERE THERE IS NO EVIDENCE, THE PARTY BEARING THE BOP LOSES.
 2. **If there is NO EVIDENCE, does NOT go to a jury and whoever failed to carry the BOP loses.**
 - a. **DENMAN v. Spain** (MS SC 1961): Girl who was hurt in a car accident while she was riding in her grandma’s car brought a negligence suit against the driver of the other car; she had to prove that the driver was (1) acting negligently; and (2) the proximate cause of the accident. Although P had some (weak) testimony tending to show that the driver was negligent, she did not produce any evidence that he was the proximate cause of the accident (everyone died but her and another passenger and neither remembered the accident) and t/f a JML was directed against her. D had no evidence but this didn’t matter b/c P had the BOP. Don’t let this go to a jury b/c:
 - i Jury could rsbly believe one story or the other (both are possible inferences), but they would just be guessing (b/c neither had any evidence to support) and we don’t allow a decision based solely on speculation, EVEN if it is a GOOD BET (see **BLUE BUS HYPO**).
 - ii WHERE THERE IS NO EVIDENCE, THE PARTY (here the P) BEARING THE BOP (here by the preponderance of the evidence) LOSES.
 - iii Need SOME evidence to make it to a jury. Here, RJML permitted b/c NO possibility that the evidence supports the jury’s decision (b/c no evidence at all).
 3. **If there is CONFLICTING EVIDENCE (i.e., could make a rsbl inference either way), the case DOES go to a jury.**
 - a. **KIRCHER v. Atchison** (US 1948): P had his hand cut off by a train after he fell through the platform onto the tracks. He had no evidence, however, of how he fell through the platform. D moved for a directed verdict, but it was denied and a verdict for the P was allowed.
 - i The difference from Denman is that in Denman there were multiple (at least **two**) equally probable explanations for the accident (either driver could have caused it), whereas here it is extremely likely that P fell through the platform b/c of the RR’s negligence (he would not put his arm on the tracks by himself). A RSBL inference (that there was a hole in the platform) could be drawn given the evidence, even though it was conflicting.
 - b. **Rogers v. Missouri** (US 1957): RR emp’ee was injured while burning weeds as a result of the alleged negligent practices of the RR. Jury found for P, but D appealed on the ground that JML should have been granted b/c there was conflicting evidence of contributory negligence by P. **Held**: It is the jury’s position to weigh the evidence, and the judge’s position only to ask whether a rsbl juror could support the verdict given the evidence presented at trial. There

was plenty of evidence here to support the jury verdict against the D (especially where, in a FELA action, the slightest negligence by the emp'er is enough to find liability).

- i Different from Denman b/c here there is much more evidence. WILL let juries guess if there is lots of evidence but NOT where there is NO evidence. Also, the std here was very easy to prove.
 - ii Any pro-non-movant rsbl inference from the evidence must be given to the non-movant but the BOP kicks in if just speculation.
4. **Seventh Amendment issues:** MNT, JML (before case goes to jury), and RJML (after jury verdict returned) all deprive a litigant of a jury trial BUT they do NOT deprive a litigant of a jury trial as guaranteed by the 7th A (b/c this only guarantees jury trials where guaranteed at common law).
- a. Several devices existed for taking a case from a jury in 18th century, including JML and NT (though not RJML); t/f, by the very terms of the 7th A, JML and MNT are constitutional.
 - b. Held (in Galloway): The 7th A does NOT apply to determination of whether to apply the “scintilla of” or “substantial” evidence tests (dissent disagrees). Old rule that a case must go to the jury if there is a “scintilla of evidence” in the non-moving party’s favor gone. New rule:
 - i **Substantial Evidence Rule: Only must go to the jury if there is “substantial evidence” in the non-moving party’s favor.**

iv. **BURDEN OF PROOF**

1. Look at BOP; same std as SJ (see chart). Ask “Who has the BOP?”
 2. Burden is usually on the P, but when it is an affirmative defense the burden is on the D.
 - a. **Daniel J. Hartwig v. Kanner** (7th Cir. 1990): P sued D to collect \$ that D owed him under their K, but D alleged that the K was invalid b/c of the P’s misrepresentations and fraud. P’s JML motion was granted. Held: Misrepresentation/fraud is an affirmative defense, so the BOP proof was on D (to show material misrepresentation and reliance thereon that caused injury). D failed to show this by clear and convincing evidence (i.e., D failed to meet his BOP) and JML was proper b/c there was no credible evidence to sustain a verdict in favor of D (the party against whom the motion was made).
 3. BOProduction is a matter of **law**. BOPersuasion is a matter of **law and fact**. Interpretation is always a Q of **fact** that must be presented to a jury.
- c. **RENEWED JML** (aka “JNOV”): If a party was denied a motion for a JML before the case was given to the jury, after the verdict is returned, the party may renew the JML motion and the judge can either (1) let the jury verdict stand; or (2) enter a JML (per FRCP 50).
- i. Same stds apply for RJML as JML but made at different times.
 - ii. **Cannot move for RJML unless moved for JML before case went to the jury** (FRCP 50(a)(2)).
 1. The denial of the first motion only acts as a reservation so that the judge can reconsider the motion after the verdict. As with JML, the judge must find that there was not sufficient evidence upon which a rsbl jury could have found the way that it did (i.e., in the non-movant’s favor). Requires that the judge assume the evidence in a light most favorable to the non-movant.
 2. Must file **within 10 days of entry of judgment** (jury verdict).
 - iii. **Old rule: Slocum** (1913): Held that once a trial court has denied D’s JML motion and allowed case to go to jury, cannot change after jury verdict (i.e., enter judgment contrary to jury verdict) but could give new trial (do a do-over).
 - iv. **New Rule:** The trial court may grant RJML if the moving party sought JML before the jury deliberated and the court reserved decision on the motion. No matter what the court’s decision is regarding JML, it’s treated as a reservation.

1. **BALTIMORE & CAROLINA Line v. Redman** (1935): P sued D for negligence and D moved (at the conclusion of the evidence) for JML. Court reserved its decision and the jury found for P; court upheld the jury's verdict. D appealed and the higher court ordered a new trial (even though the D wanted a dismissal).
 - a. Can reserve judgment (to get around Slocum problem) then if jury does the right thing, don't need to worry about it. Baltimore distinguished Slocum b/c judge had reserved ruling on the JML (so jury verdict was taken subject to his decision on the motion).
2. NOW have **FRCP 50(b)** to use (the Baltimore trick codified): automatically reserved if requested (even if denied). Don't need to expressly reserve judgment BUT must request renewal within 10 days.
3. The court of appeals may choose from several options, regardless of what is requested:
 - a. **FRCP 50(b)(1)** if a verdict was returned: (1) allow the judgment to stand, (2) order a new trial, or (3) direct entry of RJML
 - b. **FRCP 50(b)(2)** if no verdict was returned: (1) order a new trial or (2) direct entry of RJML.

2. MOTION FOR NEW TRIAL per **FRCP 59**

1. **FRCP 59(a)**: Judge may grant a new trial to any or all of the parties on all or part of the issues "for any of the reasons for which new trial [rehearing if it was tried w/out a jury] have heretofore been granted in actions at law [also in equity] in the courts of the US."
 - a. MNT must be filed **within 10 days** after the entry of judgment. This rule is strictly enforced.
 - i. If the court does this *sua sponte*, it must also order the new trial within 10 days after the entry of judgment, and must notify the parties.
 - ii. **SEE PAGE 46, INFRA, FOR EXCEPTIONS TO 10-DAY LIMIT**
 - b. Usually granted for:
 - i. **Errors in the trial process** (litigants are entitled to due process of law, including a fair trial).
 - ii. **Process was fair but result was wrong** (against the clear weight of the evidence).
 - c. **Standard**: Verdict must be against the clear weight of the evidence at the trial court level (and review for abuse of discretion on appeal b/c involves factual issues).
 - i. Miscarriage of justice. Did the jury reach a seriously erroneous result?
 - ii. Can't be solely b/c judge doesn't like outcome (must be "against the clear weight of the evidence").
 - d. Judge CAN weigh the evidence (assess witnesses' credibility and draw inferences from evidence).
 - i. An alternative to granting RJML is for a court to order a new trial. A court can also combine the decision JML with a decision on a MNT (e.g., a judge that does not want to do the whole trial over, but who thinks that the jury got the verdict wrong, might grant a JML in favor of the losing party and simultaneously deny a MNT such that if on appeal the JML is overturned, a new trial will not be held and the jury verdict will just be re-entered; case won't clog the docket then).
 - ii. Can grant partial new trials in appropriate cases (e.g., for damages only).
2. **Differences btw JML / RJML and MNT**:
 - a. Unlike a JML, a MNT can be granted if the judge determines that the jury verdict is against the clear weight of the evidence (which is an **easier std** to meet than the "no rsbl jury" std of JML).
 - i. Idea that a rsbl person can make a mistake, so if the judge thinks that the weight of the evidence goes against the verdict he can set a new trial and give it to *another* jury. JML is a higher standard b/c it does NOT go back to a jury (b/c saying that NO rsbl jury should've found that way t/f there is no point in giving it to another jury).
 1. SO trial judge can grant MNT even if a verdict that is "against the clear weight of the evidence" was rational (such that can get MNT where don't get JML).
 - b. MNT also calls for the judge to **weigh the evidence** to a certain extent (e.g., consider the credibility of the witnesses), whereas a judge cannot do this in a JML situation (judge must assume the truth of the evidence for the nonmoving party). This does not violate the 7th Amendment b/c at common law judges were allowed to grant new trials after weighing the evidence (b/c 7th A only reserves rights held at common law).

- i. **Dyer v. MacDougal** (2d Cir 1952): A judge must utterly disregard his own views of the credibility of the witnesses (i.e., NOT weigh the evidence) when deciding on a JML/RJML (must be that “no rsbl jury” could find otherwise) BUT for a MNT the judge may base his decision on his own belief or disbelief of the witnesses (i.e., can weigh the evidence and grant the motion based on credibility).
- ii. Where there is substantial evidence, judge cannot weigh it (jury must) and if no rsbl jury could decide based on the evidence, grant JML???
- c. The **standard of review** for a grant of a MNT is also different from that for JML. A judge’s decision on a MNT will be reviewed for an “abuse of discretion” on the judge’s part (makes it nearly impossible for a decision on a MNT to be overturned). The std of review for a decision on a JML is *de novo*.
 - i. **In re Greens Estate**: Abuse of discretion std for new trial (b/c evidence weighed) and de novo std for JML (b/c matter of law; no deference to the trial court b/c not about weighing evidence).
 - ii. **Aetna v. Yeatts** (4th Cir. 1941): Dr lost malpractice suit, then sought to indemnify insurance co, which refused to pay, saying that the Dr was performing an illegal abortion at the time of the malpractice and t/f was not covered by the policy. Jury ruled in favor of the Dr and judge denied the D’s MNT and JML motions. On Appeal, the court noted (1) that the std of review is abuse of discretion, which did not exist in this case and (2) that an MNT conforms w/ the requirements of the 7th A and keeps the jury system from being arbitrary and capricious.
 - iii. **Hastings**: MNT (“against the clear weight of the evidence”/miscarriage of justice); not just that if I were the jury it would come out differently, but that the weight CLEARLY shows that if the verdict were to stand there would be a miscarriage of justice.
- d. **Motion for BOTH JML and MT?** Better chance to get MNT.
 - i. **FRCP 50(c)**: If both JML and MNT motions made, judge should rule on both motions. Can conditionally grant MNT (in case JML reversed on appeal).
 - 1. **Marsh v. IL**: Judge doesn’t think there was enough evidence for case to go to the jury so he grants the JML, but denies a MNT. Appeals court reviews *de novo* and reverses him (unusual b/c usually more deference given to the trial court), i.e., the JML that was granted was reversed (normally then the jury verdict would stand). Appellate court also denial of MNT, finding an abuse of discretion (b/c if no rsbl jury could have found for them, then the clear weight of the evidence went against the jury’s verdict [easier std to meet] so should have granted a new trial). SO appellate court reverses the JML and grants a new trial. Reversed b/c should NOT weigh evidence in RJML decision and remanded to grant new trial.
 - ii. **FRCP 50(d)**:
 - 1. **50(d)** raises complications if move for both and both denied.
 - 2. **Neely**: P wins a jury verdict; judge denies RJML; appeals court reverses RJML denial, so D wins absolutely and finally (gets RJML). SC says that P had no opportunity to raise a MNT. If appeals court reverses denial of RJML, they can grant a new trial.

