LaMar Jost
Tape Outline

§1: CLUSTERS OF PROCEDURE

I. Ten Clusters of Civil Procedure

A. Overview:

1. Jurisdiction and related matters: deals with constitution, federalism, and is fertile ground for law school examinations.
2. What is the law that is applied in a federal court civil action? Deals a lot with federalism.
3. Pleading: a pleading is one of the most central aspects of civil procedure. Pleadings have been de-emphasized because of the FRCP, which dictates how the pleadings are written.
4. All forms of joinder: (sometimes called the dimension of a civil action).
5. Discovery: is the backbone of litigation and is an intensely practical matter.
6. Pre-trial adjudication: Summary judgment and how to get rid of cases that are not worthy of trial.
7. Trial: Jury trial and the availability and basic elements/role of the jury and jury control mechanisms instituted by the justice system.
8. Trilogy of Post-trial motions: motions to test the validity of the trial:
    a. New Trial motion;
    b. Directed verdict motion: the motion for judgment as a matter of law;
    c. Motion for judgment notwithstanding the verdict: renewed motion for judgment as a matter of law.
9. Appeal: final judgment rule.
10. Former Adjudication: who is bound in a civil action, what suits can and cannot be re-tried after final judgment; res judicata, or collateral estoppel; claim preclusion and issue preclusion.

CLUSTER 1: JURISDICTION AND RELATED MATTERS

§2: JURISDICTION

§2.1: Outline of Jurisdiction

I. Checklist of Jurisdiction.

A. Seven questions to ask yourself on the Final Exam.
1. Does the court have subject-matter jurisdiction? *Always* the first question to be asked because it goes to the very heart of the subject: does the court have the power to hear the case?
    a. Goes to constitutional power of the court and issues of federalism.

2. Does the court have personal jurisdiction? Discusses power of the court over the defendant?
    a. Goes to questions of Due Process, is there due process power over the defendant.
3. Has the defendant been given notice and an opportunity to be heard?
    a. Goes to due process also, because it would be a basic violation of due process if didn't give the defendant the opportunity to defend or notice.

**These first three questions are the super-questions or the "big three" because (a) they are all of constitutional dimension.

4. Has the defendant been served with process properly?
    a. A question of whether the service of process rule has been complied with properly. Not a constitutional question.
5. Does the court have venue?
    a. Venue: a system of court rules by which a court system allocates its business within the units of the system.
6. Removal? If the action has been commenced in a state court can it be removed to a federal court? [Cannot have the question unless the case began in a state court; so if the case began in federal court then removal is not a question].
7. Have any of the preceding six issues/questions been waived? Questions of waiver HAVE TO BE LOOKED FOR, ALWAYS ASK YOURSELF IF ANY OF THE JURISDICTIONAL ISSUES HAVE BEEN WAIVED!

§2.2: Federal Question Jurisdiction

I. Subject-Matter Jurisdiction: Federal Courts

A. **US Constitution: Article III:** All subject matter jurisdiction of the federal courts is laid out in Article III of the Constitution. Article III provides several different types of subject matter jurisdiction:

1. Federal Question Jurisdiction;
2. Diversity Jurisdiction;
3. Alienage Jurisdiction;
4. Admiralty Jurisdiction;
5. Jurisdiction for disputes between states, counsels, and ambassadors.

B. **Federal Question Jurisdiction:** For federal question jurisdiction, the plaintiff's cause of action *arises under* the constitution, treaties, or laws of the United States (if you ever have a federal question jurisdiction question on the exam; ALAWYS start with this premise).

1. ARISING UNDER are the main words; they mean that the federal courts are courts of *limited jurisdiction.* As limited jurisdiction courts, the plaintiff's cause of action must arise under the constitution, treaties, or laws of the US.
    a. Ex: P goes to federal court alleging he is copyright owner under title 17 of the US Code on a movie. P owns copyright on Mission Impossible and has agreed with Widget theaters that they can show the movie if they pay P 20% of profit for showing the movie. The theater then subsequently did

not pay P his profits and he is suing for damages. Is this a federal question? All this is complaint is really alleging is a common law contract case, breach of contract. THE CAUSE OF ACTION MUST ARISE UNDER THE FEDERAL STATUTE.
b. Variation: same facts with P, however, the defendant's claim that they are not paying P because his copyright is invalid. Is this a federal Question case? No, because it is still a breach of contract case and that is P's cause of action, all that P has stated has stated is there may be a federal defense—invalidity of the copyright. However, it is the P cause of action that must arise under the constitution, treaties, and laws of the US. In this variation, all the P has done is assert a possible defense and is NOT the cause of action. Therefore, this variation is not a federal question.

2. Federal Courts are courts of limited jurisdiction. Courts have interpreted their own subject matter very restrictively because (a) the constitution is a balance of power between the federal government and the states. The federal government will only exercise those powers expressly granted to it, and under 10th Amendment all the powers not expressly delegated to the federal government are reserved to the states. Any time a federal court exceeds the boundaries of Article III the federal courts are exercising unconstitutional power and that is why federal courts have interpreted their power to hear cases restrictively.

3. Well Pleaded Complaint Rule: means that you determine whether the action arises under solely on the basis of what would be in a well pleaded complaint. Since a well-pleaded complaint does not involve defenses, example (b) above is not a federal question. A US district court has no jurisdiction over a case in which the P is simply anticipating a defense.

4. Since the 1980s there is NO jurisdictional amount for a federal question case.

5. There are two forms of federal question jurisdiction:
a. Exclusive Federal Question Jurisdiction: Certain federal claims (such as copyright or patent claims) MUST be brought in federal court because Congress has decided that they want national uniformity through the federal courts.
b. Concurrent Federal Question Jurisdiction: Some federal question cases (such as Federal Employers Liability Act [FELA] claims or civil rights cases) can be brought either in state court or federal court. Congress has given P the right to choose whether to bring the case in federal or state court, subject to the right of removal.

§2.3: Diversity Jurisdiction

I. Diversity [subject-matter] Jurisdiction

A. **Diversity of Citizenship Jurisdiction:** is provided for in the US Constitution Article III and in §1332 of the Judicial Code as a way of providing a neutral federal forum in which citizens of different states could litigate an issue without fear of local biases and prejudices. Diversity jurisdiction is reinforced by federal judges who have lifetime tenures.

B. **Rules of Diversity Jurisdiction.**

1. Complete Diversity: There must be complete diversity of citizenship [Strawbridge v. Curtis] jurisdiction. The Supreme Court held in *Strawbridge* that to have diversity of citizenship jurisdiction you must have complete diversity, which means that everybody from the left of the "v." in action must come from a different state from the person on the right of the "v." in an action. This means one person or group of persons from one state can *only* sue under diversity of citizenship in federal court if they are suing one person or group of persons from another state.

a. Don't be tricked if professor gives you a lot of parties (say P's are from Wyoming, Montana, Utah, and Hawaii, and D's are from South Dakota, Vermont, Tennessee, Kentucky, and Utah). Because a P and D are both from Utah that destroys the diversity of citizenship. There is no such thing as ALMOST complete diversity. You either have it or not.

b. Rule: if there is a lot parties on the exam question, then list all the P's on the left of the "v." and all the D's on the right of the "v." and if there are two parties from the same state on the right and left of the "v." THERE IS NOT DIVERSITY OF CITIZENSHIP. It is not complete diversity.

2. Determining Diversity: You determine diversity of citizenship (not residence) for each party on the day that *action was instituted* (Not on the day the action accrued, not on the day you went to trial, not on the day final judgment was handed down. Even if one has residences in different states, for the purposes of diversity, each person can only be a citizen of one state.

3. Determining Citizenship of particular Parties: Each party can only have one citizenship. There are four main types of parties:

a. Nature People (human beings): nature people have domicile. Domicile is equivalent of citizenship, each person is born with domicile, which typically the domicile of our parents. That domicile can stay with us for life or we change it. The *critical point* is: an individual's citizenship or domicile is the domicile of birth continued through life, which is presumed to continue through life unless two things occur:

i. The individual physically changes his or her state; and

ii. The individual does that with the intention of remaining in the new state for the indefinite future.

**On exam, if prof gives you a migratory party, for example someone who has a residence in New York, a summer home in Martha's Vineyard, spends a winter a Florida or someone who lives in one state and works in another state: the issue then is where is that person's center of gravity; that is, where is that person's

citizenship as determined by the center of gravity of that life. Inquire into facts such as, (a) where does person live, (b) where is the family, (c) where does that person pay taxes, (d) where does that person work, (e) where are the cars licensed, (f) where does the person vote. Then you have to make a factual determination of where that person's citizenship is, and that is his domicile.

b. Corporations: Corporations are schizoid and have two states of citizenship. (a) Corporations are treated as citizens of the state of its birth, just like humans. A corporation is born in the state in which it is incorporated (very often New Jersey and Delaware). That determines one state of citizenship. (b) The second state of citizenship is the state in which the corporation has its *principle* place of business (not the state in which does business). The principle place of business is a unitary concept (usually where the corporate head quarters are located. (c) For diversity purposes, a corporation is a citizen of two states (unless the principle place of business and the place where the corporation was born is the same state).

i. As result, if the other party to the litigation is from any other state than the corporation's principle place of business or the place where it was incorporated, then there is diversity.

b(1). Determining a corporation's principle place of business: Two Federal Court Rules (there is a split of authority, two different rules):

i. Nerve Center Test: a corporation's principle place of business is where it makes its executive decisions. Where are its brains (nerve center) and decisions made.

ii. Plurality (Muscle) Test: a corporation's principle place of business is where that corporation does a plurality of its thing, where it does a plurality of its manufacturing or service providing.

iii. Ex: (for exam) The Dingbat Corp. is incorporated in Delaware, has its headquarters in New York, and has its manufacturing plant if New Jersey. If you use a Nerve Center Test, Dingbat is a Delaware/New York Corp. If you use the Muscle Test, Dingbat is a Delaware/New Jersey Corp. On the exam other party will likely be from New York or New Jersey. If the other party is from New York, say there is NO diversity if you use the Nerve Center Test, and there is complete diversity if you use the Muscle Test; and, vice versa with New Jersey.

c. Unincorporated Associations: [i.e. labor unions, partnerships]: With an unincorporated association you cumulate the states of all of the members of the unincorporated association. If a member of that association is from the state in which the other party is a member, then there is no diversity of citizenship jurisdiction.

i. For example, with a labor union you literally add up all the states of its members. That literally means if you have a national labor (like the teamsters) union in which there is a member in every state, then by definition the other party has to come from one of those states and the federal courts lack diversity jurisdiction.

ii. The Supreme Court has consistently upheld this rule [Cardona v. Arcoma].

d. Parties in Representative Actions: Actions brought by or against a representative. Representatives of a deceased estate, a child, an incompetent person, and the big two: a shareholder derivative suit and class action suit.

i. Classical Rule: The historical rule has always been when an action is brought by a representative or against a representative diversity of citizenship is based upon the citizenship of the *representative* and NOT the *represented*. This is still the rule for shareholder derivative suits and class action suits.

ii. Modern Rule: [based on Congressional legislation]: In actions involving children, incompetents, and estates, the rule now is that in actions involving those types of representatives diversity of citizenship is tested in terms of the citizenship of the *represented* (the child, the incompetent, the decedent) NOT the citizenship of the *representative.* This is not the rule for shareholder derivative suits or class action suits.

II. Diversity Jurisdiction: Amount in Controversy

A. **G/R:** Congress has always had an amount in controversy requirement for diversity jurisdiction cases to screen out smaller cases and to ensure that the federal courts did not become bogged down with several cases. The amount in controversy requirement has gone up and up over the years.

B. **Amount in Controversy Rule:** The current rule is that the matter in controversy must be *more than* $75,000 *exclusive* of (not counting) interests and costs.

1. There is no such thing as a $75,000 diversity action. It has to be *more* than $75,000; so only $75,000.01 or more can satisfy the diversity requirement [a common professor trick on the exam].

2. Ex: [another common professor trick] Plaintiff sues the defendant in federal court based on diversity for $70,000 plus $3,000 accrued interest, plus $3,000 of costs. This equals $76,000 but does not satisfy the amount in controversy requirement because it is only for $70,000 and that amount is *exclusive* of interests and costs.

3. Punitive Damages are part of the amount you can consider in computing the amount in controversy. Statutory attorney fees are probably within the amount you can compute in determining the amount in controversy.

C. **Aggregation Rules:**

1. Single Parties: If a single plaintiff sues a single defendant on multiple claims, [For example: $50K for defamation, 10K for trespassing, and 20K for battery], the plaintiff can aggregate the claims (add them up), even if the individual claims have nothing to do with each other, to satisfy the amount in controversy rule.

2. Multiple Parties: The rule is exactly reverse when trying to add up the claims of two or five plaintiffs against a single defendant or a single plaintiff's claim

against multiple defendants. In other words, in multi-party cases you cannot aggregate the amount in controversy. Unless the claims are really joint claims like undivided interest claims.

3. The Supreme Court has held, that basically the court is supposed to accept a plaintiff's allegation of jurisdictional amount, unless the court is convinced to a legal certainty that the plaintiff cannot recover the jurisdictional amount.

4. In actions for injunctions you try to quantify the value of the injunction to the plaintiff in determining the jurisdictional amount.

§2.4: Supplemental Jurisdiction

A. Pendent and Ancillary Jurisdiction: [United Mine Workers of America v. Gibbs]: *Gibbs* was a federal question case under a federal employment statute, however, in addition the plaintiff brought a tortious conduct claim under Tennessee common law. The court decided that a party could append the tort claim to the federal question claim because they all emanated from the same factual scenario, even though there would never be federal jurisdiction over the tort claim because it would be more efficient and economical to try both cases at once. The court expanded the Article III definition of a "case and controversy" as it is found in Art. III, which became known as the "pendent doctrine."

1. Ancillary claims/doctrine: allowed plaintiffs to bring a case and allowed defendants to assert jurisdictionally insufficient compulsory counter-claims, cross claims, and third-party claims because they all emanated from the same transaction and factual occurrence as the original claim and therefore it was more efficient and economical to try all the cases in a single action (in federal court).

2. However, overtime both pendant and ancillary jurisdiction began to expand and expand. So the Supreme Court in *Owen Equipment & Erection Co.* and then in a second case called *Finely v. US* started to curb ancillary and pendent jurisdiction.

3. Congressional reaction to the *Finely* was negative, and Congress legislated on pendent and ancillary jurisdiction and enacted (in 1990) §1367 of the Judicial Code and instead of using the words "pendent and ancillary" used the words Supplemental Jurisdiction.

B. §1367 of the Judicial Code:

1. Codifies the *Gibbs* case;

2. §1367(a) supplemental jurisdiction is now recognized over everything within a "case or controversy" as those words are used in Article III of the Constitution. Codifies the notion that a "case and controversy" includes everything that originates from a common nucleus of operative facts.

3. §1367(b): that provision codifies the *Kroger* decision and rejects the *Finely* decision. §1367(b) basically says that Congress loves supplement jurisdiction that it just validated in §1367(a) but it is not so crazy about it when the basis of jurisdiction is diversity.

4. §1367(b) prohibits the use of supplemental jurisdiction when the case is based solely on diversity jurisdiction and the jurisdictionally insufficient claim is one by the plaintiff under Federal Rules of Civil Procedure 14 (third party practice); 19 &

20 (permissive and compulsory joinder); and 24 (intervention). In those cases you cannot use supplemental jurisdiction in favor of the plaintiff in a diversity based action.
5. §1367(c): Supplemental Jurisdiction is completely discretionary by the federal courts. A court does not have to take supplement jurisdiction. It also lists when federal courts should decline supplemental (subject matter) jurisdiction, such as when, the action is over a novel or complex state issue, or a primarily state based claim. Or when federal claim has been settled or dismissed.

§2.4: Jurisdiction over the Person

I. Jurisdiction over the Person (Personal Jurisdiction)

A. Analytical framework: (1) Is there a traditional base of personal jurisdiction? If yes, then you aren't looking at a traditional base of personal jurisdiction. (2) If there is no traditional base, does the long-arm statute apply? (3) If there is no traditional base, but the long-arm statute applies, is the application of the long-arm statute constitutional?

B. **Traditional Bases of Personal Jurisdiction:**

1. Territoriality:

a. Pennoyer v. Neff: Ct. basically stated two propositions:
(1) A state is all-powerful within its borders. A state has complete total territorial power within its boundaries.
(2) A state is completely helpless; it's impotent outside its borders. The law of jurisdiction is about the breakdown of this proposition.

* Pennoyer: the first proposition has never changed, the state can assert territorial jurisdiction within its borders even when the defendant is simply in the state on a transitory basis. This is the first basis of personal jurisdiction.

2. Domicile: The citizen of state is a domicile of that state; thus a domicile of a state owes that state a duty of loyalty; it doesn't matter where the domicile of that state is, the state has the power of its citizens or domiciles. In effect, you can't leave home without your domicile.

3. Agency: One can assert jurisdiction based on agency, you can grab an agent, a corporate agent, a partnership agent, or individual citizen agent. Our agents, when they are acting for us, are in effect, jurisdictional carriers, if you can grab the agent that is in effect grabbing the individual.

4. Consent: You can base jurisdiction on consent, one of the most traditional basis of jurisdiction. There are three basic types of consent:

a. Express Consent: consent is often express (in contracts there are often express consent to jurisdiction clauses). Almost all modern contracts contain express jurisdictional consent clauses.
b. Implied Consent: [Hess v. Pawloski]: In 1927, when the impact of motor vehicles were being felt, states passed statutes that said if you drive

on our highways you are impliedly consenting to the appointment of the registrar of motor vehicles as your agent, and if you get into an accident any lawsuit arising out of your use of the highway enables service of process to be made by serving the registrar of motor vehicles. It is a legal fiction used to recognize the states power to use its police powers, adjudicate what happens on the highway, to make the non-resident vulnerable if they are in accident. *Hess* validated the implied consent rule for personal jurisdiction. The implied consent in *Hess* has been expanded to include aircraft, watercraft, motorbikes, stock fraud and may others. Recognized the traditional base of implied consent.

c. Consent by not asserting a jurisdiction defense [waiver producing consent]: This consent arises when the defendant fails to assert a jurisdictional defense, a waiver of jurisdiction.

5. Corporate Presence: it is sort of like territoriality applied to entities. The law treats corporations as people. When a corporation is doing business in a state, in effect, it is present in the state and if it is present in a state the state can assert jurisdiction over the corporation even though it is a foreign corporation. That is a form of territoriality.

§2.5 Long Arm Statutes

I. Constitutional Issues

A. Three Critical Cases:

1. International Shoe Corp. v. Washington: **Facts:** Plaintiff, a Missouri corporation, was shipping shoes into Washington and set up an elaborate scheme were it did not actually sell the shoes in Washington directly, but rather shipped them there through its Missouri headquarters. Defendant, State of Washington, wanted to tax the corporation. The Supreme Court said that plaintiff was shipping a lot of shoes into Washington and they did not know if it was corporate presence or doing business; but all they knew in terms of modern jurisdictional thinking was that realistically plaintiff should be vulnerable to jurisdiction in Washington.

a. *Holding:* A state can assert jurisdiction over a non-resident, if the non-resident has **minimum contacts** with the forum so that it is fair play and substantial justice to say to the non-resident you must stand and defend in this court.

b. *Key Elements:* (1) Minimum contacts: some relationship with the forum, some activity in the forum and the activity in the forum must be enough so that is fair play, it is reasonable to say stand and defend. That is Due Process. What the Supreme Court was doing in the *Shoe* case was breathing life into the Due Process clause, making it relevant to 20th century America, recognizing what it had begun to recognize in *Hess v. Pawloski*. Modern life is interstate vehicles and products are constantly in motion across state boundaries. (2) Fair Play and Substantial Justice.

c. The birth of modern long arm statutes came out the *Shoe* case. Smart legislators in 1950s realized that if you put the principle of *Hess* with the doctrine of *Shoe* that enabled states to enact long arm statutes. Enabled states to say if one commits a tort within the state boundaries—that is minimum contact with the state and fairness and justice permit the state to assert jurisdiction over the person who committed the tort even if they are from out of state.

d. ***The **critical element** in understanding all long arm statutes is that the cause of action, the minimum contact, must be related to the forum. It cannot be a situation in which the defendant is harmed in another forum.