NEW TRIAL	JML
App Ct review std: <i>Abuse of discretion</i> (more deferential)	App Ct review std: <i>De Novo</i> (less deferential)
↑	↑
Trial Ct review std: <i>Against the clear weight of evidence</i> (more intrusive)	Trial Ct review std: <i>No rsbl jury</i> (more deferential to the jury)
↑	↑
Jury	Jury

B. VOLUNTARY DISMISSAL AND DEFAULT

- 1. **Voluntary Dismissal per FRCP 41(a)** – Three ways to get:
 - a. **FRCP 41(a)(1)**: P can move for a voluntary dismissal ONCE either (1) before the adverse party has answered/filed for SJ or (2) w/ D’s consent (stipulation by the parties) w/o prejudice against P.
 - i. Voluntary dismissal does NOT have the effect of adjudication “on the merits” the first time (P can sue again), but DOES if tried more than 1x (b/c don’t want to be able to use to harass Ds).
 - b. **FRCP 41(a)(2)**: Can get a voluntary dismissal with the consent of the court.

- i. **McCants v. Ford Motor** (11th Cir 1986): P sought voluntary dismissal so he could re-file where there was a longer SOL. Judge grants it after a year of discovery per FRCP 41(a)(2). DISCOVERY done here was NOT prejudicial b/c D can use in the next case.
- 2. **Involuntary Dismissal (Dismissal for Failure to Prosecute) per FRCP 41(b)**
 - a. P cannot stall. Must proceed to prosecute “with due diligence” and w/in a “rsbl time” (or a specific time in some jx).
 - i. **Link v. Wabash RR** (US 1962): SC, *sua sponte*, dismissed P’s claim after he and his counsel failed to attend a pretrial conference (after 6 years and many postponements). Held: When circumstances make involuntary dismissal appropriate (b/c failure to prosecute egregious as here), a District Ct may dismiss a complaint for failure to prosecute even w/o affording notice of its intention to do so or providing an adversary hearing before acting. Appeals Ct will review only for an abuse of discretion.
 - ii. **GCIU Emp’er Fund v. Chicago Tribune** (7th Cir 1993): Lengthy delays do not necessarily lead to dismissal for failure to prosecute (here litigants were actively negotiating during 22-month delay btw judicial proceedings).
 - b. Don’t need to show prejudice to D but it is a factor in letting P get rid of the case.
 - i. **Messenger v. US** (2nd Cir. 1956): “The operative condition of the Rule is lack of due diligence on the part of the P, not a showing by the D that it will be prejudiced by denial of its motion.”
 - c. Operates as an “on the merits” decision. When the P files a suit and then doesn’t due anything about it, the court kicks it out with prejudice and that is it (P cannot re-file).
 - d. **Cleminshaw v. City of Norwich** (DCT 1981): Although FRCP 41(b) only provides for the sanction of dismissal, FINES may also be invoked under the rule for failure to prosecute.
- 3. **Default per FRCP 55**
 - a. **Entry of Default** per FRCP 55(a): Clerk will enter default at the behest of the other party IF the defaulting party has failed to plead or defend as required by the rules (you still can’t just file an answer, but if you’ve got an excuse the judge may still let you file).
 - i. It is easier to get out of an entry of default than entry of judgment itself BUT easier to get out of default judgment than a judgment on the merits (although still not a place you want to be).
 - b. **Entry of Judgment per FRCP 55(b)**:
 - i. The CLERK can enter judgment IF:
 - 1. The sum at issue is certain, or rsbly calculable (not pain and suffering), AND
 - 2. The D has not appeared (i.e., has “failed to plead or defend” and isn’t and infant or an incompetent person).
 - a. What does “appearance” mean for 55(b)(2) where party didn’t plead or defend? Ex: return of waiver of service. Settlement meetings don’t count.
 - b. When default judgment entered, CANNOT get more \$ than what specifically asked for in the complaint (whereas CAN with a trial on the merits).
 - ii. In all other cases (e.g., damages uncertain or person has “appeared”), the party must appeal to the court and the JUDGE can enter default judgment.
 - 1. MUST give 3 days notice to the defaulting party if they’ve shown up at any point.
 - 2. **COULAS v. Smith** (AZSC 1964): P sued D1 and D2; D1 cross-claimed D2 and answered the complaint and appeared at some pre-trial thing where the court set the trial date; date changed and parties given notice but D1 didn’t show up, so case was tried on the merits and judgment was entered against D1, who appealed, claiming that per FRCP 55 the judge must give him 3 days notice before default judgment can be entered. Held: No. Once you’ve filed an answer you CANNOT DEFAULT (so you don’t get 3 days b/c FRCP 55 doesn’t apply b/c answering means more than just “appearing” b/c you are now talking merits). Any attack on jx, venue, service, or any other answer on the merits, whether D shows up at trial or not, PRECLUDES entry of default judgment (b/c D1 answered on the merits, judgment should have BEEN on the merits [not DJ] b/c D1 did NOT “fail to appear or otherwise defend”) BUT b/c D1 waited 2 years to appeal, he waived rights to reopen case per AZ statute.

3. **Bass v. Hougland**: Default judgment entered for P after D's counsel withdrew. Fifth Circuit held: not really default under FRCP 55 b/c answered (even though D didn't know counsel withdrew or that adverse judgment entered against D), but entry of judgment w/o jury trial violation of due process, and judgment void.
- c. **Penalty default**: Judges have the authority to issue default judgments if the party willfully violates rules or disobeys court orders; usually happens re: discovery. Court says "you are very bad, so you lose" (see Cine [didn't do discovery] and FRCP 37).
- d. **Setting Aside Default** per FRCP 55(c): The court may set aside an entry of default or a default judgment for good cause shown. If D thereafter (within statutory time) fails to contest default judgment, it becomes BINDING and carries all the RES JUDICATA effects of a judgment "**on the merits**." Most jxs provide that default judgment may be reopened within one year of full trial on the merits for any "good cause."

ISSUE #4: THE TRIAL

A. ROLES OF JUDGE AND JURY

1. LAW vs. FACT

a. Pure LAW is for the JUDGE.

- i. MARKMAN v. Westview Instruments (US 1996): P patented dry-cleaning organizational system. D made similar system but wasn't as advanced. Held: Interpretation of a patent claim is a **Q of law** for the court, not a Q of fact for the jury. In determining whether jury must shoulder the Q b/c right to trial by jury, SC looked at (1) prior jurisprudence (inconclusive), (2) functional considerations (judges are better suited to decide what patent terms mean), and (3) importance of uniformity (especially in patent context where this outweighs individualized justice concerns b/c *stare decisis* applies and juries cannot render definitions; better to go to judges). Because patent constructions include terms of art, what those terms mean is a Q of law. Interpretation of statutes and land acts goes to judges, and a patent claim feels like a statute. When leave it to the judge, get precedent AND explanation (which only get in limited sense from jury if use special verdict).

b. **FACT is for the JURY** (and application of the law to the facts is for the jury).

- i. When rsbl people can disagree, usually a matter of fact.

ii. Hypo: P sued D for negligence. Matter of law or fact?

1. JUDGE defines the legal std for negligence, then JURY decides how to apply that law to the facts.

- a. "Legal Effect" is the result of applying rules of law to the facts.

2. Checks on this process by the judge

- a. Judge sets jury's bounds in deciding what rsbl (SJ/JML)

- i. Also, judge determines the circle in which a jury gets to decide (the burden of production).

- b. Judge gives jury instructions (sets out std)

- c. Judge makes evidentiary rulings

iii. INTERPRETATION of a K is a **FACTUAL** matter and should t/f be presented to the jury.

1. Dobson v. Masonite (5th Cir. 1966): P and D enter into an oral K where P clears trees and gives D \$12 per 1000 log feet actually sold and keeps the excess; D terminates the K and P sues for expectancy damages; D claims it's barred by SOF. Issue is whether the K is for "goods" (not barred) or "services" (barred by SOF)? Held: Determination of what type of K this was calls for an interpretation of the agreement btw the parties to determine what they meant by the terms of that agreement.

- a. Here there are questions of mutual assent that differ from the "assent with the world" questions raised in the Markman patent case.

2. **Jury Instructions**: The fight over legal issues.

- a. Judge relies on lawyers to come up with jury instructions, then picks.

- i. FRCP 51: Party can file request that court instruct jury on law set forth (before or after argument or both). Counsel may object (to jury instructions) but must do so before jury retires to consider (and must state grounds for objection).

- b. Judge is NOT relieved of the obligation to give proper jury instruction where the parties haven't provided one. Judge **MUST** correct error and give proper jury instruction.

- i. Kennedy v. Southern California Edison Co. (9th Cir. 2000): P brought wrongful-death action but messed up request for jury instruction, even though requested one based on new law. NOT harmless error (i.e., jury would NOT have reached same outcome had proper instruction been given) that the judge didn't fix and give proper instruction.

1. "When the district court is presented with an applicable instruction that raises an important issue of law or directs the court's attention to a point upon which an instruction to the jury would be important, it is not relieved from the responsibility of giving a proper instruction simply b/c the party making the request has proposed an instruction that does not completely comply with the relevant law."

3. Verdicts: FRCP 49

- a. **General Verdict:** Jury only needs to say which side found for and for how much.
 - i. Unsure whether jury listened to judge's instructions or what they thought.
 - ii. **General Verdict with Interrogatories:** Can also give written interrogatories on some facts or issues.
 1. If interrogatories and general verdict conflict, judgment is entered on the answers to the interrogatories OR the jury is sent back for further consideration.
 2. If interrogatories conflict with one another and some conflict with general verdict, no judgment is entered but court shall return jury for more consideration OR order a new trial.
- b. **Special Verdict:** Judge can require jury to return special written finding on each question of fact.
 - i. Court explains and instructs; party must demand submission of omitted issue or it is waived and court finds in accord with judgment on special verdict.
 - ii. Tells you what the jury was doing and why they came out the way they did.

4. Managerial Judging per FRCP 16

B. RIGHT TO A JURY TRIAL

1. Seventh Amendment:

- a. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the US, then according to the rules of the common law."
- b. 7th Amendment doesn't *create* a right to trial by jury, it just *preserves* the right to one if it was available at common law in 1791.
 - i. 7th Amendment freezes the right to a jury trial in 1791 (that's the std we still must apply, so even though courts of law and courts of equity have been merged since the mid-19th century, still must ask whether would have been decided in a court of law or a court of equity to determine whether one has the right to a jury trial).
 1. Courts of Law: Specific categories, gave you money, **gave you the right to a jury.**
 2. Equity Courts: Did what the law courts didn't, no witnesses (all paper) and **no jury trial.**
 - a. Historically, equity courts would "clean up" a case by adding money as incidental to an equitable decision (w/o a jury trial) where law and equity were mixed (but equity was central).

2. Mixed law-and-equity case today?

- a. Every LEGAL ISSUE, whether incidental or not to an equitable claim, carries within itself the right to a jury trial.
 - i. Step #1: Announce Beacon (case that magnified the availability of a jury trial in a mixed case).
 - ii. Step #2: Break case down into ISSUES and decide which issues are. To decide what is law and what is equity, look at (1) the nature of the remedy and (2) historical analogues:
 1. Legal?
 - a. Damages (punitive and restorative); \$\$\$.
 2. Equitable?
 - a. Injunctions, specific performance, restitution (discretionary system); restorative.
 3. Common?
 - a. Example: "Was there pollution?" (common to both law and equity decisions).
 - iii. Step #3: Send legal and common questions to jury and equitable questions to judge.
- b. In an action with equitable claims by the P and legal defenses or counterclaims by the D, the legal claims must FIRST be tried by a jury (before the equity issues go to the judge).
 - i. **BEACON Theatres v. Westover** (US 1959): D (new theatre) was preparing a treble-damage antitrust suit (for \$) against P (old theatre with Ks for first-run films) when P "beat D to the punch" and filed injunction-and-declaratory-judgment action against D, so D counterclaimed with the antitrust claim (equitable claim with legal counterclaim). **Held:** D is entitled to a jury trial (first) for the legal counterclaim.