2. Hanson v. Denkla: VERY IMPORTANT CASE (don't let fact that it is a squib in text bother you, it is too confusing and un-teachable to be principle case). **Facts:** A woman of great wealth from Pennsylvania established a trust in Delaware. She reserves a lot of power over the trust, and she maintains a relationship with the Delaware trust, then moves to Florida and dies there. The heirs fought over the estate. Some of the heirs, two sisters, wanted to "bust" the trust because they would get more money; one sister wanted to keep the trust because she would get some more money. Florida asserted jurisdiction over the estate of the deceased, and it was the state of probation (were she died) and many of the heirs were from Florida. Florida had all sorts of contacts with the deceased, the deceased heirs, with the deceased estate. The *issue* was whether this gave Florida jurisdiction over the Delaware trust. The Supreme Court (5-4) said no. The Delaware trust did not have minimum contacts with the state of Florida; it wouldn't be fair play or substantial justice to hold it to jurisdiction in Florida. How can this be? Florida maintained a relationship with the deceased, she was a Pennsylvanian became a Floridian, and they kept dealing with her and made money off her because they earned fees. But that was an *involuntary shift* the Delaware trust did not *voluntarily* do business or get involved with Florida, they simply were trying to maintain their responsibility as a trustee.

a. Holding: *Hanson* says minimum contacts must be volitional, beneficial, and cognitive and that wasn't true with regard to the Delaware trust therefore the Delaware trust is not vulnerable to Florida personal jurisdiction.

3. World-Wide Volkswagen v. Woodson: One of most important modern decisions by the Supreme Court on jurisdiction. **Facts:** The Robinson family lived in New York and went into Seaway Motors and bought an Audi (in New York). They then decided to move to Arizona, while driving through Oklahoma they get hit from behind and the gas tank explodes burning the kids and Mr. Robinson's wife. The Robinson's then decide to sue a bunch of folk: (a) Volkswagen AG (the German manufacturer of the Audi); (b) Volkswagen of North America (the importers of the Audi); (c) World-Wide Volkswagen (the distributor which only sold in New Jersey, New York, and Connecticut); and (d) Seaway Motors (the retailer). They brought suit in an Oklahoma state court, invoking the Oklahoma long arm statute because Oklahoma is the place where the tortious act occurred. Seaway Motors and World-Wide move to dismiss for lack of jurisdiction (Volkswagen AG and Volkswagen of North America did not because they were interstate and international companies which make them vulnerable to jurisdiction everywhere). The case reaches the Supreme Court after Oklahoma asserted jurisdiction.

a. Holding: The Court held there was no personal jurisdiction in Oklahoma. Why? (1) Court stated the Seaway and Word-Wide could not reasonably apprehend ever being hailed before an Oklahoma court. They were selling and distributing Audis in up-state New York and Connecticut and there was no evidence that any other Audi that ever went through their hands ended up in Oklahoma. (2) Defendant argued that an automobile is the most mobile chattel that can be sold and that it should have been foreseeable. Supreme Court said maybe it was foreseeable that the car would end up in Oklahoma, but there needs to be more. You need the defendant to *purposely avail itself of the protection of the forum.* The defendant not purposefully avail itself of the laws and protections of the forum of Oklahoma.

b. **Purposeful Availment Rule:** For personal jurisdiction to be asserted over an individual or corporation, the defendant must purposely avail itself of the protection of the forum. (i.e. the defendant must take advantage, or benefit, from the laws and protections of the state).

c. World-Wide sold the Audi to Seaway in New York, Seaway sold the Audi to the Robinson's in New York; it was the Robinson's (the consumer) who brought the car from New York to Oklahoma. Neither World-Wide nor Seaway had any control over the Robinsons and were they drove the car. A third-party moved the car from New York to Oklahoma. ***It is *always* relevant who brought the chattel/product into the forum.

B. Other Constitutional Decisions

1. Burger King Case: A couple of Michigan residents are held jurisdictionally vulnerable in Florida because they contracted with Burger King Corp. to run a franchise in Michigan. The Supreme Court held Florida can assert jurisdiction over the Michigan residents because: (1) it was a contractual arrangement; (2) the contract was for 20 years; (3) the Michiganders agreed to be bound by rules established by Burger King in Florida; (4) the contract itself had a choice of law provision which said Florida law controls. When you add those four things up it is a relatively easy case in which a Federal Court applied Florida's long arm statute.

2. Asahi Case: A Californian, Zercher, was driving his Honda motorcycle in California and the tire blows out killing him. His estate sues a lot people, but the two important ones are: (1) the tire manufacturer was a Taiwanese Company (Chen Chang); (b) the tire valve company Asahi a Japanese Company (which manufactured the valve and shipped it to Taiwan where Chen Chang incorporated the valve into the tire, which it sold to Honda who put the tire on the bike). The bike eventually made it to California. They settle with Zercher, and the lawsuit is left between Chen Chang and Asahi. There are two parts to the lawsuit: (1) the question of whether a manufacturer who puts a product into the stream of commerce is automatically jurisdictionally vulnerable wherever the product alights (the stream of commerce problem). Four justices of the Supreme Court said yes, if a company puts a product into the stream of commerce they are vulnerable wherever the product shows up, the company is jurisdictionally vulnerable. In effect, those justices where saying that the Japanese valve manufacturer and the Taiwanese tire manufacturer

had each put their product into the stream of commerce, it showed up in California, it had failed in California, so they were jurisdictionally vulnerable in California. Whether they solicited business in California or not. Four other justices, however, said they don't buy the steam of commerce argument because it makes it to scary to be an interstate or international manufacturer. They insisted that not only must manufacturer put the product into the stream of commerce, but the manufacturer must engage in specific conduct directed toward the forum (advertise, have agents and distributors in the forum, service the product there, in other words it was a *stream of commerce plus test*). In the context of the *Asahi* case that would have not been enough to hold them vulnerable to jurisdiction. The nineth justice went off on a separate tangent and that is where the law stands.

C. Illustrative Case (Possible Exam Question and Ways to Handle It)

1. Two New Yorkers are on vacation in California, the rent a car in San Francisco and drive on a highway going north to Mendisceno. As they're driving along the interstate highway they see a big sign which says "Ma and Pa Kettles Jam and Jelly Shoppe" with a big arrow. They decide to go, pull off the highway into Ma and Pa Kettles Shoppee, buy two jars of guava jell-o put it in their bag and go on with their vacation. A week or so later, they're back in New York, they're in their condo on central park west, reading the paper on a Sunday morning and eating bagels which they smear with cream cheese and guava jelly. They each take a bite out of the bagel and keel over with some sickness.

a. Can they sue Ma and Pa Kettle, the California vendor, in New York under New York long arm statute?

b. The injury producing event occurred in NY, from a long arm text perspective there is a tortious act in NY (notice by the way there is no traditional bases, the defendants are not domiciliaries of NY, not territorially in NY, and there is no consent or agent in NY).

c. **Analysis:** [how to answer the question] (1) State that there is no traditional base for jurisdiction; (2) move to the long arm statute, say there was a tortious act in NY *BUT*; (3) would it be constitutional for NY to assert jurisdiction over Ma and Pa Kettle based on the sale of guava jelly in California, transported by the plaintiffs to NY, would it be constitutional for NY to take jurisdiction?

d. Answer: No. There is no minimal contacts, no fair play or substantial justice, no voluntary affiliation, no reasonable apprehension of being hailed before the court of NY. THE QUESTIONS ARE ALL FACT DEPENDENT, TWO OR THREE LITTLE FACTS WOULD HAVE CHANGED THE QUESTION COMPLETELY.

II. <u>Personal Jurisdiction: Specific Jurisdiction v. General Jurisdiction</u>

A. <u>Specific Jurisdiction:</u> [All previous cases and constitutional principles dealt with specific jurisdiction.] Long arm jurisdiction is specific jurisdiction, that is, it is jurisdiction that arises out of a particular connection between the outside defendant and the forum—the contact, the tort, the breach of contract, the broken marriage.

B. General Jurisdiction: Jurisdiction that is based on the fact that the defendant has a *continuous and systematic association* with the forum—on ongoing intense relationship. So it is not unfair or unreasonable to say to that defendant, "stand and defend here in the forum" even over disputes that have nothing to do with the forum, unlike specific jurisdiction (where the subject matter of the action must relate to the state).

1. Example: Finn-Air Case; *Perkins v. Bengay Consolidated Mining* [Supreme Court held that if the defendant has a continuous and systematic relationship with the forum state, and the plaintiff is suing on a non-forum state event, it still okay to sue because the systematic activity in the forum state, gives that state constitutional power to assert jurisdiction].
2. Helicopter De Columbian National v. Hall: (a) Facts: Involved a South American corporation helicopter crash. The plaintiff's wanted to sue in Texas based on general jurisdiction but they failed. The helicopters were purchased in Texas, certain negotiations took place in Texas, the pilots were trained in Texas, and funds were funneled by the corporation through Texas. Because the crash was in Texas, the plaintiff's couldn't use the Texas long arm statute. (b) Issue: Whether the contacts between the South American helicopter corporation and Texas were systematic and continuous enough to give Texas general jurisdiction. (c) Holding: No. Demonstrates that you have to get beyond the aforementioned contacts to make the grade for general jurisdiction. *** It is a much tougher standard to meet than specific or long-arm jurisdiction.

§2.5: Jurisdiction Based on Property

I. Other Types of Jurisdiction: Jurisdiction Based on Property

A. **In Rem Jurisdiction:** jurisdiction based, on *Pennoyer*, that because a state is all powerful within its boundaries it can adjudicate title and interests in any piece of property within its boundaries no matter where the claimants are. The power over the property gives the state the power to adjudicate anything about the property.

B. **Quasi In Rem Jurisdiction:** it is one of the remarkable fictions the law creates. The defendant has property in the state, the defendant is not in the state, the cause of action has nothing to do with the state, but the state has power over property (real property, a bank account, securities, machinery, etc…). Quasi in rem jurisdiction enables the state to seize the property and say "hey that's you" and if we got your property we got you. The court is extracting jurisdiction and asserting power over the defendant based on the fact they have their property. That was validated in *Pennoyer* and has been validated several times since by the Supreme Court.

1. Quasi in rem jurisdiction was allowed to exist because quasi in rem decisions didn't get full faith and credit. If the jurisdictional basis was the property, then the jurisdictional power exhausted itself when the property was exhausted. You couldn't take the judgment to another state and get it enforced beyond the value of the property in the rendering state.
2. By 1970s, in Shaffer v. Heightner, the court demonstrated the unfairness that exists in quasi in rem doctrine. In *Shaffer*, the plaintiff owned ONE share of

Greyhound bus lines. The plaintiff brought a shareholder derivative suit in a Delaware state court against all of the officers and directors of the Greyhound corporation, none of whom lived or had ever been in Delaware. The cause of action asserted was that they had mismanaged Greyhound and allowed Greyhound to engage in an antitrust violation, which had been prosecuted and resulted in a multi-million dollar judgment against Greyhound, which came out of the corporation so the corporation had been damaged and all the shareholders had been damaged. Heightner, the one shareholder owner, wanted the officers and directors to reimburse the corporation for this big loss. Liability for the action was imposed in Oregon. Heightner got jurisdiction by attaching all of the stock and options the officers and directors had in Greyhound. The Supreme Court said that this was fundamentally absurd, and held that *all* assertions of jurisdiction will be tested by the principles of *Shoe* and its prodigy (Denkla and World-Wide Volkswagen).

a. In other words, now you need minimum contacts, fair play, and substantial justice for a quasi in rem case. Basically eliminated quasi in rem jurisdiction because if you have minimum contacts, fair play, and substantial justice, you can assert in personum jurisdiction, which means you would sue under in personum jurisdiction because you would get full faith and credit for the decision across the country.

b. Supreme Court didn't really declare quasi in rem jurisdiction unconstitutional, only knocked out most of the utility of it. However, because in most states the long arm statute does not go to the constitutional limits, you can still sue for some actions under quasi in rem jurisdiction.

C. Burnam v. Superior Court: In *Shaffner v. Heightner,* justice Marshall said from now on ALL assertions of state court jurisdiction were to be tested by *International Shoe* and its progeny. Many people read that line and believed that *Pennoyer* was dead, territorial jurisdiction was dead, and transitory jurisdiction was dead because unless there are minimum contacts, fair play, and substantial justice the mere territorial presence of a person is not enough. However, this was wrong because in 1990 the Supreme decided *Burnam.*

1. In *Burnam,* the court held that territoriality jurisdiction (and therefore *Pennoyer*) was not dead because the line by justice Marshall in *Shaffner* only applied to quasi in rem jurisdiction and cases in which the defendant was not in the forum state. Territorial and transitory jurisdiction then still lives because of tradition based on premises of sovereignty of the state. Pure territoriality jurisdiction lives.

D. **Federal Court Jurisdiction:** Federal courts typically use the long arm statute of the forum state in which they are sitting, they certainly do that in diversity cases and they do that in federal question cases when the federal statute that is at issue does not have a jurisdiction provision in it. In Federal Rule 4K(2) that principle is embedded in the rule.

1. The standard a Federal Court uses in a federal question case when there is no federal long arm statute is believed to be the constitutional standard. The

constitutional standard is *Shoe*, *Denkla, and World-Wide Volkswagen* by analogy (because they deal with state court jurisdiction).
2. The question then is what constitutes a minimum contact with the United States. No one really knows, but the court will use fair play and substantial standard to make sure it is reasonable.

§3: NOTICE AND OPPORTUNITY TO BE HEARD

§3.1: Notice

I. General Principles

A. **G/R:** The defendant must obviously be given notice an opportunity to be heard, that is, to defendant himself. Most forms of process, in and of themselves, provide notice: in hand delivery of the summons, delivery by certified or ordinary mail, service of process on a person the defendant is living with, service of process on agent who will transmit the service of process to the defendant. All these methods satisfy the methods of due process and notice.

II. Notice by Publication

A. If you see notice in any form of publication of the exam, you know you're being tested about notice and opportunity to be heard.

B. Mullane v. Central Hanover Bank and Trust Company: In the 1940s, the Supreme Court held that the Constitution requires that notice must be *reasonably calculated under the circumstances* to give actual notice. That is the constitutional threshold.

1. Notice in a newspaper is not reasonably calculated to give actual notice because nobody reads those things in the newspapers.
2. The other forms of notice, supra §3.1(I)(A), make the constitutional grade, thus, the notice issue requires you spot the publication form and make sure it is reasonably calculated under the circumstances to give actual notice. Sometimes the circumstances are such that there is no way of giving notice other than by publication; but those circumstances are relatively rare instances. They exist, usually, one when there is a class of peoples so huge, and you don't know their addresses and the best you can do under the circumstances is to use effective media notice, which is a form of publication.

C. **G/R:** You must analyze the facts, on the exam, and determine if the notice is reasonably calculated under the circumstances to give actual notice!

1. Ex: NY "Nail and Mail" case was not reasonable under the circumstances.

§3.2: Opportunity to be Heard

A. The normal context for an opportunity to heard problem is in a creditor/debtor situation. Someone borrows money and doesn't repay it. The creditor uses one of a

series of very powerful remedies: (1) wage garnishment; (2) property will be attached; (3) the property will be repossessed. All of these creditors remedies were never questioned until the Warren Court era in the 1960s. The Supreme Court decided a series cases (Shevin, Mitchell, and cases in our text) trying to breath some due process balancing into the creditor/debtor problem. Trying to assure the debtor would have an opportunity to be heard. In almost all cases, the debtor owes the money, cannot pay the money, and the system doesn't want to create too many procedural barriers to the creditors enforcement of the debt. Otherwise the whole thing breaks down and people won't lend money and the cost of credit goes up.

B. Supreme Court of the US has basically held opportunity to be heard requires certain due process protections:

1. The decision to issue the writ of garnishment, attachment, repossession, or replevin must be a decision made a *judge* and not some clerk or sheriff. The judge must make that decision based on a full presentation by the creditor of why that creditor believes it has right to immediate possession. That means a fact-based statement of right to the debt or property, under oath. The creditor has to post a bond to protect the debtor in case of wrongful attachment or replevin AND *the debtor* must be given an immediate right to a hearing on the merits.
2. This means that the property can be seized, but not disposed of, at least for some period of time during which the debtor can come in and make his case (hey I paid or it doesn't work, etc…). That is the due process balance that has been struck.
3. Due process is a balancing act, and what will be constitutional acceptable really depends at what is at stake and the legitimate interests on both sides of the equation.

§3.3: Service of Process

A. It is very unlikely that a service of process question will be on the exam because it is simply a question of whether service of process was effectuated in the manner proscribed by the service of process rule. Rule 4 in Federal Rules of Civil Procedure.

1. This is an exercise of nothing more than comparing the way service of process was effectuated in the exam question and the particular service of process rule.

B. Etiquette of Service of Process: One can't entice or trick people into the jurisdiction to serve process on them; on the other hand, if someone is in the jurisdiction and hiding you can flush them out (you can yell fire outside his apartment and when he comes out serve him the process, if the person to be served dashes to his car and starts to drive away you can stick the process under his windshield wiper).

1. **G/R:** You cannot entice someone who is outside the state into the state, in order to serve process. You cannot lie, defraud, or cheat.

C. Immunity from Process: There are rules for immunity from process, in most states you can't serve process on Sunday or someone's Sabbath, people are permitted to come

into the jurisdiction to testify or litigate, and you can't serve them with process while there in the jurisdiction on judicial business.
**May be an issue woven into the exam but not large enough to make an exam question.

§4: VENUE, TRANSFER OF VENUE, AND FORUM NON CONVENIENS

§4.1: Venue Principles

I. General Venue Principles

A. Venue: Venue is a rule of administration, a set of principles designed to allocate the cases among the different courts within judicial system, the judicial of the states or the federal courts. Venue simply means location.

B. Possible Exam Questions: There are three basic exam questions that can possibly show up on a first year exam question dealing with venue.

1. Application of the rules of venue for a particular system.
2. A question about the transfer of venue.
3. A question on the doctrine of forum non-conveniens.

** An exam question on venue is rarely a full essay question, probably a paragraph or two within a full essay question. A natural combination of elements for a first year procedure question is subject matter jurisdiction, venue, and personal jurisdiction.

C. Rules of Venue: Every system in the country has a different system of rules for venue because every system in the country has different notions of where the convenient forum is. Most procedure courses use the federal venue principles. READ 28 U.S.C. §1391.

1. In a federal question case venue is based on the residence of the defendants (residence, not citizenship). For example, the residence of a corporation may every state if it is doing business in every state, if it can be held vulnerable to personal jurisdiction, like General Motors resides in every judicial district. Individuals can reside in more than one jurisdiction because they have summer or winter homes, or work in one place and live in other place.