1. Can't do the injunction first b/c in order to grant the injunction you have to decide on the facts and the legal issue (t/f would be no legal issue left for the jury).
 2. In a merged law-equity system, the 7th Amendment right to a jury trial should be expanded, not contracted (shouldn't lose right just b/c case mixed). Would be patently unjust to deny D a jury trial where would have gotten simply if had filed complaint before P.
- c. **Must grant at least partial jury trial for ANY legal issue** (even if "incidental" to central equitable issues) that is presented when trial by jury is timely demanded.
- i. **DAIRY QUEEN v. Wood** (US 1962): Breach of K suit (exclusive licensing agreement for franchises) where injunctions to prevent DQ from buying from, selling to, or collecting rents from other DQ sellers in the area and an accounting (to determine the amount of \$ owed) sought. DQ timely requested a jury trial, which Wood (EDPA trial judge) refused (said that no legal issues and even if there were they were incidental and could be tried as such, with the equitable claims, to the court). Held: Accounting here is analogous to P asking for \$ damages for breach of K (a legal claim). Where both legal and equitable claims were presented in DQ's complaint, t/f improper to deny at least partial jury trial on the legal issues, even though the legal claims may be only incidental to the equitable claims (overrules the "clean-up" doctrine). Jury must attend entire trial but pass verdict only on the single legal issue presented.
- d. Where there is an equitable precursor, **CAN do the equity issue first** then have a jury trial on the legal points BUT where there are both legal and equitable claims, the Ps are still entitled to a jury trial for the legal claims.
- i. **ROSS v. Bernhard** (US 1970): Ps (shareholders) sued brokers for charging excessive fees and having unlawfully large representation on board of directors (class-action derivative suit; traditionally equitable). Ps claimed entitled to a jury trial. Must do the 3-part analysis and look at the issues underlying each claim to determine whether it is legal or equitable:
 1. Q1: Can the stockholders sue on the corporation's behalf?
 - a. Principle claim. This is equitable.
 - b. The "right to a jury trial attaches to those issues in derivative actions to which the corporation, if it had been suing in its own right, would have been entitled to a jury."
 - c. In this case the judge has to go first to see if they can sue for their underlying claim (but this won't interfere with the jury's decision). Reversing the order here (doing equity first) will reach the same goal.
 2. Q2: Does the corporation have a claim for damages against the directors (b/c the company had been charged excessive brokerage fees)? Underlying claim. This is legal.
 3. Q3: Too complex for a jury? Only SOME courts have added this "complexity exception" (see below).

3. Complexity Exception

- a. The SC has never said that an exception exists for complexity, BUT:
- b. **9th Circuit**: No exception. Don't take from the jury. Judges can make less confusing.
 - i. **Financial Securities**: No liberty to craft a complexity exception to the 7th Amendment.
- c. **3rd Circuit**: Will make an exception for complexity b/c violates due process if like giving the case to a bunch of monkeys.
 - i. **Japanese Electronics**: Takes case from jury when it's so complex that would violate 5th A due process rights.

4. Seventh Amendment extends the right to a jury trial to actions enforcing newly created statutory rights.

- a. **CURTIS v. Loether** (US 1974): D (white apartment owners) wouldn't rent to P (black woman); P claimed was b/c of race and sued under Civil Rights Act of 1968, which allows private Ps to bring civil actions to redress violations of the fair housing provisions of the Act (Title VIII), seeking injunctive relief (district court granted a preliminary injunction which was dissolved after 5 months) and punitive damages and later a claim for compensatory damages. D demanded a jury trial. Held: The 7th A entitles either party to a jury trial in a Title VIII action.

- i. **Statutory claims are NOT immunized from the 7th A:** Right to a jury trial extends beyond the common-law forms of action recognized in 1791 to actions enforcing newly created statutory rights.
 1. This issue never arose before b/c Congress provided for jury trials with new actions until the Civil Rights Laws b/c of concern over white jury nullification in the South (these laws lacked express right to jury trials).
- ii. **Must see if the claim fits into the 7th A analysis:**
 1. **NATURE OF THE STATUTORY ACTION: Right created by the statute must be analogous to a right that would have rec'd a jury trial in 1791.**
 - a. Here, innkeeper duty to not refuse lodging; maybe also defamation or IIED: in 1791, common-law tort actions were tried to juries.
 - b. Might have been different if had been more analogous to an action of equity.
 - c. This is NOT a great restriction b/c can always compare to trespass on the case, which was amorphous and broad.
 2. **NATURE OF THE REMEDY SOUGHT: Remedy must be one traditionally granted by juries (i.e., traditionally "legal" remedy).**
 - a. Here, P's action for damages is an action to enforce a "legal right."
 - b. Might have been different if had been seeking traditionally "equitable" remedy, e.g., specific performance or injunction, but the P here dropped her injunctive relief claim. Can be distinguished from Title VII cases, b/c when you put Title VII cases through the analysis they come out "equitable" (b/c the \$ involved in those cases is restitutionary, i.e., back pay to return P to status quo, not compensatory or punitive.
 - c. If both claims had been present, first the jury would decide whether there was a violation and award damages, then the judge would decide whether to grant an injunction.
 3. **The right given by Congress must be vindicated in an Article III court** (i.e., when Congress relies on ordinary civil action in federal court for enforcement, the 7th A applies). Congress didn't assign this to a non-Article III court.
- b. **TULL v. US** (US 1987): Gov't sued T (destroyer of wetlands) for dumping fill on wetlands on an island in VA in violation of the Clean Water Act (§1319); gov't wanted (1) an injunction and (2) civil penalties. D appealing denial of timely request for jury trial.
 - i. **7th A analysis: "THERE ARE TWO INQUIRIES"**
 1. **NATURE OF THE STATUTORY ACTION (historical analogue?)**
 - a. Here this is similar to 1791 actions in debt (court of law) but also to public nuisance (court of equity).
 - b. **When can't decide** (and decide that it could be either or both), suggestion here is that should **go to a JURY**.
 2. **NATURE OF THE REMEDY SOUGHT:**
 - a. **This is the more important of the two questions:** "Characterizing the relief sought is more important than finding a precisely analogous common-law COA in determining whether the Seventh Amendment guarantees a jury trial."
 - b. Civil penalties and punitive damages could only be enforced at common law in courts of law (§1319(d)'s purpose is punitive) BUT can't try the whole thing to a jury b/c CWA shows that Congress intended for trial court judges to perform the "highly discretionary calculations" necessary to award civil penalties after liability found.
 3. Note: No "public rights" exception b/c came up through an Article III court.
 4. **Held:** D had a constitutional right to a jury trial on the liability issue (whether §1319 was violated), but not re: the penalty amount.
 - a. This is a weird majority decision b/c usually damages questions go to the jury.
 - b. Especially when one thinks about the fact that juries make "highly discretionary calculations" (e.g., calculations based on pain and suffering) all the time.

5. **Concurrence & Dissent:** Whole thing should go to a jury b/c determined that sounds like an action at law. There is no precedent for judgment on civil liability by jury but assessment of damage amount by the court.
 - a. See (re: difference btw majority and Scalia & Stevens) **Feltner v. Columbia Pictures TV** (1988): Jury decides liability AND amount of damages.
 - c. **Chauffeurs, Teamsters, and Helpers Local 391 v. TERRY** (US 1990): Truckers sued their union for violating its duty of fair representation (claimed union didn't properly represent them [they filed a grievance claiming a violation of their seniority rights and the union declined to submit it to a grievance committee] so they ended up getting screwed by the agreement with their emp'ers).
 - i. **7th A analysis:**
 1. **METHOD OF PROCEEDING WITH ANALYSIS: There are two inquiries (per Tull) and the second (remedy Q) is more important to the analysis (per Granfinanciera).**
 2. NATURE OF THE STATUTORY ACTION (analogous claim?):
 - a. Majority says we shouldn't look at just the claim; look at the **UNDERLYING ISSUES:** breach of duty of fair representation analogous to trustee/beneficiary (equitable) but collective bargaining agreement analogous to breach of K (legal) t/f first inquiry leaves us in equipoise re: whether P is entitled to a jury trial (b/c both legal and equitable issues involved).
 3. NATURE OF THE REMEDY SOUGHT:
 - a. Remedy is **backpay**, which here is **legal in nature** (b/c Ps don't seek \$ held by D, but \$ that they would have rec'd from emp'er had D properly processed their grievances). Usually backpay would be equitable.
 - i. **Restitutionary \$ damages** or incidental or intertwined with injunctive relief are **NOT legal**, but equitable (not the case here).
 - b. In this case the union wasn't unjustly enriched; what we are doing is punishing the union (they are looking for \$ from one who hasn't taken \$ from them (the emp'ers are the one who took \$ from them). A **punishment is LEGAL**.
 4. **Held:** Because there are both legal and equitable issues (Q1), the remedy sought is legal in nature (Q2), and there is no "public rights" exception, Ps are entitled a right to a jury trial.
 - a. Brennan (in **CONCURRENCE**) would do away altogether with the first inquiry and decide solely on the basis of the relief sought.
 - b. Kennedy/O'Connor/Scalia (in **DISSENT**) would adhere to first inquiry and when equitable the inquiries should end there. Say majority going too far here by parsing out legal elements from equitable claims and say Beacon, DQ, and Ross inapplicable here.
 - ii. NOTE: If the gov't had the Dep't of Labor deal with the emp'ees in an administrative setting that would be similar to Atlas Roofing as a "**public right**" exception (BUT not the case here).
 - iii. Brennan (in **CONCURRENCE**) would do away altogether with the first inquiry and decide solely on the basis of the relief sought.
5. **The Seventh Amendment only guarantees civil jury trials in FEDERAL (Article III) courts.**
 - a. Beacon and Curtis are 7th A civil jury trials BUT the SC has never incorporated (via the 14th A) to make states use civil jury trials (like they have for 6th A criminal jury trials), t/f a state may reject or apply these rules.
 - b. A federal civil jury must be unanimous unless the parties stipulate otherwise, but states vary widely.
6. **"PUBLIC RIGHTS" EXCEPTION to the Seventh Amendment right to a jury trial:**
 - a. If Congress gives adjudication to a **non-Article III court** (e.g., an administrative agency like OSHA) or to a specialized court of equity (e.g., Bankruptcy Court) there is **NO RIGHT TO A JURY TRIAL** (even if there IS a legal issue) b/c the right = "public right" (gov't in dispute with an individual); jury incompatible with the forum.

- b. What if a statute creates a new COA?
- i. **KATCHEN v. Landy** (US 1966): Bankruptcy is traditionally equitable (no jury trial). “There might be situations [as here] in which the Court could proceed to resolve the equitable claim first, even though the results might be dispositive of the legal claim.” P→D (P has two claims that D, a trustee, owes him \$ and that P didn’t get his full share of the pie; divide up the assets btw all of those who have an interest in the corporation and P is only one of those people). D→P (claim of fraudulent conveyance: trustee D is saying “we paid you something, but we should’ve waited to see how much we have so that we can divide it uniformly btw the different people owed and it turns out that we gave you too much \$”). If third claim (re: fraud) was the only claim, would have been legal BUT what P is claiming has changed b/c not just saying “you owe me \$” but P is claiming a piece of the pie (which is equitable).
 1. **Held:** By extension, anything that the trustee claims is also dealing with the pie and what piece P is going to get so those claims are also equitable.
 2. Congress is taking a legal claim (P’s claims) and making them into an equitable claim.
 3. In Tull, statutes enacted by Congress still have to go through the 7th A analysis. Here the court is implicating that Congress can create regulatory regimes that change matters and shift legal matters to equitable matters.
- c. **ATLAS Roofing v. OSHA** (US 1977): Gov’t sued AR for violation of OSHA before an ADMINISTRATIVE LAW JUDGE and fines were imposed; AR claimed violated the 7th A b/c should have been a jury trial. **Held:** NOT a violation of the 7th A b/c 7th A “does not prohibit Congress assigning the fact-finding function and initial adjudication to an administrative forum with which a jury would be incompatible” in cases in which “PUBLIC RIGHTS” are being litigated.
- i. For a **Public Rights** issue, **Congress CAN** specifically **give** it to an **administrative law judge**.
 1. Congress can create a “PUBLIC RIGHT” regime to make exceptions to claims that might be legal. If Congress thinks it would be better to be heard by an ALJ they can displace the right to a jury trial if the issue is a “public right.”
 2. But, Congress must **say** that an ALJ is better than a jury or a judge. Must take it out and give it to a non-Article III court (ALJ); CANNOT take it away from the jury and give it to a judge.
 - ii. “The right to a jury trial turns not solely on the nature of the issue to be resolved but also on the **forum** in which it is to be resolved... The Seventh Amendment is no bar to the creation of new rights or to their enforcement outside the regular [Article III] courts of law.”
- d. **GRANFINANCIERA v. Nordberg** (US 1989): Bankruptcy case (**similar to Katchen**) where trustee P is suing beneficiary D to recover funds that were fraudulently transferred from the debtor’s estate to the D (like third claim in Katchen, which we said would have been a legal matter if it had been brought alone). Must do the 3-part (claim, remedy, public right) 7th A analysis:
- i. NATURE OF THE STATUTORY ACTION (analogous claim?)
 1. Court says P’s entitled to a jury trial (like third claim in Katchen).
 2. “Trustee v. old creditor” more like a state-law K claim brought by a bankrupt corporation to augment the bankruptcy estate (a LEGAL claim when it is ALONE).
 - a. In a “creditor v. trustee” case (as was in Katchen), where creditors’ claim a pro rata share of the bankruptcy estate (seeking a piece of the pie), really going against the other creditors (EQUITABLE).
 - b. In a “creditor v. trustee” case with a “trustee v. creditor” counterclaim (Katchen), the counterclaim is the same thing as in Granfinanciera, BUT when it is a counterclaim to a “piece of the pie” claim it becomes equitable, b/c you are now **talking about the pie** (which is always equitable b/c it involves the other creditors). BOTH ARE EQUITABLE when they come TOGETHER.
 - ii. NATURE OF THE REMEDY SOUGHT:
 1. May Congress assign this to a non-Article III court (i.e., is it a “PUBLIC RIGHT”)?
 - a. This claim is a private right that resembles a state-law K claim. Such “public rights” cases must be brought by the gov’t or be brought against the gov’t.
 - b. Therefore, this claim is entitled to a jury trial (no public rights exception).