2. §1391(b): says that venue is proper where any of the defendants reside, any district in which any of the defendants reside, but all of the defendants must reside in a single state. In other words, you can have defendants spread over all four of the judicial districts in New York, but you can't have those four defendants and fifth defendant from Connecticut because they all don't reside in one state.

2. Second, venue is proper in a judicial district in which a substantial part of the events giving rise to the claim is situated. In other words, where the tort occurred, where the contract was breached, where the property in litigation is located. This is an alternative place of venue. You can place venue where the defendants reside *or* where a substantial part of the claim arose.

3. Third, venue can be located in the judicial district in which the defendant may be found. This probably means wherever the defendant can be found in jurisdictional terms.
4. BUT you can always use defendant residential venue, you can always use substantial part of the claim venue, BUT you can only use the found venue when neither of the other two are available. In other words, it is more or less, a default venue.
5. This statute section applies to federal question cases, or mixed federal question cases and diversity cases.

3. §1391(a): When the civil action is based SOLELY on diversity of citizenship §1391(a) reads differently. You can have defendant residential venue, you can have substantial part of the claim venue, and third you can have venue based on a place where the defendant is subject to personal jurisdiction at the time the action the action is commenced. Once again, third option is a default principle and can only be used if there is no district in which the action may otherwise be brought.

4. Corporate venue: is wherever the corporation is subject to personal jurisdiction.

5. Alien venue: an alien may be sued in any district.

6. Venue in Property Actions: **Local Action Venue:** it all stems from the case of *Livingston v. Jefferson* (with Justice Marshall writing as a circuit court judge) and the principle is, and it accrued in a case involving land and it is basically land actions that fall within the local action principle, you must bring the action where the land is located.

1. The local action rule is based on ancient principles, but the rule still continues, in federal courts and in most states. Some states have abandoned it, however (Minnesota).
2. The real problem with the local action rule is defining what a local action constitutes. Disputes over titles to land are local actions and possibly the destruction of property on the land. Much more difficult are the questions of trespassing or stealing natural resources from land.
3. Transitory actions can still be brought in different venues.

§4.2: Transfer of Venue

I. Transfer of Venue: Every judicial district in this country has a transfer of venue provision. Every system uses approximately the same standard for transfer. Almost every system, if not every system, says you can transfer in the interest of justice.

1. Interests of Justice: that really is pure common sense and completely textual and fact dependant. The "interest of justice" means where the events occurred, where the parties are, where the witnesses are, where the records are, or some combinations of those factors would say that were in the wrong place, lets transfer it to another place in the interests of justice.

II. Federal Transfer of Venue: §1404(a) speaks of the interests of justice but then says the action can only be transferred to a place where it could have been commenced or initiated.

1. Hoffman and Blaski: The Supreme Court said they must interpret the statute literally so you can only transfer in the federal system to a court that would have original subject matter jurisdiction, original personal jurisdiction, and original venue. In other words, the Court is not going to look for the perfect court. The Court is going to limit the transferability capability to those courts in which the action could have been brought.

2. This could be a misdirection on the exam, in a federal court the transfer is never more then a single paragraph—the ONLY place you can transfer the action is to the courts that had original subject matter jurisdiction, original personal jurisdiction, or original venue. So what you are really being tested on is subject matter jurisdiction, however, if there is subject matter jurisdiction in the transferor court by definition there is going to diversity or federal question jurisdiction in the transferee court.

a. Personal jurisdiction is the catch though because even if there is personal jurisdiction in the transferor court, there may not be personal jurisdiction in the transferee court. So you have to go through the analysis for personal jurisdiction!! Finally you have to decide if §1391, the venue statute, permits you to lay venue in the transferee court. So the transfer of venue of question is really the tail wagging the dog, DO NOT fall for that trap.

§4.3: Forum Non Conveniens

I. Forum Non Conveniens: simply means this is not a convenient place for the action to be brought. Transfer of venue cannot be used in certain situations and that is why the doctrine of forum non-conveniens exists. For example, a New York state court cannot transfer to a New Jersey court because there is no such thing as state-to-state transfer. A federal court cannot transfer to state court and an American court cannot transfer to a foreign jurisdiction. In all of those situations transfer does not work so you've got to use forum non-conveniens.

1. Because the Courts respect the plaintiff's forum choice, in practical application, the forum-non and the transfer provisions are not used with much frequency (transfer more than forum non). In both instances the defendant has to overcome the presumption in favor the plaintiff's choice of forum.

a. However, in certain situations it really makes no sense to litigate in the American court then forum non works.

A. Piper Aircraft v. Reyno: most recent forum non Supreme Court case.

1. Facts: An American built plane, by piper aircraft, gets in a crash in Scotland and some people are killed. An attempt is made on the part of the representatives of the deceased to go after Piper Aircraft, first in California, and then the action was transferred to a federal court in Pennsylvania. But everything about the case

was tied to Scotland, that is where the plane was flying, that was where the plane was serviced, that was were the people were killed.
2. Holding: The Court held that in forum non convenien issues, the courts should look at the factors—the private factors relating to convenience of litigants; litigation elements such as witnesses and documents and convenience in obtaining them. Courts should also look at public factors; whose has interests in adjudicating the dispute (in this case Scotland). The Supreme Court upheld the application of forum non conveniens principle.
3. The forum non conveniens really acts as check, a safety valve on the jurisdictional principles of America.

B. **G/R:** Very often the effect of a forum non grant is very harsh on the plaintiff. Transfer simply moves the action from one court to another court. The forum non principle causes an actual dismissal of the action, so that the plaintiff must initiate again.

1. Initiating another action is sometimes difficult because a statute of limitations may have run between the institution of the first action and dismal for forum-non. It may also be hard on the plaintiff because it may be more difficult to get personal jurisdiction over the defendant in the second forum. However, courts are too smart to fall into this trap. Remember, the defendant almost invariably makes a forum non motion.
2. So Courts usually do not grant a forum non motion unless the courts (a) know there is another alternative forum; (b) the defendant agrees to waive any statute of limitations defense that has accrued since the institution of the first action; and (c) the defendant must also agree to stand and defend in the alternative forum; that is, the defendant must consent to jurisdiction in the alternative forum.

§5: REMOVAL

I. Removal

A. **G/R:** Removal is a one way street; you can only remove from a state court to a federal court and not vice versa. If the removal is improper, the action will be remanded but there is simply is no mechanism in the procedural system that can send a federal action to a state court on its own terms.

B. Rules of Removal: 28 U.S.C. §1441.

1. **G/R:** A party can only remove an action that could have been brought in a federal court originally. In other words, you can only remove an action when there is a federal question, diversity of citizenship, and amount in controversy.

a. Remember misdirection questions on the test. A removal case also involves subject matter jurisdiction. It is a good way of getting testing on the well pleaded complaint rule. YOU can only remove that which you could have initiated originally; and the well pleaded complaint rule applies fully on removal. So the fact that there is a federal defense to state based common law action—that is not basis for removal.

b. Similarly, you cannot remove based on a $40,000 state based claim and followed by a $20,000 diversity based counterclaim. You cannot aggregate the claim and the counterclaim for removal purposes because you could not have originated that claim in the federal court.

**There must be original jurisdiction in the federal court to take a case by way of removal.

2. **G/R:** Only a defendant can remove.

a. Think of removal as evener upper—the plaintiff has the original choice of forum, but if the plaintiff chooses a state court, then Congress concerned when it creates subject matter jurisdiction, wants to be sure that both sides of a dispute have a fair shot at exercising their Congressionally mandated right to use a federal forum and the only way to achieve that is by giving the defendant a right to veto the plaintiff's choice of a state forum and giving the defendant a right to choose a federal forum for the federal question or diversity case by invoking the removal right.

b. Removal is a way protecting the congressionally mandated federal forum choice, but since the plaintiff has exercised his choice originally, removal is only needed by the defendant.

c. Defendant only means the ORIGINAL defendant, counterclaim defendants (the original plaintiff) cannot remove.

3. **G/R:** In a case based on federal question the action is removable by the defendant without regard to the citizenship of the parties. In other words, an in state defendant or out of state defendant can removal a federal question case.

a. However, when the action is based on diversity of citizenship then the only defendant that can remove is a defendant who is not a citizen of state in which the action was brought. In other words, an in state defendant cannot remove. As a matter of fact if there is multiple defendants, none of the defendants can be instate defendants.

4. **G/R:** A party removes a case from a state court to the federal court covering the geographical area embraced by the state court. In other words, if you got an action in the county of Manhattan New York, it is removed to the Southern District of New York.

1. Once you remove an action from a state to a federal court under §1441 you can then seek to transfer the action to another federal court under §1404(a).

5. **G/R:** §1441(c): If there is a completely separate federal question in the action, this only applies to federal questions, and it has been joined with a completely state claim—that is non removable.

1. In order to prevent plaintiffs from defeating the removal right by joining something that would otherwise by removable with something that is not removable Congress has said when you have a separate and independent federal question claim that is joined onto a state action you can take the separate and independent claim and remove it.

2. This, §1441(c) enables the defendant to not only remove the federal question but also the otherwise unremovable state matter. Almost like a form of

supplemental jurisdiction. The defendant can remove them both up and it is the discretion of the federal court to keep the entire case or send the entire case back—whatever makes sense.

§6: Waiver

I. Waiver of Defenses

A. **G/R:** Waiver of Subject Matter Jurisdiction: Subject matter jurisdiction is never waived because it is one of the most important matters of jurisdiction. The parties cannot consent to waiver of subject matter jurisdiction; the court can raise the issue on its motion. Indeed, the United Supreme Court on its own motion, then threw cases out [Louisville and Nashville RR v. Motely].

1. Reasons: subject matter jurisdiction is not a personal matter; it is not anything the parties can flip and fight about. Its systemic issue, the power of the court is something that is constitutionally based in the federal system, it implicates matters of federalism and therefore the Courts are free to raise it anytime.