- iii. **Held:** Because recovery involved fraudulent conveyance and no “public right” exception, jury trial available to P. This was a private right suit at common law t/f 7th A right to trial by jury (again, Q2 from Tull is more important). Three issues:
 - 1. If third party sues bankruptcy trustee could be equitable or public right (w/o jury). See Katchen and Granfinanciera.
 - 2. If trustee goes after third party for common-law claim (e.g., K) going too far (need jury). See Granfinanciera.
 - 3. If third party counterclaimed after sue trustee (no jury), entered administrative regime so becomes public right. See Katchen.

7. SUMMARY OF RIGHT TO A JURY TRIAL

- a. When multiple claims exists some of which are equitable and some of which are legal, the party is entitled to a jury trial on the claims that are legal, even if that claim is only incidental to the equitable claim (**Beacon Theaters; Dairy Queen**).
- b. **3-Part Analysis:**
 - i. **Analogous Claims?**
 - 1. Look at the ISSUES of the claim (**Chauffeurs; Ross v. Bernhard**) to see what issues were analogous at common law (i.e., ask whether the issues are more similar to legal or equitable issues at common law).
 - ii. **Remedy?**
 - 1. Look to see if the remedy sought is one that is legal or equitable in nature.
 - 2. **EQUITABLE:**
 - a. Restitution (putting one back to the place they were)
 - b. Backpay in Title VII cases (b/c Congress specifically characterized it in the statute as a form of equitable relief)
 - c. Injunctive Relief
 - 3. **LEGAL**
 - a. Money damages w/ punishment are always legal (Tull)
 - b. Backpay can be (Chauffeurs)
 - c. Punitive Damages (Curtis v. Loether)
 - iii. **“Public Rights” Exception**
 - 1. If claim is in an area that is a “public right” than Congress may give it to an ALJ.
 - 2. Can be a gov’t suing a private party or a private party suing a gov’t.
 - a. **CANNOT BE A PRIVATE PARTY SUING ANOTHER PRIVATE PARTY** (Granfinanciera: does NOT fall into the “public rights” exception just b/c it is a bankruptcy court).
 - 3. Congress CANNOT take case away from a jury and then give it to a judge; must give it to an ALJ.

- 8. **GASPERINI (re: 7th A):** 7th A bears not only on allocation of trial functions between judge and jury but also controls allocation of authority to review verdicts. Reexamination clause does not inhibit authority of trial judges to grant new trials “for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States,” and that authority is large. Trial judge in the federal system has discretion to grant a new trial if the verdict appears to be “against the weight of the evidence”, and that discretion includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on verdict winner’s refusal to agree to a reduction.

- a. **Appellate review for abuse of discretion is reconcilable with 7th A as a control necessary and proper to the fair administration of justice.** Nothing in the 7th A precludes appellate review of trial judge’s denial of motion to set aside jury verdict as excessive. Proper role of trial and appellate courts in the federal system in reviewing the size of jury verdicts is a matter of federal law; role of district court is to determine whether jury's verdict is within the confines set by state law, and court of appeals should then review district court's determination under an abuse-of-discretion std. Within the federal system, practical reasons combine with 7th A constraints to lodge in the district court, not the court of appeals, primary responsibility for application of NY's “deviates materially” check on the size of damage awards based on NY law.

ISSUE #5: PRECLUSION

1. Three ways in which adjudication may affect subsequent suits: (1) stare decisis, (2) CP, and (3) IP.
 2. General principles of preclusion:
 - a. A party ordinarily can have only one chance to litigate a claim (one bite at the apple): res judicata/CP.
 - i. Use it or lose it.
 - b. A party can ordinarily have only one chance to litigate a factual or legal issue: collateral estoppel/IP.
 - i. Must actually litigate.
 - c. A party is entitled to at least one full and fair chance to litigate before being precluded.
 - d. Preclusion may be WAIVED unless it is claimed at an early stage of the litigation (as an affirmative defense in Suit #2).
 3. The aim of preclusion is to avoid multiple suits on identical entitlements or obligations btw the same parties accompanied by the re-determination of identical issues of duty and breach.
 - a. Finality is the goal of civil procedure. CP promotes judicial efficiency, consistency, and avoidance of harassing or vexatious litigation. The goal is to save resources (by ending the chain of litigation)...
 - i. BUT also may end up being less efficient b/c may encourage pieces of suits that might not otherwise be brought at all (b/c people are afraid to lose chance to bring later, bring more now than otherwise would).
- A. CLAIM PRECLUSION (RES JUDICATA)**
1. A judgment, once rendered, is the full measure of relief to be accorded btw the same parties on the same claim or COA.
 2. In certain circumstances, when a second suit is brought, the judgment in a prior suit will be considered conclusive, both on the parties to the judgment and those in privity with them, as to matters that actually were litigated or should have been litigated in the first suit. Thus, for CP to operate, three elements must be present:
 - a. **The original judgment must have been FINAL, VALID, and ON THE MERITS.**
 - i. See Section C: "The Required Quality of Judgment."
 - b. **SAME PARTIES: The parties to the subsequent action must be identical to those in the first action (or in privity with them).**
 - i. **MATTHEWS v. New York Racing Association** (SDNY 1961): M had been acting strange at racetrack and was detained and eventually arrested and convicted of disorderly conduct. After that conviction, M sued racetrack security, accusing them of assault and libel (Suit #1); security company won (final, valid, on the merits). M then filed a Suit #2 against the racetrack, alleging basically the same charges (same claim). Held: The racetrack and the security company were in privity with one another such that M should have brought all the claims together (and is now precluded). A corporation can only act via its agents, t/f if the agents are not at fault, there is no basis for liability (this is a vicarious liability/respondent superior issue).
 - ii. **Those who have contested an issue are bound by the result** of the contest, and once the matter is tried, it is considered forever settled btw the parties. The goal of preclusion is NOT justice, but FINALITY (does NOT matter whether the first suit was right or wrong).
 1. **Federated Department Stores v. MOITIE** (US 1981): In an antitrust suit with seven Ps, the District Court dismissed the claims for failure to state an injury. Five of the Ps took an appeal to the appellate court, but the other two Ps refiled (brought a new action in state court). While those two Ps were awaiting a judgment, the appeals court found in favor of the other five Ps. The state court then dismissed the two Ps claims on CP grounds. Held: Dismissal stands b/c CP serves a public interest beyond the equities of any individual case. Even though Moitie I was later deemed wrong (no stare decisis effect) on appeal (by the five Ps), the two who didn't appeal are bound and precluded.
 - c. **SAME CLAIM: The second suit must include matters properly considered included in the first action (i.e., actually litigated or should have been litigated).**
 - i. What is a "claim"? Old rule was to define re: their legal theory (e.g., a K claim would always be separate from a tort claim, even if the same T&O led to the suit); modern definition is different: **a claim is defined by the facts that give rise to it** (i.e., if the same T&O gave rise to both a tort claim and a K claim, they would be considered part of the same claim and a P would have to bring them together).

- ii. Under this **modern transactional approach**, cannot split a single COA (the “single-action” rule); can’t sue in two separate actions for damages resulting from a single transaction/accident (only one bite at the apple). **Basically, COA = T&O.**
 - 1. Per Rest.2d of Judgments, §24 comment a, a “factual grouping constitutes a single transaction” when:
 - a. The facts are related in time, space, origin, or motivation;
 - b. They form a convenient trial unit; and
 - c. Their treatment as a unit conforms to the parties expectations or business understanding or usage.
 - 2. **RUSH v. City of Maple Heights** (US 1958): P was injured when her motorcycle hit a hole in the road. Suit #1 was brought against the city for property damage (to her bike); P won. Suit #2: P tried to bring a suit for personal injuries arising from the same accident. Held: P’s personal injury claim should have been brought at the same time as the claim for property damages and t/f it merged into that judgment and is now precluded (“a single tort can be the basis of but one action”).
 - a. Disagrees with Vasu, which held that insurer and insured are NOT in privity for preclusion purposes (Vasu I: insurer v. truck; Vasu II: insured v. truck); doesn’t overrule, but really narrows Vasu holding.
 - b. There is no reason to split a COA under modern civil procedure rules. Same T&O so per FRCP 18 *can* bring together (although don’t need to bring together). Now *must* bring together under preclusion rules once on notice (or lose the chance forever).
- iii. CP is meant to avoid piecemeal litigation, whether the case is like Matthews (where the P should have sued Ds in privity at the same time; piecemeal people) or Rush (where the P should have brought all of her claims at once; piecemeal claims).
- iv. **“Merger” (when P wins)**
 - 1. **Jones v. Morris Plan Bank of Portsmouth** (SC App VA 1937): P sued bank that repossessed his car, claiming that the bank had forfeited any remaining rights to the car when it sued him (and won) but for only one payment (Suit #1); per the K, once a payment was missed, the bank’s remedy was to accelerate the payment on the car but after P missed a payment the bank only claimed *that* payment. The bank then repossessed the car when P missed a second payment. P brought suit (Suit #2) and won, claiming that the bank was precluded from any further interest in the car when it failed to sue for the entire price in the original suit. Held: An action for an overdue debt merges with a separate foreclosure action. Merger here constituted a waiver on the right to sue on the remainder of the K.
- v. **Defense Preclusion: “Bar” (when D wins):** CP can also affect Ds in a suit (i.e., can have preclusion against the original D as well as the original P). Need to bring all and any defenses at the start (cannot relitigate liability if fail to bring as a defense).
 - 1. At common law, if the D were to raise an affirmative defense (shield), but not make a counterclaim, he would be precluded from bringing the claim later in a separate trial (sword).
 - a. **Mitchell v. Federal Intermediate Credit Bank** (SCSC 1932): Farmer offered potato crop as collateral on a \$9K loan. When the crop was sold off it was worth \$18K, but the bank refused to turn over the profit to the farmer. Bank then sued for the \$9K when farmer refused to pay. Farmer successfully defended the claim by asserting that he had already turned over the crop worth \$18K (shield). Farmer then tried to bring a claim against the bank to recover the extra \$9K (sword). Held: The second claim was merged with the original defense. A party may not split a COA arising out of one transaction by asserting one portion of the claim as a defense and another as an affirmative claim in a second action (no “sword and shield”).
 - (A) Kirven (withdrew defense in first suit t/f didn’t use as a shield [not “actually litigated”]) so could still use as a sword).

(B) O'Connor (builder sued house owner b/c didn't pay; owner defended that bldr did bad job and won [shield]; couldn't bring second suit for damages b/c precluded [no sword]).

b. Defining scope:

(A) Linderman Machine v. Hillenbrand (IN App 1920): L sold machine to H and sued for purchase price; H defended that machine no good and tried to give it back. Then H sued L to recover fraud damages (for expense of moving and attempting to use machine). L said CP but H won b/c didn't have to bring cross-complaint (this wasn't a defense, but a separate COA against L).

2. **This common-law rule has been superseded in the federal courts by FRCP 13(a)** (compulsory counterclaims: if same T&O must bring in Suit #1).

vi. *nb*: The claim does NOT have to be "actually litigated" like for IP. As long as had the opportunity to litigate, this is enough (e.g., 12(b)(6) is "on the merits" b/c get many chances).

B. ISSUE PRECLUSION (DIRECT/COLLATERAL ESTOPPEL)

1. IP recognizes the fact that suits addressed to a particular claim may present issues relevant to other claims btw the same parties. In such a case, IP bars the relitigation of issues actually litigated and essential to the judgment in a prior suit between the same parties. IP requires four elements:

a. **Must be the SAME ISSUE**;

i. Defining and characterizing an "issue" may be difficult for IP, especially where the law or fact has changed btw cases. In such an instance, the issue might not be considered to be the same.

1. Change in LAW btw suits: usually still precluded.

a. US v. MOSER (US 1924): Retired Navy captain relied on preclusion (of issue that "retired") for Suits #2-4 such that kept getting paid under Suit #1 even where law changed after Suit #1 decision such that would have been different if decided later (i.e., would NOT have been deemed "retired" for benefit purposes b/c court had changed its interpretation of the pension statutes after first suit). Finality, not justice, is the goal of preclusion, and it is unfair to reopen cases just because the law has changed. Here there was NO change in FACT (only the LAW had changed).

2. Possible exception (where NO IP after major changes in both LAW and FACT)

a. Commissioner of Internal Revenue v. SUNNEN (US 1948): D thought he would hide income from the IRS by having it transferred to his wife. The IRS caught on to the scam and tried to bust D, suing for the tax years of 1929-31 (IRS lost). After Suit #1, D continued to transfer income to his wife under agreements similar to that challenged in Suit #1. The IRS then brought Suit #2 for taxes paid between 1937-41. D tried to get the issue of the agreement precluded. Held: IP inappropriate for two reasons: (1) Each tax year represented a different issue (t/f material facts different); and (2) The law had changed and t/f it would be unfair to allow the D to continue to break it simply b/c he had won a favorable decision in an earlier suit.

(A) Worried about equity across taxpayer cases. **Questions have been raised as to the general applicability of this rule outside of the tax context.** More recent than Moser, but maybe tax-specific.

(B) No CP b/c each tax year is a new T&O.

(C) Here treating FACTS as changed AND the LAW changed too.

(D) Where IP runs counter to accepted legal principles, IP must fail.

(E) **Must be a BIG CHANGE in the law.**

b. **The judgment in the first action was FINAL, VALID, and ON THE MERITS**;

i. See Section C: "The Required Quality of Judgment."

c. **The issue must have been ACTUALLY LITIGATED**; and

i. Unlike CP, IP never applies to matters that were not argued and decided in the prior suit (even if they should have been).

- ii. The “actually litigated” requirement simply means that the parties in Suit #1 must have addressed the issue that is now facing preclusion. IP does NOT apply when the subject matter is the same but the issue is different.
 - 2. **Cromwell v. County of Sac** (US 1876): Suit #1: P1 sued D to recover the coupons on certain municipal bonds and lost b/c couldn’t show that bonds were purchased for value. Suit #2: D trying to preclude the issue of whether P2 is a bona fide owner of the same kind of bonds (and t/f win the suit). Held: No IP b/c whether P2 is a bona fide owner of the same type of bonds was NOT “actually litigated” in the original suit (each coupon is its own thing).
 - 3. **Southern Pacific RR v. US** (US 1897): A “right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground for recovery cannot be disputed in a subsequent suit between the same parties or their privies.”
 - a. **Blanchette v. School Committee of Westwood** (US 1992): CAN litigate after an arbitration proceeding pursuant to a K’s collective bargaining agreement b/c single bites from two different apples (NOT “actually litigated”).
 - 4. **Doctor-Patient Hypo**: Suit #1: Dr. treats patient, who then doesn’t pay, so Dr. sues (issue: whether care was adequate); default judgment is entered. Suit #2: Patient sues for malpractice damage (issue again: whether care was adequate) and Dr. claims IP. NO IP b/c wasn’t “actually litigated” where default judgment was entered. There IS, however, CP here (unless didn’t know, e.g., instrument was left in patient’s stomach).
- d. **The issue must have been “NECESSARILY DECIDED,” which includes two sub-elements:**
 - 1. If general verdict, can use “necessarily decided,” but if special verdict, need to split and look at separately (b/c could be actually decided but NOT necessary to the outcome and cannot be appealed by winner of underlying suit).
 - i. **The issue sought to be precluded must have been ACTUALLY DECIDED by first court.**
 - 1. This could generally come about in two ways. Most frequently, when a jury returns a general verdict in a case and a party wins, that party must have proved certain issues to the jury’s satisfaction (e.g., if a man brings a negligence suit against a neighbor and wins, the jury must have decided that the D was both negligent and the proximate cause of the injuries; otherwise it could not have returned a verdict in favor of the P). If the outcome of the earlier action could have rested on several alternative holdings or if the issue in the earlier trial was “stipulated” (rather than adjudicated), there is usually no IP effect. IP does not apply where the precise Q raised and decided is unclear.
 - a. **Russell v. Place** (US 1876): Suit #1: P sued D for patent infringement for two separate processes of preparing leather (the “regular grease” and “fat liquor” methods), either of which would have constituted the infringement that the lower court held (P won but court didn’t specify on which claim). D continued to use the processes and the P sued again (Suit #2). D defended on the same grounds as the first suit and P sought to have the issue of patent infringement excluded. Held: No IP b/c the general verdict in the first suit did not specify on what grounds the P won (t/f it is uncertain whether both processes were patented or just one and what exactly the violation was).
 - a. There must be CERTAINTY. When a holding rests on several alternative grounds, any of which could have supported the plea, there is NO preclusion to any of the issues b/c not “expressly and necessarily determined” in prior case.
 - 2. The actually decided element might also be determined when the jury reaches a special verdict that lists its findings.
 - a. If there are ALTERNATIVE HOLDINGS, either of which could support a verdict individually, BOTH holdings will stand as actually decided and necessary to the outcome for purposes of IP.
 - ii. **The determination of the issue must have been NECESSARY TO or SUPPORTIVE OF the OUTCOME of the first suit.** This situation will only occur with special verdicts when a jury finds more than is necessary for the verdict.

1. **Rios v. Davis** (Ct Civ App TX 1963): Car accident involving three different parties. Suit #1: P's emp'er sued D for truck damage and D cross-claimed against P. The jury returned a verdict for D against P's emp'er and for P against D and added that all three parties had been negligent (so no recovery either way but judgment based on D's negligence). Suit #2: P sued D separately for negligence and D sought IP re: P's negligence (b/c jury had already determined that issue). Held: NO IP of P's negligence b/c the determination of P's negligence was not necessary to the original verdict (b/c P would have won simply because D was negligent). The "necessary to the decision" requirement protects parties like P, who won the judgment but had issues decided against him (b/c P could not appeal the verdict where he won).
 2. There must be NECESSITY. No dicta (here P's negligence was dicta).
2. Preclusion in different kinds of proceedings:
- a. **SEC v. Monarch Funding** (2nd Cir. 1999): Suit #1 was criminal (RICO/obstruction-of-justice case in NJ federal court) and Suit #2 was civil (in NY federal court). Should preclusive effect be given to a criminal sentencing finding here? ONLY if clearly fair and efficient and "necessary" in Suit #1 (actually litigated and decided). No IP here. No blanket rule created either way re: IP. There is a presumption against preclusion across procedures but it is rebuttable.

C. THE REQUIRED QUALITY OF JUDGMENT

1. For either IP or CP to be effective, the judgment relied upon must have been on the merits, valid, and final. It is not always easy to determine what judgments are of sufficient quality to justify preclusion.
 - a. "VALID" refers to jurisdiction.
 - b. Generally a judgment is "ON THE MERITS" if it is:
 - i. Made pursuant to a 12(b)(6) motion.
 1. Because has the opportunity to hear on the merits but didn't. Usually has many chances to amend first.
 2. Unless judge specifies otherwise (maybe if didn't get many chances to restate with a claim).
 - ii. **Summary judgment**.
 - iii. **JML / RJML**.
 - iv. **Dismissed** means "on the merits" per FRCP 41(b) **unless** dismissed for lack of venue or jx or for bad joinder per FRCP 19.
 - v. **At the end of a trial**.
 - vi. **Settlements** (a common type of end to a suit).
 1. Settlements will NOT result in IP (unless otherwise specified, e.g., by contracting around the rule [e.g., "this settlement bars this issue from being re-litigated"]) b/c the issues were not "actually litigated and decided" by the court when the parties have settled); do NOT presume that precluded.
 2. Settlements WILL result in CP (unless the parties otherwise specify, e.g., by contracting around the preclusion [e.g., "this settlement doesn't bar me from litigating this claim against you in the future"]); assume precluded.
 - a. **Hanover Logansport v. Robert C. Anderson** (Ct App IN 3rd Dist 1987): D agreed to lease his liquor store to P but failed to turn over the property so P sued. Before trial, D proposed to P that it would turn over the property to end the suit. P agreed, but stipulated that the performance was only to be a mitigating action to reduce damages later sought. The court entered a consent judgment (FRCP 68: if offer accepted, clerk enters judgment) stating as much and then D sought to dismiss the complaint against him. P objected that it still wanted to seek damages for the breach. Held: CP b/c P, in his complaint, stated that it was seeking *either* damages or specific performance (didn't claim delay damages). A party can reserve a claim for trial after a settlement only if it (1) specifies in the settlement agreement that the claim is reserved AND (2) specifically states the claim and relief in the complaint. **A P who accepts an offer of judgment that conforms to one of the alternative prayers for relief may not then seek additional damages from the same COA (there is CP).**

- (i) Most courts would look to the intent of the K rather scour complaint the original complaint as here (b/c discourages settlement). Could have amended original complaint here to fix this problem.
 - (ii) Goals of FRCP 68:
 - (a) Encourage settlement.
 - (b) Discourage vexatious lawsuits.
 - (c) Avoid protracted litigation.
- vii. **Default judgments** will be CP (b/c “on the merits” and had opportunity to litigate) but **NOT IP** (b/c nothing “actually litigated”) **UNLESS** the subsequent claim was not foreseeable at the time of the default (then neither CP nor IP).
 - 1. **Housing Authority v. YMCA** (US 1984): Gov’t sought to condemn certain lands for gov’t use, so called parties to court that had claims to the land so that they could be compensated for the condemnation. Gov’t discovered that there was a dispute over one particular tract of land. Parties were to settle the dispute but one party did not show up (t/f defaulted on the judgment). Fifty years later, the heirs of the defaulting party sought an injunction against the heirs of the winner of the suit to stop a parking lot from being built on the land. Held: Default judgment was preclusive as far as subsequent *claims*, but not necessarily as for *issues*.
- viii. A judgment is **NOT “on the merits”** if it is:
 - 1. **Voluntary dismissal** (the first time).
 - 2. **Stipulations** do **not** have IP effect per FRCP 36(b).
- c. A decision will be “**FINAL**” upon the entry of a judgment, regardless of the status of an appeal.
 - i. “Finality” is finality in ANY court (even if on appeal) and is binding until *changed* on appeal.
 - ii. Preclusion btw different agencies
 - 1. **Holmberg v. State** (AK SC 1990): P sought permanent disability benefits from the state for an accident that occurred at work. Suit #1: P tried to get the state to give her disability (AWCB) but lost; she appealed that judgment in court. Meanwhile, Suit #2 brought suit in the retirement system (PERB) and won. P went to court on the Suit #1 appeal, amended her complaint, and moved for IP based on the PERB decision. Held: NO IP b/c (1) the PERB and the state/AWCB were not the same parties or in privity and t/f the state cannot be bound by the decision of the retirement system (cannot be bound unless were a party or in privity with a party from Suit #1) and (2) the PERB decision was not final and, if anything, should have been barred by the state/AWCB decision (which came first and was final upon entry of the judgment, regardless of the status of the appeal until it was changed on appeal).
 - a. Litigation conducted before one agency’s officials is generally binding on another agency of the same gov’t b/c in privity, but **here no privity**.
 - b. Q1: Are the agencies APPEARING before the forum agencies in privity?
 - (A) Question is NOT whether the forums themselves are in privity.
 - (B) Incorrect for P to argue that PERB and state in privity b/c state is only a member (i.e., D1 includes but is not equal to D2).
 - c. Q2: To what degree do the tribunals functions diverge?
 - (A) If diverge, no preclusion. Preclusion is defeated where agencies represent different interests (e.g., in Porter, where the IC case re: postal service and diet pills no good b/c different interests).
 - (B) Although disability stds were different btw PERB and AWCB, they were NOT substantial enough to allow relitigation (there WAS enough overlap here).
 - b. Q3: Are there procedural safeguards present so as to be sufficiently “judicial” to warrant preclusion?
 - (A) If no, no preclusion.
 - (B) Arbitration not always “judicial” enough b/c no/little discovery, FRE, or written opinions re: why decided as decided.