B. **G/R:** Personal jurisdiction, notice, service of process, and venue can ALL be waived; every system says you can waive them. Every today says these are threshold matters. If you want to raise any of these issues, put up or shut up, and if you want to put up you have to do it at the front end of the litigation. Don't try to try a case and then at the back end of the litigation, probably because you don't like the way the litigation turned out.

1. Indeed, systems today say, these four matters (personal jurisdiction, notice, process, and venue) must be raised by a *pre-answer* motion or asserted in the answer or they are WAIVED.

** A law school exam may have an issue (intended to trick you) at the end of the exam after raising other issues, in which it says *at the end of the trial* the defendant realizes that it may not be subject to jurisdiction so the defendant moves to dismiss on the lack of personal jurisdiction. DON'T BE TRICKED. The simple answer is, personal jurisdiction defenses are threshold defenses and they must be asserted in a pre-answer motion or in an answer, the defendant failed to do either, we are now at trial, the defendant cannot raise the issue now because he has waived it. That is the answer.

C. **G/R:** In many systems, particularly the federal system, and all the states that follow the federal rules, there is a principle known as consolidation of defenses. Fed. Rules 12(g) and 12(h).

1. Rules 12(g) and 12(h) basically say: all of these threshold defenses must be made by pre-answer motions, or put in the answer. But if you are going to make a pre-answer motion you can only make ONE pre-answer motion consolidating them. You can't make separate pre-answer motions—you can't make a personal jurisdiction motion, lose it, then make a venue motion, lose it, and then make a notice motion. Life is too short to allow defendant's to play the attrition game. Defendant's love to make sequential motions. Rules 12(g) and (h) say ONE

motion, anything you do not put in that one motion, you cannot raise by a second motion.

a. The real kicker is that you can't make a motion based on an omitted threshold defense in a second motion if you have omitted threshold defense you cannot even put it in your answer!

D. **G/R:** In most modern jurisdictions you make your motion for lack of personal jurisdiction or venue and lose it, and you simply go to the merits knowing that the issue is preserved for appeal.

CLUSTER 2: THE LAW THE GOVERNS IN A DIVERSITY ACTION

§7: Ascertaining the Applicable Law

I. Choice of Law

A. Generally: what this cluster deals with is really choice of law, does a federal court sitting in diversity apply federal law, state law, when does do one or the other. In the first year course it only deals with choice of law in federal diversity cases, the rest is reserved for federal courts class.

II. The Erie Doctrine

A. Generally: the Erie doctrine encompasses four main cases:

1. Erie v. Tompkins;
2. Guaranty Trust Co. v. York;
3. Byrd v. Blue Ridge Rural Electrical Cooperative; and
4. Hanna v. Plummer.

** For first year purposes YOU MUST MASTER THESE FOUR CASES! If you know these four cases you know the Erie doctrine. Focus on these cases.

III. Erie v. Tompkins

A. **G/R:** In diversity action, a federal court applies the substantive law of the forum state.

1. Overruled Swift v. Tyson rule because the constitution does not give federal courts the power to create substantive common law that governs state dominated actions. The constitution gives the power to create a whole host of other things, but the 10th Amendment, the reserved power clause, means that substantive law in diversity actions must come from state law.
2. The issue then becomes what is substantive law.

B. **Facts:** (a) Tompkins (D) is walking along the Erie RR in Pennsylvania and gets clipped by a train; he sues because a tort has been committed against him. The defense that D was a trespasser. The Erie case is an absolute paradigm of what we mean when we say substantive law—torts, property, contracts, etc…

C. **G/R:** Substantive law: substantive law is system of rule of rights and duties that run between people and institutions in society. Substantive law is torts, contracts, property, corporations, constitutional law, everything in law school besides civil procedure, evidence, trial practice, etc.

IV. Guaranty Trust Co. v. York

A. **Issue:** whether a federal court sitting in New York was free to apply historic equity principles that had been applied in the federal courts known as laches (sort of an implied federal statute of limitations) or whether the court in the diversity case was bound by New York's statute of limitations which are hard automatically binding rules.

1. If the Court was bound to apply the NY statute of limitations, York was dead, the case was over because the action was barred but if the court was free to uses the doctrine of laches then his claim could continue.
2. York was written as if the most import thing is that the federal court achieve the same outcome as the state court (as opposed to Erie which was constitutionally based).
3. The court was fixated on "identity of outcome" it was fixated on the notion that there should not be forum shopping because it would result in an inequitable administration of the law.
4. Erie gets transformed into something that tries to make the federal courts another court of the state when the court is sitting diversity jurisdiction case.

B. Outcome Determinative Test: the federal court cannot afford a defendant the right to recover if the application of the federal law instead of the state law will substantially affect the outcome of the litigation.

1. The problem with the York decision is that almost anything could be outcome determinative (size of paper for one example). The problem is that it made a hash out of anything like a uniform application of the federal rules of civil procedure because the courts would have to follow the state rules.
    a. By making federal courts "carbon copies" of state the courts it was really reducing the significant and stature of the federal courts.
2. In the period following the York decision a number of Supreme Court decisions really restricted the actions of the federal courts, the most famous being *Ragen*.

C. *Ragen* Case: In *Regan* what happened was a wrongful death in Kansas, and a diversity action was commenced within the statute of limitations.

1. A federal action is commenced, under Federal Rule 3, when the complaint is filed with the clerk.
2. Under Kansas law, an action is commenced when the defendant is actually served.
3. The complaint, in *Regan* was filed on time but not served on time.
4. The Supreme Court said, under York principles, the federal in a diversity action was obliged to follow the Kansas rule on commencement and since the action was not commenced on time it was barred by the statute of limitations.

V. Byrd v. Blue Ridge Rural Electrical Cooperative

A. Generally: Eire and York swung the pendulum way over toward the application of state law; Byrd and Hanna swing the pendulum back over in favor of federal law.

B. **Facts:** Byrd, P, was injured while working and brought a diversity based tort action in Carolina. An issue arose as to whether P was covered by workers' comp and if P was covered by workers' comp that meant he had to go through workers' comp and couldn't bring a tort action, that is, whether the worker was a statutory employer. In Carolina, state courts that issue is decided by a judge, in federal court that was an issue, under 7th Amendment, to be decided by a jury.

C. **Holding:** the Supreme Court moved away from Erie and York, because the Court had a "countervailing federal consideration." Namely, first the federal commitment to jury trial and second (more subtle) the distribution of power between a federal judge and jury. Which issues are decided by the judge and which are to be decided by the jury.

1. The court held the countervailing federal consideration should be balanced against the significance of the Carolina policy for giving the issue of statutory employer to the judge. The Court looked through the Carolina precedent and concluded that Carolina Supreme Court had not really given any substantive reason why it concluded the issue should go to the judge.
2. The Court said the question of the distribution of decision-making power between a federal judge and jury operates under the influence, if not the command, of the 7th Amendment. Whereas, the Carolina policy was probably just administrative efficiency which wasn't a weighty enough policy to make the court follow it on the federal side.
3. In addition, the court said it's not clear that it is outcome determinative if you give an issue to judge rather than a jury. So Byrd amounts to moving away from Erie and York, a recognition that federal interests need to be balanced against state interests, and leaving the matter to the judge.

VI. Hanna v. Plummer

A. Generally: is some respects is a specific application of the Byrd doctrine. In Hanna, there was a wrongful death action, in Massachusetts (Mass) federal diversity action. It was an action against the executor of the deceased. In Mass, there was provision that said in actions against an estate you must make in hand personal delivery of service of process to the executor within one year after the death.

1. Fed. Rule 4 simply says you can make substituted service, that is, leaving service of process with the spouse. Which is what occurred in the case. So the service of process in Hanna was valid under Fed. Rule 4 but invalid under the Mass statute. By the time the parties litigated the issue the one-year statute of limitations had run. But if federal service was valid, the action could proceed.

B. **Holding:** the Court held that Fed. Rule of Civil Procedure represent federal policy. They are rules promulgated by the Sup. Ct. subject to congressional veto. [That's Byrd,

you have a federal policy]. Under the Supremacy Clause of the constitution federal law trumps state law. Therefore, whenever you have a FRCP that *is applicable* (that is a critical issue) and it is *valid* federal rule under the Enabling Act and doesn't violate the constitution and the rule applies to the issue before the court—that FRCP trumps state practice or law in general.

1. Valid Federal Rule: a valid federal rule has to be a rule of procedure. The only authority that the Sup. Ct. has to promulgate rules, under the Rules Enabling Act 28 U.S.C. §1652, the only power Congress has given the court is to promulgate rules of procedure and proscribe anything that enlarges, abridges, or modifies a substantive right.
2. The drive of the Hanna opinion is that the FRCP will trump even if it is outcome determinative.

C. **G/R:** Hanna rule is a very powerful rule (and application of the countervailing federal consideration principle of Byrd) because it says once you've got a FRCP it automatically applies if it is valid and applicable.

1. Probably applies to Federal Rules of Evidence also.

VII. Walker v. Armco Steel Corp.

A. Generally: after Hanna, everyone thought *Regan* was overruled because FRCP 3 says you commence an action by filing the action with the clerk. BUT the Sup. Ct. said in Walker, *Regan* lives it has not been overruled by Hanna because (very important to understand this):

1. In Hanna, the Court made it very clear that before a FRCP would trump state law, the FRCP had to be applicable to the particular issue before the court. Rule 3 according to the Sup. Ct., although it does declare a commencement principle, that is NOT a commencement principle with regard to measuring the statute of limitations. Court said Rule 3 measures time frames from commencement forward, like when the response of pleading must be served, when a summery judgment can be entered and things of that nature. Rule 3 was not intended to apply to the tolling of state statutes of limitations because there would be a question if there was a violation of the Rules Enabling Act if the Court tried to promulgate a rule that amounted to a statute of limitations.