D. PERSONS BENEFITED AND PERSONS BOUND BY ISSUE PRECLUSION

1. Mutuality of Preclusion

- a. Old rule of mutuality of preclusion: to benefit from a decision, party had to have also been bound by it (i.e., had to be a party in Suit #1 to be bound or benefited).
 - i. **Old Rule:** Ralph Wolff & Sons v. New Zealand Ins. Co. (KY Ct App 1933): P had 12 different insurance policies on his candy factory, which burned down. Suit #1: P sought to recover \$14,500 from 9 insurance companies; jury set damages at \$2,500 and awarded P the proportional amount that the 9 insurance companies would have owed (\$1858.90). Suit #2: P sued the remaining 3 companies, who sought IP on the issue of damages. Held: No IP b/c 3 companies were not parties to the first suit; where they were not bound, they could not benefit.
- b. The old rule slowly developed (“indemnification circle” exceptions).
 - i. City of Anderson v. Fleming (IN 1903): Suit #1: P sued K’r after she fell into a street excavation but lost. Suit #2: P sued the city. Held: City’s request for IP granted here b/c otherwise if the city lost it would have to indemnify the K’r (like vicarious liability), who would have to litigate the claim again, although he already won once. Not quite privity, but let City benefit even though not bound.
- c. We finally arrived at the **new rule**: there is no mutuality required to benefit from IP, only to be bound.
 - i. **YOU CANNOT BE BOUND UNLESS YOU WERE A PARTY IN SUIT #1 BUT YOU CAN BENEFIT EVEN IF YOU WERE NOT A PARTY IN SUIT #1.**
 1. For a person to be bound by a previous decision on an issue, he must have been a party or privity to that decision BUT a non-bound party may now benefit from a prior decision through IP.
 - a. IP plea no longer needs mutual estoppel or privity when used as a defense. Mutuality requirement is gone for benefit (relaxed requirements); strangers may now use IP defensively.
 2. First ask regular IP questions (i.e., issue identical, actually litigated and decided, final and necessary to the outcome), then ask:
 - a. Is the party AGAINST WHOM the plea is asserted an original party (or in privity to an original party)? Can the party seeking the benefit bind the other party?
 3. **Bernhard v. Bank of America** (CA SC 1942): Suit #1: P (relative of dead woman) sued the executor of the woman’s estate (D1) to get him to return some \$; court held that the \$ had been a gift from the woman to Cook. Suit #2: P sued the bank that had transferred the \$ gift to D1’s account (D2) under the theory that the bank should not have done so. D2 sought IP re: that the \$ was a gift. Held: Yes IP b/c the P had already litigated the issue and lost. Even though D1 and D2 were not in privity, D2 can still benefit where the P was the same as Suit #1 (P can be bound).
 - a. P has had a “full and fair opportunity to litigate” already.
2. Federal Adoption of Defensive Non-Mutual Issue Preclusion (i.e., where the IP is used as a defense to a subsequent claim); same P (lost before), different D.
 - a. See **Bernhard** (P lost claim #1 and then brought claim #2 and new D successfully asserted IP).
 - b. Mutuality doctrine should no longer apply to patent cases b/c patent suits are very expensive and b/c patents are presumed valid (broader justification but some case-specific factors):
 - i. **Blonder-Tongue Labs v. Univ. IL Foundation** (US 1971): Suit #1: UI sued antenna mfr for patent infringement and lost b/c the court declared the patent invalid. Suit #2: UI sued BT (different D) and won (patent valid); D in Suit #2 (BT) appealed to SC arguing that the issue of whether the patent was valid should have been precluded. SC agreed and held that where a P had “one full and fair opportunity to litigate” an issue and lost, the issue was precluded for subsequent suits, even if the D in those suits was not a party to the original suit.
 - c. Defensive IP promotes judicial economy. Undesirable to make D relitigate issues that P has already lost elsewhere. Conserves judicial resources by giving incentive to all potential Ds and do it once.
3. Offensive Non-Mutual Issue Preclusion involves different concerns and t/f follows a different rule. Offensive IP will normally take place when a D in a prior suit has LOST and then an entirely new P sues and tries to preclude the issues found in the original suit; different P, same D (who lost in prior suit).

- a. Look at:
 - i. **Effect on judicial resources**
 - 1. At district court judge's discretion (asks whether P could have joined first suit or is P playing wait and see, which would counsel against allowing offensive use of preclusion).
 - ii. **Fairness**
 - 1. **Incentive for D to litigate the first time (were future suits foreseeable)?**
 - 2. **Prior inconsistent judgments?**
 - 3. **Lesser procedural opportunities for D in first suit (no procedural unfairness, e.g., poor forum)?**
 - a. Jury trial right NOT considered such a procedural advantage per Parklane?
- b. Offensive non-mutual preclusion is not permitted against the gov't (b/c of the multitude of suits that it must defend).
- c. **PARKLANE Hosiery Co. v. Shore** (US 1979): D (Parklane) was accused of securities fraud by the SEC in Suit #1 (a non-jury trial). D lost that suit (SEC won declaratory judgment) and was subsequently sued by shareholders who sought to preclude the issues of the false and misleading statements by D (shareholders moved for partial summary judgment re: the issues from Suit #1 but Dist Ct denied motion on ground that would deny D of Seventh Amendment right to jury trial). P appealed and was reversed by CtApp and now D appeals.
 - i. Held: Mutuality no longer applies to IP. Offensive non-mutual IP could be troublesome re: judicial efficiency b/c rather than discourage litigation, it would encourage parties to wait and sue separately BUT not barred entirely; okay in certain circumstances where the trial judge has determined that:
 - 1. D had an **incentive to vigorously litigate/defend** in suit #1 (e.g., future suits were foreseeable).
 - 2. **No procedural unfairness** in Suit #1 (e.g., forum was unfair to D).
 - 3. **No inconsistent prior decisions** (e.g., if multiple Ps sue a D separately and several lose until one finally wins, that one victory should not outweigh all the prior losses by precluding the issues in subsequent suits).
 - ii. In Parklane, the Court decided that the D did have ample motivation to D and was not suffering from any other injustice at the original trial and t/f preclusion would be okay. Broadens holding of Blonder-Tongue (in terms of subject matter and defensive to now both defensive *and* offensive). Shouldn't be allowed offensively where P could have joined the earlier case (out of fairness to D) BUT in Parklane P couldn't have joined the SEC action. D not prejudiced b/c had a full and fair opportunity to litigate in the SEC suit.
- d. SC has consistently held that the **Seventh Amendment** does not require that a issue be relitigated in front of a jury if the issue has already been fully litigated. This is justified mostly b/c at common law judges retained the power to remove certain issues from jury consideration and therefore that power was reserved by the 7th A (flexibility in applying and interpreting 7th A).
 - i. **Parklane**: D's rights to jury trial not violated b/c, even though mutuality of estoppel was required when Bill of Rights adopted (so wouldn't work in 1819 anyway), procedural devices may develop to assure substantial justice and not violate the 7A.
 - 1. PRECLUSION WORKS EVEN IF DENIES JURY TRIAL (potentially): Suit #1 had no jury but in Suit #2 would have had right to a jury trial.
 - 2. In Beacon, legal questions must go the jury first (BUT in Beacon there was ONE case, not TWO, as with preclusion).

E. INTERSYSTEM PRECLUSION

1. **State-to-state preclusion:** What happens when a motion to preclude an issue or a claim is based on a prior suit from a state other than the one deciding the preclusion in the subsequent suit? There are two separate sources of authority on the issue.
 - a. First, the **Full Faith and Credit Clause** (Article IV, §1) requires states to honor judgments given in other states, but the fate of preclusion cannot always be simply determined.
 - b. The approach of most courts follows **28 U.S.C. §1738** and is to employ the rules of the rendering court. This allows the first court to limit the effects of its own proceedings. Thus, if the first suit is decided in OH, a subsequent suit in a NY court would be decided as to preclusion issues by looking at what preclusive effect, if any, the OH courts would have given to the first judgment.
 - i. **Hart v. American Airlines, Inc.** (US 1969): Plane crash led to the death of 58 of 62 passengers. Suit #1 (in TX federal court): judgment rendered against the Airline. Suit #2 (brought by several other passengers in NY state court): Ps moved to have the issue of the airline's liability excluded. After looking at the effect that the original judgment would have in TX, the court determined that the issue of liability would be precluded because the D already had a full and fair opportunity to litigate the issue in the first suit (non-mutual offensive IP here; courts says preclusion would not be unfair to the D).
 1. When different court systems look at procedural opportunity afforded in Suit #1 to make sure really had chance to litigate ("full and fair opportunity") it usually lacks teeth b/c usually get due process anywhere.
 2. Would this outcome be different under Semtek?
 - c. **States can enhance but not limit preclusive effect of prior state's decision.** Courts will not always follow exactly the rules of the rendering court in a situation where a subsequent court wants to give broader preclusive effect to the original judgment. This is usually justified by the states by the argument that expanding the preclusive authority of the original decision can only enhance the power of the original court and pay greater respect to that decision.
 - i. **Finley v. Kesling** (IL [fed] 1982): Suit #1: Divorce hearing in IN where husband claimed that certain property belonged to the couple's children. Husband won, then brought Suit #2 in IL to declare that the property he had claimed belonged to his children actually belonged to him. The IL court recognized that the IN court would NOT grant preclusive effect to its own decision, but decided nonetheless to do so. The IL court justified the preclusion by saying that it was merely expanding the effect of the IN judgment.
 1. Used alternate ground that party cannot contradict previous sworn testimony.
 2. Okay to make MORE preclusive and go beyond, although not usually what happens.
 - d. **28 U.S.C. §1738** (the Full Faith and Credit Statute) requires states to provide the same preclusive effect to judgments of other states as those judgments would receive in the rendering states, i.e., the recognizing court must look to how the rendering state would apply (e.g., if mutuality required in rendering state, need to use for preclusion in recognizing state).
 - i. Cases such as Finley are the exception and not the rule.
 - ii. Although **28 U.S.C. §1738** proscribes the functioning of the FFCC, it **does NOT provide private parties to seek a remedy directly in federal court**. A party cannot sue in federal court claiming that one state was not honoring the judgment of another; the party must follow the litigation through the appeals process and if the error is not corrected in state court, the SC might then entertain an appeal.
 1. **Thompson v. Thompson** (US 1988): To remedy situation where no state would give preclusive effect to its own or other courts' custody decisions (could always be reopened to determine a child's best interests), the Parental Kidnapping Prevention Act was passed to prohibit parents from litigating custody in many states until finally winning: The first state to hear a custody suit would retain permanent and exclusive jx over the case and other states were barred from deciding the custody issue. Mother awarded joint custody in CA, then moved to LA and rec'd another judgment that held sole custody. Father challenged custody ruling in CA and won sole custody. Instead of going to LA to enforce the judgment, he went to CA federal court under §1738. Held: §1738 did NOT provide a private COA and father would have to seek custody in LA.