VII. Choice of Law

A. Rule of Klaxon: [Klaxon v. Stentor Electric MFG Co.] when a federal court in diversity looks to the substantive law of the forum state, that embraces the forum states conflict principles. In other words, a federal court in diversity cannot make up its own conflicts rule. That is, it must apply the forum's states choice of law rules.

1. Reaffirmed in *Day v. Zimmerman*. In Zimmerman, the Court reaffirmed the rules of Klaxon.

B. Inverse Erie Doctrine: the inverse Erie problem is the question of when you have a federal substantive right that is being adjudicated in a state court (remember Congress

often says this particular federal substantive right can be vindicated in a state court or federal court—plaintiffs option, concurrent federal and state subject matter jurisdiction). Inverse Erie says when one these substantive rights are being adjudicated/vindicated in state court, the state court is obliged, under the supremacy clause, to apply federal law. Inverse Erie makes a state court enforcing a federal substantive right another federal court.

CLUSTER 3: PLEADING

§3.1: Pleading Overview

I. Overview

A. Generally: in modern procedure a much-reduced procedural incident, pleading is not as important at common law which is true in federal and state courts. In the current sociology of litigation, which is opposed to a lot of litigation, one of the ways plaintiff's are screened is by insisting that parties plead with more particularly. In reality the rules of pleading procedure are not very onerous and not terribly important today. [Also they are not very testable because the teachers get mush].

B. Basic Elements of the Pleading Cluster:

1. Standard of particularity of pleading: what is it you have got to plead? What is the detail level?
2. Special Pleadings Rules [Fed. Rule 9];
3. Amendment of pleadings; and doctrine of relation back [probably the most testable part of the pleading cluster].

§3.2: Particularity of Pleading

I. Arts and Crafts

A. Historically: historically, the pleadings served three functions:

1. pleading served as a procedure of notice giving;
2. the pleadings involved the revelation of fact because there was fact pleading; and
3. it served the purpose of issue forming, the pleading system was set up so that the pleading between the plaintiff and defendant formulated the issues then the case went to trial on those issues.

II. Modern Procedure

A. Federal Rules: the federal rules only assign the first of the three historic functions (notice giving) to the pleadings. In modern procedure, there are things that were not available historically, such as, massive discovery, joinder, sophisticated motion practice (summary judgment); so there are other ways to get to fact revelation and issue formulation.

1. The federal rules don't have theory of the pleadings, fact pleading, or a requirement that the pleadings formulate precise issues for trial and exclude everything else. The rules don't call for any of that, they simply call for notice.

B. **Federal Rule 8(a)(2)**: Rule 8(a)(2) says that the pleader should simply provide a short and plain statement indicating that the pleader is entitled to relief. Notice, Rule 8(a)(2) doesn't say to plead facts or a cause of action, just a short and plain statement—it can be narrative, it can be stream of consciousness, and it doesn't say cause of action. It just says claim for relief, legally cognizable claim for relief. VERY LOW PLEADING THRESHOLD.

1. Whereas, code states, and there are a few of them left, they want pleading of facts that demonstrate the existence of a cause of action. A much more demanding system.

C. Liberal Construction: The federal courts are supposed to construe the pleadings liberally; to read every conceivable inference into the pleadings so that unless there is a legal certainty that under no construction of the pleadings could the plaintiff recover anything a motion to dismiss on the pleadings will granted.

1. A motion to dismiss on the pleadings is governed by Fed. Rule 12(b)(6): the plaintiff has failed to state a claim upon which relief can be granted, that motion must be denied, if, under any construction of the pleading the pleading might be read to indicate that the pleader is entitled to relief.
2. Ex: A simple statement: on July 23, I was crossing Mass. Ave. in Cambridge and the defendant negligently hit me with his car, wherefore I want $125,000. That would satisfy the specificity requirement of Rule 8(a)(2).
    a. Look at the forms in the back of the supplement (federal form #9, demonstrates how simple it is to satisfy Rule 8(a)(2).
3. Very few motions to dismiss, under Rule 12(b)(6), are granted. Although, the federal courts are getting tougher and tougher about not granting motions to dismiss.

D. Disfavored Actions: one finds, by looking at the federal decisions, that the tougher pleading rules exist in a certain substantive context, the so called disfavored actions where the court is afraid it is just too easy to get into court and harass a defendant and extract a settlement.

1. Ex: in RICO actions, securities, wire tap cases, and mail fraud. Some people think the federal courts have even toughed up in civil rights actions.
2. The Supreme Court in the *Leatherman* decision made it very clear that the way the rules are written that there is a uniform standard of particularity; a short and plain statement indicating that the pleader is entitled to relief. Absent a *special pleading rule*, one size fits all, courts are not empowered to create high pleading thresholds simply because they do not like the cause of action. The *Leatherman* decision is just beginning to have effect around the country.

§3.3: Special Pleading Rules

I. Special Pleading Rules

A. Generally: there are special pleading rules [**Federal Rule 9**]. Probably the most significant special pleading rule for purposes of a first year course is the one found in Fed. Rule 9(b).

B. **Federal Rule 9(b):** Federal Rule 9(b) says the circumstances of fraud must be pleaded with *particularity*. Notice the second sentence of the Rule, it says "condition of mind" (intent can be plead generally because if you stop and think about it what can you say about someone acting maliciously or intentionally). But fraud has historically been a disfavored action, it is an easy accusation, it involves moral turpitude, it is very hard to prove the elements of fraud or disprove the elements of fraud. Once a fraud action is brought the defendant is sort of in the "suit."

1. In the 20th Century, fraud is the backbone of almost all securities cases under the Federal Securities Laws and a school of thought has developed that these are often strike suits. That is particularly true today, the defense bar has convinced Congress and a lot of courts that most of security fraud cases are strike suits.
2. So what the Federal Courts have done is raise the level pleading the circumstances of fraud with *particularity* in many contexts, but with special emphasis in securities cases to unprecedented heights. To survive a motion to dismiss for non-compliance with the fraud pleading requirement of Rule 9(b) a plaintiff must plead *facts*—who committed the fraud, when was the fraud committed, where was the fraud committed, where are the documents, how was the fraud committed. It really has become a very very high pleading burden.

C. Defamation Actions: another illustration of another special pleading rule is, in many states, in defamation actions which many people consider to be disfavored actions. The rule is, if you are going to plead defamation, you must plead the actual defamatory words and the failure to plead those words means that you are vulnerable to a motion to dismiss.

1. The theory, of course, is that since the pleading is a public document, unless you are deadly serious about suing for defamation, you are not going to repeat the words.

D. Pleading of Conditions Precedent: a third illustration of a special pleading requirement, that is also found in Rule 9, is the pleading of conditions precedent.

1. The old rule in a contract breach case, was that the plaintiff had to identify each of the conditions precedent to the performance and enforcement of the contract—he had to plead each one of them, and then plead that he, the plaintiff, had performed each and every one of them.
    a. In a simple world, were a contract may have two or three conditions precedent in them, that was no big deal. But modern contracts, particularly modern insurance contracts, modern construction contracts, they are very complex and they may have hundreds of conditions precedent.

b. So you have a situation in which to plead conditions precedents is a big bore, it consumes a lot of paper and if you forget one or two you are in deep trouble.

2. So what the drafters of the federal rules decided was to reverse the burden. All the plaintiff has to do under Federal Rule 9 is say that all the conditions precedent have been complied with. The burden then is on the *defendant* to identify with *particularity* any condition that the defendant believes has not been performed. If the defendant fails to do that, then the issues of condition precedents are out of the case. It is a very common sense rule which is probably pragmatically wise after all, because plaintiff's usually don't sue for breach of contract unless they have performed their side of the bargain, which would include the conditions precedent.

§3.3: Amendments

I. Amendments to the Pleadings

A. Classical Rule: in the old days, you could not amend the pleadings, you were stuck with what you said the first time up. That is completely reversed in modern procedural systems.

B. Liberal Amendment Rules: (modern rules): in modern procedural systems, all systems have liberal amendment policies and probably no system is more liberal then the federal system. You have got to look at Federal Rule 15, is a very import rule for first year students.

C. **Federal Rule 15:** Federal Rule 15 sets up time frames and establishes slightly different standards for amendment.

1. First, quite logically, Rule 15 says at the first end of the case, before anyone has invested in it, our policy is going to be wide open. If you want to amend your pleading before any responsive pleading is served, you can do it once automatically, you don't even have to make a motion. It is a complete free fire zone that recognizes what conceivable basis would there be to deny an amendment at that embryonic point. So during that time frame, one amendment is automatic.

a. Some systems, go further and say you can do it not only until the responsive pleading is served, but for 20-days beyond that. Which means you can take a look at your opponent's answer and make some corrections in your complaint and start all over again.

2. Second, what about an amendment to the complaint or answer during the pre-trial process (which can often be two years, fours, six years)? The pre-trial process in modern procedure is very extensive, you have got motions, joinder, and discovery. Well the Federal Rule says that amendments shall be liberally granted. The federal Rule makes it clear that there really are virtually no instances in which you are going to deny an amendment that is requested during the pre-trial process. You have to make a motion, yes, but the rule says that the shall *be freely*

given when justice so requires. So unless the party seeking the amendment is playing tricks, has been negligent, should have gotten an amend in four years ago but didn't, a motion for an amendment will usually be granted.

3. Third, there are amendments at trial. Yes you can amend at trial. Very often what happens is that at trial evidence that is either inconsistent or outside the pleadings starts coming in. The other side can ignore it, it comes in, and what the system says is if the other party doesn't object the pleadings are just automatically viewed as having been amended, that is the end of the story.

a. More typically, the deviating evidence is proposed and the other side objects and says that is outside the scope of the pleadings. The Rules says that in that type of situation the court *may* allow the pleadings to be amended and *shall* do so freely when the presentation of the merits will be sub-served thereby. In other words, this is a justice seeking system and if the amendment would further getting it right, grant leave to amend even at trial freely *except* when the objecting party (notice the burden of persuasion there) fails to satisfy the court that the admission of such evidence would prejudice the defense. In other words, if you are going to object to deviating evidence at trial you have got to be able to show prejudice or the rule says the court should allow the amendment.

b. Many courts say prejudice or following around, or mouse trapping, or being a bad actor will be cause to deny the amendment.

c. That should demonstrate how liberal the amending procedure is, basically, a court can allow pleading amendment at any time.