2. **Parker v. Hoefler** (NY 1957): Alienation of affection action in VT (“you stole my wife”). NY court will respect even though no law in NY.
 - a. This is why there is such hoopla over gay marriage in Hawaii (b/c other courts must give FFC to marriages).
2. **State-to-Federal Preclusion:** What happens when a federal court is trying to determine an issue of preclusion based on a prior state decision? Thanks to §1738 (recall Erie: statute on point), the rule is the same for federal courts determining preclusion. Thus, a federal court will give preclusive effect to the judgment of a state court if the courts in that state would do the same.
 - a. **Congressional exceptions to §1738:** The catch is that b/c §1738 is statutory and not in the Constitution, Congress may legislate around it to allow federal courts in certain circumstances to hear claims that otherwise might have been precluded in state court. The congressional grant to circumvent §1738 does not necessarily have to be an express one. Rather the court must try to determine the congressional intent of the particular statute and whether Congress meant for state actions to have binding effect. Claims brought under certain statutes may NOT, t/f, be subject to the preclusive effects of state judgments.
 - i. **Allen v. McCurry** (US 1980): Man was convicted of heroin possession in a state criminal court, which decided that the search and seizure of the drugs by the police office *was* constitutional. After his conviction, the man brought a claim under 42 U.S.C. §1983 (providing federal forum for civil rights cases) seeking damages for an illegal search of his home by the police. The police moved to preclude the issue of the constitutionality of the search as already litigated and decided by the state court. The convict responded that Congress did not intend §1983 claims to be bound by state decisions. SC held that there was NO evidence that §1983 claims were meant to be exceptions to §1738 and t/f the state decision WOULD have preclusive effect.
 1. §1983 is NOT an exception to §1738.
 2. Dissent: Should be an exception b/c the point is to give a federal forum to state cases b/c don’t trust states to get it right. Unfair to make criminal D chose btw forgoing either a potential defense or a federal forum to have his constitutional claim heard.
 - b. **Claim Preclusion:** A second potential problem with state-federal preclusion is what should be done **when P has two claims, one a state-law claim and the other a federal-law claim.**
 - i. If there is **EXCLUSIVE federal jx** over the second claim, would the P be precluded from bringing the federal claim in federal court after litigating the state claim in state court? The analysis has two parts per MARRESE (US 1985; arose under Sherman Antitrust Act). To determine the **preclusive effect of a state court judgment in a subsequent suit where federal court has exclusive jx:**
 1. Applying §1738 (FFC statute), federal court must determine whether the STATE claim-preclusion law would preclude the federal suit. If not, no preclusion.
 - a. Look at state law to determine how the state court would handle preclusion where the two claims could not be brought together because one was under exclusive jx of another court (e.g., family court w/ only family jx and a second tort claim).
 - b. Most states have what is called a **“prior jurisdictional competency” rule**, which prohibits the preclusion of a claim beyond the rendering court’s jx (i.e., state itself would not preclude when exclusive jx).
 2. **If the state does not have a PJCR and would preclude the claim**, determine whether the relevant federal law (that created the exclusive jx) contains an explicit or implied exception to §1738 (would probably generally be the case if Congress is vesting exclusive jx).
 - a. Marrese remanded to determine how IL would have treated the suit #2, thereby avoiding issue of whether the Sherman Act creates an exception to §1738.
 3. Outcome: Usually prevents preclusion (unless had jx in court #1 for the claim #2; then precluded: see “concurrent jx” §). The best bet is to bring all the claims together in federal court.

- ii. **Should bring claims together where there is CONCURRENT jx.**
 - 1. **Migra v. Warren City School District** (US 1984): If could have added federal claim in state-court suit, should have done so. Lost right to bring suit #2 in federal court for same T&O (can't split COA). It is "more important [per §1738] to give FFC to state-court judgments than to ensure separate forums for federal and state claims." Reflects concerns including comity, need to prevent vexatious litigation, and desire to conserve judicial resources." Same preclusive effect to §1983 claim as OH court would give.
- 3. **Federal-to-state preclusion** is implicated when a state court is forced to decided preclusive effect of a federal court decision on a case now before a state court.
 - a. **Federal Question Jx:** Where a party is seeking CP or IP based on a prior judgment of a federal court sitting in federal-question jx, the state court will normally apply the FEDERAL preclusion laws (T&O, etc) as set out in Blonder-Tongue or Parklane. This is federal common law (supported by Semtek dicta), but no federal rule on point to say so.
 - b. **Diversity Jx:** Preclusion based on diversity jx in first federal suit can be more troublesome.
 - i. **Before Semtek, people were unsure** whether (in a diversity suit) to (1) follow federal rules b/c the court was federal, (2) follow receiving state's rules (recall Hart), or (3) follow rendering state's rules (b/c fed ct w/ Erie would've used state law, t/f really like state's decision).
 - ii. **SEMTEK Int'l Inc. v. Lockheed Martin** (US 2001): P sued D in CA state court for breach of K; removed to CA federal court on diversity and was dismissed b/c barred by CA SOL. P then sued D in MD state court (within MD SOL); D asked CA federal court to enjoin the action and then removed to MD federal court on federal Q grounds. CA federal court said "no" and MD remanded to state court b/c federal Q was only a defense. MD state court dismissed as res judicata and MD state appeals court affirmed. STATE court was forced to decide preclusive effect of a judgment of a FEDERAL DIVERSITY court on a case now before it. Whose preclusion rules should have been followed?
 - 1. **If Suit #1 is a federal diversity suit, Suit #2 in state court must look to the rendering state's preclusion rules** (i.e., the preclusion rules of the state where the federal court in Suit #1 sits). Reversed (should've looked to CA [rendering state] law).
 - a. Scalia **creates federal common law** (mirroring §1738 with a twist) to say "look at state law" (b/c §1738 **[rule that says to look to rendering court] doesn't apply**). Under federal common law, federal diversity judgment is to be accorded same preclusive effect that would be applied by state courts in the state in which federal diversity court sits.
 - b. Under CA law, judgment should NOT have been on the merits. CA dismissal barred refiling in CA federal court but is NOT enough for claim preclusion in other courts (doesn't bar MD suit). *Should SC have just said that was NOT decided on the merits? Should P have just appealed "on the merits" in CA?*
 - 2. Scalia ran through Erie analysis:
 - a. Federal rule on point? Arguably procedural? **NO.**
 - (i) Scalia said **FRCP 41(b) NOT on point**. 41(b)'s "on the merits" does not necessarily equate with preclusion's "on the merits." Not all 41(b) "on the merits" claims are precluded b/c here not passed on substantive merit of the claim. 41(b) is just a default rule. To say that a SOL dismissal is "on the merits" runs counter to Hanna and Erie.
 - a. Modified outcome determinative? **YES**
 - (i) Scalia says **would lead to forum shopping**, so follow state law.
 - 3. **Dicta:** Still **follow federal law** if comes from a **federal-Q case**. States cannot give federal court judgments in federal-Q cases merely whatever preclusive effect they would give their own judgments, but must accord them effect prescribed by SC (i.e., do NOT apply Semtek analysis if claim #2 not diversity, e.g., in RICO case where SOL period will not vary in districts located in different states).
 - 4. **NOTE:** Rendering state law determines the preclusive effect of the substantive issues addressed in the second state court's judgment (per Semtek and Gasperini) BUT

Semtek did **not** address the role of rendering state's law in determining the preclusive effect of **jurisdictional findings** made by a federal diversity court preceding it.

4. **Federal-diversity-to-Federal-diversity Preclusion:**

- a. If Suit #1 is in a MD federal court sitting in diversity, and Suit #2 is in a CA federal court sitting in diversity, then follow MD state laws of preclusion b/c CA state court will follow Semtek (§1738 doesn't apply) and look to MD federal court, which looks in turn to MD state court.
 - i. State court #2 will look to federal diversity court #1, which looks to state court #1.
 - ii. If per Erie, federal diversity court #2 looks to state court #2, then traces all the way back.

5. **Intersystem Administrative Preclusion:**

a. **Administrative agency must have been acting in a judicial capacity**

- i. **US v. UTAH Construction & Mining** (US 1966): §1738 is limited in scope to judgments of courts and does NOT generally apply to administrative decisions however if the administrative agency was "acting in a judicial capacity and resolved disputed issues of fact properly and the parties had an adequate opportunity to litigate" then use common-law rule that looks just like §1738. An administrative (judicial-capacity) decision will exist, according to the Restatement of Judgments, where:
 1. The parties bound by the judgment had notice
 2. There was a fair opportunity to rebut evidence
 3. The judgment was made according to the specific facts before the agency
 4. There was a structured timeline for the proceeding, specifying when the decision would be rendered
 5. Parties were afforded a full and fair opportunity to litigate the issues.

- b. **Statutory exception:** An exception to this rule may be found where Congress has passed a statute with the intent that the federal courts are NOT to be bound by an administrative decision. Then there is NO preclusion (e.g., with §1983).

- i. **Univ. Tennessee v. Elliott** (US 1986): UT emp'ee who was discharged from his position sued in federal court under §1983 but, while suit was pending, an administrative law judge found that the discharge was not racially motivated. In response to the UT's motion to preclude the issue of racial discrimination, SC held that the congressional intent behind §1983 was NOT to bind courts by administrative decisions (in contrast to Allen, where the SC held that §1983 was not an exception to §1738 re: state-court decisions).

ISSUE #6: APPEAL

- A. **GROUND FOR SEEKING RELIEF FROM DISTRICT COURTS:** Power To Set Aside a Judgment on Grounds Discovered After It Was Rendered (Post-Judgment Relief). **Have 30 days to file appeal.**
1. **NEW TRIALS:** Per **FRCP 59** a court may grant a **MNT** if the jury's verdict was against the clear weight of the evidence. Judges ALSO have the power to grant new trials for any of the reasons that new trials were granted at common law (e.g., bad jury instructions and those under **FRCP 60(b)** if found within 10 days).
- a. **Exceptions to the 10-day limit on MNT** per **FRCP 60(b)**: Situations where a party will be allowed to move for a new trial *after* the 10-day limit, but untimely MNT only allowed where:
- i. **Mistake, inadvertence, surprise, or excusable neglect:** The party will have up to 1 year after the entry of the judgment to move for a new trial under one of these theories.
1. However, not just any mistake will satisfy the court that a new trial should be held. Courts have generally held that a mistake of law will not be a valid excuse and will not be excusable neglect.
- a. BUT see **Briones v. Riviera Hotel and Casino** (9th Cir 1997): P sued emp' er (*pro se*) for unlawful discharge but didn't respond to motion to dismiss. Remanded to determine whether excusable neglect; four factors to consider:
- i Danger of prejudice to the opposing party.
- ii Length of the delay and its potential impact on the judicial proceedings.
- iii Reason for the delay.
- iv Whether the moving party acted in good faith.
2. Usually used after default judgment (e.g., if D had been in a coma when default judgment was entered).
- ii. **Newly discovered evidence** which by due diligence could not have been discovered in time to make a timely new trial motion again allows party up to 1 year to file the motion.
1. For a new trial to be ordered b/c of newly discovered evidence, five elements must be met; the evidence **MUST**:
- a. Be such as would probably change the result on a new trial;
- b. Have been discovered since the trial;
- c. Be of such a nature that it could not have been discovered before trial by due diligence;
- d. Be material; and
- e. Not be merely cumulative or impeaching.
2. It has also been held that the evidence must have been in existence at the time of the trial (otherwise Ps could always challenge judgments based on changes in circumstances), i.e., evidence must "relate to facts which were in existence at the time of the trial."
- a. **PATRICK v. Sedwick** (AK 1966): P injured as a result of a doctor's negligence. After a judgment had been entered in favor of the P, the D moved for a new trial on the grounds that a new treatment for the P's injury had been created that would substantially reduce the amount of damages.
- i New trial could NOT be ordered b/c the new evidence was **not** in existence at the time of trial.
- b. **SWIFT Agricultural Corp v. Usamex Fertilizer** (EDLA 1979): Patent-infringement case where key element of the defense was the amount of time that a reaction took to take place. If the reaction was as quick as the patented process, then D would be guilty of infringement. This is how the court found, but after a judgment was entered, the D moved for a new trial because a new method of measurement showed that the reaction was slow.
- i New trial could be ordered b/c evidence itself (reaction time) **was** in existence at the time of the trial (only measuring method was new).

- c. **HYPO:** If P brings damages based on testimony that her injuries will prevent her from bearing children but later she becomes pregnant and delivers a healthy child, should the trial court grant a motion to reopen the case? Depends on whether the FACT is that P **was** infertile but now is fertile (i.e., fact NOT in existence at time of trial so no good) OR **was mistaken** about the infertility (i.e., has been fertile all along t/f newly discovered and okay).
- iii. **Fraud, misrepresentation, or other misconduct of an adverse party:** Either intrinsic or extrinsic fraud would be sufficient to order a new trial (although before 60(b)(3), courts would only order new trials based on intrinsic fraud, i.e., fraud that was part of the case and should've been revealed at trial [on cross-examination]). Allows a party up to 1 year to file for new trial.
- iv. **The judgment was void:** The original court lacked jx (no time limit to make the motion, but must be rsbl).
- v. **A prior judgment upon which the judgment was based was reversed** or otherwise vacated (as w/ issue preclusion or claim preclusion). Acts to undue the finality of a prior judgment (no time limit to make the motion, but must be rsbl).
 - 1. Change in judicial view of an applicable law after a final judgment will NOT be sufficient basis for vacating such judgment.
- vi. **Any other reason** justifying relief from the operation of the judgment. This exception will only work when there are *extraordinary* circumstances.
 - 1. Some say applies to that within 1 year but can bring later; others say no (that there is no time limit to make the motion, but must be rsbl).
 - a. There is no SC guidance on this.
 - 2. *Independent action? Reserved by 60(b) but don't count on it.*

B. APPELLATE REVIEW AND FINAL JUDGMENT RULE: Timing of Appeals

1. **The Final Judgment Rule:** Under 28 U.S.C. §1291, appellate courts are allowed the power to review *only final decisions*. A decision is NOT final where assessment of damages or awarding of relief remains to be resolved.
 - a. Even if neither party raises the issue of whether an appeal follows a final judgment (i.e., neither party objects), the courts on their own initiative will dismiss such appeals (*sua sponte*).
 - i. **LIBERTY MUTUAL v. Wetzel** (US 1976): A district court awarded Ps partial summary judgment, but did not resolve their request for relief (declaratory judgment that liable but no damage determination). D then appealed and neither party made an issue of whether the appeal was proper. SC nonetheless found that the appeal was not proper b/c the district courts decision did not determine the question of relief.
 - ii. **Jetco Electronic Industries v. Gardiner** (5th Cir. 1973): Common-sense approach to finality (substance over form). Trial court granted 12(b)(2) and 12(b)(6) motions against 1 of 3 Ds and later dismissed claims against other 2 Ds. Neither was final judgment by itself, but the “two orders, considered together, terminated this litigation just as effectively as would have been the case had the district judge done through the motions of entering a single order formally reciting the substance of the two earlier orders...[b/c the SC has held that] practical, not technical, considerations are to govern the application of principles of finality [Appeals Ct has jx here].”
2. **Exceptions to The Final Judgment Rule:** Although federal appellate courts may generally only hear appeals from final judgments, there are *limited* occasions where the appellate court will have the power to hear interlocutory appeals.
 - a. **Injunctions:** Per §1292(a)(1), appellate courts can review interlocutory orders from district courts granting, continuing, modifying, refusing or dissolving injunctions.
 - b. **Important to have appeal per FRCP §1292(b):** If, in the discretion of the court, an order that is otherwise non-appealable meets 3 criteria, then it may be appealed (must be applied for in district court within 10 days) when the district court judge thinks this and has put it in writing within 10 days:
 - i. The challenged order involves a controlling question of law.
 - ii. There is substantial ground for difference of opinion over the order; and
 - iii. Immediate appeal would materially advance the ultimate termination of the litigation.
 - c. **Separate Claims:** Per FRCP 54(b), where one case involves multiple claims, either by the same party or in the form of cross-claims or counter-claims, a party may take an appeal upon an order that

constitutes a final judgment on one or more of those claims, even if all the claims have not been resolved BUT it must be clear that the claims and decisions are separate such that can be concluded independently (need express finding that final judgment).

- i. Can't appeal partial summary judgment if claims are not severable, but okay if can split.
 1. **Sears Roebuck v. Mackey** (US 1956): P brought three different claims against the D: (1) anti-trust; (2) breach of K; and (3) patent infringement. District Court dismissed the anti-trust claim; Ps could bring an appeal on that dismissal even before final judgment entered on the other claims b/c the anti-trust claims are expressly independent from the others and were completely resolved as a result of the dismissal. These claims *can* be decided separately, so the district court has *discretion* to decide.
 2. Dissent from **Cold Metal** (US 1956) thinks that discretion has gone too far here.
- ii. **Counterclaims** can be split up by the judge (such that they are severable and decidable):
 1. **Curtiss-Wright v. GE** (US 1980): Just b/c there is a counterclaim doesn't mean that SJ not final. Here, winner of SJ wanted certification of finality (odd b/c usually want to be final so can appeal but not really here b/c P just wanted \$ sooner).
- d. **Collateral-Order Doctrine**: This is a court-created rule.
 - i. Appeals are sometimes allowed to be brought immediately if:
 1. The challenged order was a conclusive resolution of an issue;
 2. The challenged issue is independent from the merits; and
 3. The order would be incapable of review after a final judgment.
 - ii. *The Judicial Improvements Act of 1990 added subdivision (c) to §2072, which allows the SC to define, by rule, "when ruling of a district court is final for purposes of appeal under §1291"?*
 - iii. **COHEN v. Beneficial Industrial Loan Corp.** (US 1949): P brought shareholders derivative suit; NJ state courts required shareholder Ps to put up a security deposit to cover D's costs pursuant to the suit BUT this suit was brought in federal court, which decided not to force the security deposit. D wanted to appeal that ruling; court decided that he DID have a claim b/c (1) the ruling was conclusive, (2) the order was independent from the merits, and (3) the order could not be reviewed after the end of the suit (b/c by that time it would be too late to make the P place a security deposit).
 - iv. **Application of COD**: Has been held to apply differently depending on what type of order is trying to be reviewed. It is TOUGH to get discovery orders reviewed on appeal before final judgment entered.
 1. **Forum Selection (venue transfer, personal jx, forum non conveniens)**:
 - a. **Lauro Lines v. Chasser** (US 1989): Italian Airline did not want to be sued in the US so tried to have suit moved to Italy. District Court denied the **venue** change and refused to allow the issue to be heard on appeal. SC held that the order was NOT immediately appealable b/c it was capable of review after a final judgment (although was separate from the merits). SC likened the refusal of venue transfer to the finding of **personal jx**; in both cases the order may be remedied after a trial, although the party will face some inconvenience in defending the suit. Because can get relief at the end, can't appeal before final judgment.
 - b. **Van Cauwenberghe v. Biard** (US 1988): Denial of a motion to dismiss based on **forum non conveniens** is NOT immediately reviewable (D must wait until the final judgment).
 2. **Civil contempt for non-parties**: A non-party witness who has been held in civil contempt may challenge the court's SMJ directly (take immediate appeal on the issue).
 - a. **U.S. Catholic Conference v. Abortion Rights Mobilization** (US 1988): USCC (who had at this point been dismissed from the suit) was held in civil contempt for refusal to comply with subpoena (said no SMJ) and charged \$50K/day for noncompliance. Held: "A nonparty witness can challenge the court's lack of SMJ in defense of civil contempt citation, notwithstanding the absence of a final judgment in the underlying action" b/c nonparties cannot appeal adjudications of contempt.

- b. Cannot get if you are a party held in civil contempt (e.g., for violating a discovery order).
- 3. **Criminal contempt**: The ONLY way to get definite immediate appeal (as a collateral proceeding) from discovery is if held in criminal contempt.
- 4. **Class Certification**: SC has found that orders dealing with class certification (FRCP 23(e)) are NOT immediately appealable.
 - a. **Coopers & Lybrand v. Livesay** (US 1978): Class certifications are (1) decisions tied up with the merits of a case; and (2) the orders are not conclusive b/c the judge can change his mind; and (3) the certification decision can be reviewed after the final judgment.
 - (A) Attempt by lower courts to create a “death knell doctrine” failed.
 - (B) Could’ve certified under §1292(b) with question re: whether FRCP 23 applicable; SC won’t bypass §1292(b) procedure. Recent change in law was an amendment (FRCP 23(f)), which accomplished what wanted in Coopers BUT different from §1292(b) b/c decision not made by the district court and can go right to appellate court.
- 5. **Immunity from suit** (e.g., qualified immunity) makes a decision “final” enough for purposes of collateral order.

C. STANDARDS OF APPELLATE REVIEW

- 1. **Review of Findings of Fact**: FRCP 52(a) states that findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.
 - a. **Can appeals court review facts?**
 - i. **Corcoran v. City of Chicago** (IL SC 1940): Yes (legit). At CL, courts exercising appellate jx were authorized to set aside jury verdicts on ground that fact finding was not supported by evidence, and such practice is authorized in IL by statute. Reviewing fact is not unconstitutional for depriving successful party of right to jury trial. The power of court of review to set aside jury verdicts as “against the weight of evidence” must be exercised judiciously, and only under circumstances where interests of justice demand it. The statute does not vest such court with power to reverse for error of fact, where evidence was conflicting, without remanding cause for another trial.
 - 1. **If in state court**: Look to see if there is a statute that sets forth the “clearly erroneous” std of appellate review.
 - iii. **Galloway**: Does DV violate 7th A (by judges invading jury sphere)? MNT and JML/RJML do deprive a litigant of a jury trial BUT they do NOT deprive a litigant of a jury trial as guaranteed by the 7th A (b/c this only guarantees jury trials where guaranteed at common law). Several devices existed for taking a case from a jury in 18th century, including JML and NT (though not RJML); t/f, by the very terms of the 7th A, JML and MNT are constitutional. Held (in Galloway): The 7th A does NOT apply to determination of whether to apply the “scintilla of” or “substantial” evidence tests (dissent disagrees). Old rule that a case must go to the jury if there is a “scintilla of evidence” in the non-moving party’s favor gone. New rule: Only must go to the jury if there is “substantial evidence” in the non-moving party’s favor.
 - ii. **Gasperini**: AppCt-TrialCt (w/jury) relationship. App Ct cannot look at facts as determined by jury (should never review jury fact-finding per Scalia). Stevens said opposite. Ginsburg in the middle: said can review but ONLY for abuse of discretion.
 - 1. **Appellate review for “abuse of discretion” is reconcilable with 7th A as a control necessary and proper to the fair administration of justice.** Nothing in the 7th A precludes appellate review of trial judge’s denial of motion to set aside jury verdict as excessive. Proper role of trial and appellate courts in the federal system in reviewing the size of jury verdicts is a matter of federal law; role of district court is to determine whether jury’s verdict is within the confines set by state law, and court of appeals should then review district court’s determination under an abuse-of-discretion std. Within the federal system, practical reasons combine with 7th A constraints to lodge in

the district court, not the court of appeals, primary responsibility for application of NY's "deviates materially" check on the size of damage awards based on NY law.

- b. **Orvis v. Higgins** (2nd Cir 1950; old approach): If trusts set up solely to avoid estate taxes, don't get tax break (Q was intent; if set up independently, okay). Bench trial (judge as fact-finder) holding: set up independently so get tax break. Orvis said that written-record-based judge decision gets less deference (almost like de novo b/c appellate court looking at same documents). Later held to be incorrect. DO get deference for written SAME as oral (see Anderson).
- c. **New approach is the "clearly erroneous" std** (regardless of whether oral or written) of **FRCP 52(a)**.
 - i. **Pullman-Standard v. Swint** (US 1982): If *de novo* on law, remand to redo facts.
 - ii. **Anderson v. City of Bessemer City** (US 1985): Get same deference for written as oral materials reviewed (must be "clearly erroneous") but even GREATER deference when trial court's findings rest on credibility of witnesses.
 1. **Deference/respect scale:**
 - a. **Jury Findings:** Given MOST deference b/c of their special position that was outlined in the 7th A. Must be "clearly erroneous" to reverse a jury decision on matters of fact.
 - b. **Administrative Agency Findings:** Given deference b/c of the particular expertise of the rendering agency.
 - c. **Judge:** Given deference.
 - iii. **When a finding is Clearly Erroneous:** When, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. Where two permissible views of the evidence, fact-finder's choice cannot be CE.
 - d. **First Amendment Exception to the "Clearly Erroneous" Rule:** Where review involves a question of a party's first amendment rights, the appellate court does NOT have to adhere to the FRCP 52(a) "clearly erroneous" rule (b/c judges must preserve the precious liberties established and ordained by the Constitution, which are not merely questions of fact, findings of fact may be reversed at a lower std). Less deference given in First Amendment cases.
 - i. **Bose Corp. v. Consumers Union** (US 1984): Stereo-speaker mfr P sued D over an article that disparaged the quality of the speakers. District Court found that there had been actual malice as required in defamation cases under the NY Times std. SC upheld the Appellate Court's review of the finding and reversal without evidence of a "clearly erroneous" finding, holding that the clearly erroneous std of FRCP 52(a) does NOT prescribe the std of review to be applied in reviewing a determination of actual malice.
2. **Review of Findings of Law:** Appellate courts can review findings of law *de novo*.
 - a. "Should this have been strict liability or negligence?" is a Q of law and could go either way. Appellate court reviews anew (without any deference to the lower court's finding). Need to create precedent for uniformity.
 - b. JML is a Q of law BUT in reviewing MNT, **abuse of discretion** std is applied (b/c involves factual component).
3. **"Abuse of discretion" standard.**
 - a. MNT, discovery, etc.
 - b. Example: Under FRCP 26, a judge can say discovery is excessive and stop it. The Appellate Court will review for abuse of discretion.
 - i. BUT if a judge allows NO discovery, court COULD say that judge misread a federal rule, which is a matter of LAW and would be reviewed *de novo*.