II. Doctrine of Relation Back (very testable pleading subject).

A. Doctrine of Relation Back of Pleading (amendments): this is very particular phenomenon. A lawsuit is brought, it is brought on a particular theory, such as negligence or trespass or battery or whatever. And as so many lawsuits go (in modern federal practice) it goes on in the pre-trial phase for several years. In the middle of that process, the plaintiff wakes up to the fact that he has a different theory. Not only is there a negligence theory, maybe there is a strict liability or warranty theory. So he seeks to amend the complaint.

1. Now here is the problem: in the time that has transpired since the original origination of the action, and the time that the amendment is to be interposed, the applicable statute of limitations on the new legal theory, the new claim, has run. That is very common in modern litigation because the pre-trial process does take so long.

2. The question now, is not whether you can amend, because the modern amending practice is exceedingly liberal and in the interest of justice the plaintiff will probably be able to add the new claim. The problem is that if this were an action that were commenced on the day of the amendment, well the new claim would be time barred and would be vulnerable to a statute of limitations defense.

3. So the issue is not is the amendment permissible, the issue is well if you permit the amendment will the new material simply be barred by the statute of limitations.

B. Relation Back of a Newly Added Claim: the doctrine of relation back of amendments says under certain circumstances we will allow the plaintiff to add the new legal theory, the new claim, and instead dating the new claim as of the day it was asserted, which means its time barred, we will relate back to the day of the original interposition of the complaint. We will relate back date and in effect circumvent the statute of limitations. We are doing an end run on the statute of limitations defense.

1. Now the question is, when are you going to allow that to happen?
2. The doctrine of relation back of amendments grew up many years ago and under the code system of procedure you would be allowed to relate back the new material if it arose out of the same cause of action as the original action.
    a. The problem was that "cause of action" was a very vague concept. Cause of action ties you back to the old writ system so that if the original action was negligence and you wanted add strict liability those are different causes of action so you could not relate them back, so the doctrine was a rather restrictive one.
3. Under modern notions of relation back, particularly in the federal courts, the standard is no longer the cause of action because we no longer measure causes of action any more in procedure.

C. **Federal Rule 15(c):** the standard for relation back of amendments as it is set out in federal rule 15(c)(2) is if the new material emanates from the same *transaction or occurrence* as the original material, we will allow it to relate back. Thus, if you buy a car and a part falls off and you have different theories of negligence and strict liability and warranty, and you are trying to relate back, you won't have much difficulty because each of these things arise same transaction or occurrence. And relation back under federal 15(c)(2) will work.

1. As the result of an amendment to federal rule 15(c) a few years ago the doctrine of relation back has been broadened.
2. **Federal Rule 15(c)(1)** also permits you to relate back if it is permitted by the law that provides the statute of limitations that is applicable to the case. Certainly, in all diversity cases, that means relation is allowed whenever the law of the forum state would allow relation back. That broadens relation back and goes beyond the transaction and occurrence test of rule 15(c)(2) because in some states relation back of amendments is broader then transaction and occurrence.
    a. It also solves a series of nasty *Erie* problems that existed prior to the amendment because there were situations in which you would be in a state in which there was no relation back of amendments even though the new material fell within the same transaction or occurrence and a lot of states felt that under *Erie* a federal court in diversity wouldn't be able to apply the transaction and occurrence standard for relation back because state law didn't permit it.
3. Now with Rule 15(c)(1) and 15(c)(2) you have got the benefit of *Hanna v. Plummer*, if relation back would be permitted either the forum state law or the transaction and occurrence provision, *Hanna* says the federal rule trumps the state practice (or at least we think it does, there is an argument that the amendment to the relation back doctrine violates the rules enabling act and therefore is invalid

because it affects a substantive right it affects the length of the applicable statute of limitations, and therefore is not a fit subject for rule making *Hanna* doesn't apply and you're back to *Erie* and if you believe this a matter of state substantive law then you have got to follow limitations on relation back of state law).

D. Relation Back of a Newly Added Party: the problem is a little difficult when the addition of a party is trying to be related back, that is, you suddenly discover that there is somebody out there who you should have sued, and you didn't sue, and you want to add that party.

1. This happens an incredible number of times, people make party decisions that are often inaccurate. One of the most famous cases, involved a party who sues fortune magazine, well the truth is, there is no fortune magazine, fortune magazine is simply a product of time life, and by suing fortune magazine the plaintiff did not sue a proper party defendant and when the plaintiff discovered that he should have sued Time Life, the statute of limitations had run. This kind of problem arises in a dozen different contexts.
2. Relation back involving parties is a more delicate problem than relation back involving claims. When you are relating back on claims, you are doing it against someone who had notice that you are suing them him within the limitations period. But when you're adding a party outside the limitations period, that person has never been notified, and therefore you're undermining the statute of limitations policy which is to make sure people are notice within a certain period of time that they are going to be sued.
3. So **Rule 15(c)(3)** deals with this problem.

E. **Rule 15(c)(3):** deals which relation back of parties is much narrower than relation back of claims. Rule 15(c)(3) says if you want to change a party you have got to satisfy the transaction and occurrence standard set forth for claims in Rule 15(c)(2) AND, in addition, within the limitations period and the service of process period the party that you are now trying to bring in must have received notice of the institution of the action will not be prejudiced in maintaining a defense on the merits and must have known or should have known that except for a mistake concerning the identity of the party who should have been sued the action would have been brought against him.

1. So you see those preconditions satisfy the policy of objectives of the statute of limitations but it is a very hard standard to satisfy. The party to be added within the limitations period must have known of the institution of the action, must not be prejudiced in his ability to satisfy the action, and must have known, or should have known, that he was the true defendant and *but for* the mistake would have been sued.
    a. It is a rare case that meets all those standards.

F. One Last Point on Relation Back of Amendments: there is an old testing trick, to relate back the added claim must have been time viable on the day the action was instituted. In other words, you can't add a claim by amendment that would have been time barred if it had been asserted when the action was begun. In other words, you can't relate back something that was dead on arrival. WATCH OUT FOR THAT.

1. Profs occasionally try to ask you a relation back problem when what you are really facing is a situation in which the claim to be added was time barred on the day of institution and you simply cannot use relation back to revive that time barred claim.

III. Sanctions

A. **Rule 11:** History: Rule 11 controls the sanctions of parties for improper pleading. This rule has been a major phenomenon since the mid 1980s. The sanction rule was in the Federal Rules since the beginning in 1938. But it was totally ineffectual, it just did not work. But in 1983, the Rule was rewritten to make the sanctions provision much more powerful and an enormous sanction practice developed in the 1980s.

1. Indeed, sanctions became such a cottage industry that the people write the federal rules decided to rewrite the federal rule 11 in 1993 because there was too much activity.
2. Because of all this business about sanctions it is plausible that your professor will ask you something about sanctions on your final exam.

B. **Rule 11:** Things you Should Know: there a several things you should know about Rule 11 and sanctions for the exam:

1. First, in most modern procedural systems it is the lawyer who signs the papers (pleadings, motions, and other papers) it is the lawyer who puts his head in the noose. And when a lawyer signs a paper, at least in federal practice, the signature is a certification. The lawyer is certifying that the paper is not being presented for an improper purpose such as to harass, or to cause unnecessary delay or needless cost. The lawyer is certifying that the contents of the paper or the positions that are being advanced are warranted by existing law, they are not frivolous. The lawyer is warranting that the contentions have evidentiary support and are not simply fabricated. And finally, if the paper is a denial paper, the lawyer is warranting that there is evidence to support them and they are reasonably based on information and belief. That is what certification is.
2. What happens when you have a mal-signature is that the opponent or quite possibly the court, will seek sanctions. Sanctions are designed to *deter* not punish. That is the new philosophy of sanctions under Federal Rule 11.
3. In many cases, sanctions involve monetary sanctions, it can be a flat sum of money, it could be the cost of meeting the improper paper. But a creative court is encouraged to use a non-monetary sanction so you do not create a profit center mentality. The sanction be anything, an apology, a slap on the wrist, community service, or service in the courts library. Sanctions now are discretionary, they were mandatory between 1983-1993 if there was mal-signature. Now they are discretionary with the court. There is a desire not to overuse sanctions.
4. Rule 11 also provides what is called a "safe harbor" provision. In other words, if a party puts in a paper that the other party objects to, the objecting party can say "hey withdraw it within 21-days or I'm going to seek sanctions." Within that period there is a safe harbor, the offending paper can be withdrawn and if it is

withdrawn then no sanction will befall the party who put the offending paper before the court.
5. Curiously, one aspect of the 1993 amendment to Federal Rule 11, actually increased the burden. Prior to the 1993 amendment, the question of whether the paper was improper or proper was dependant on what was known by the party who put the paper in at the time the paper was put in. And if it subsequently turned out to be an improper paper there was no sanction because on the basis of what the party knew when the paper was put in there was no intent and no reason to believe it was improper.
6. The new federal rule 11 imposes a continuing obligation on every party, which means every lawyer, who puts a paper in to monitor its continued viability. If it turns out later on in the litigation that the paper really is invalid, that there is no basis for it, the party who put it in is under a continuing obligation to withdraw it and failure to do so can produce the imposition of a sanction.

CLUSTER 4: JOINDER

§4.1: Joinder Overview

I. Overview

A. Generally: joinder can be a very difficult subject for first year students if they do not break it down into its constituent parts. Do not make joinder a giant blob. Break it down into each element for the exam.

B. Constituent Units of Joinder: there are nine constituents of joinder. Joinder can be broken down into three units each containing three items. The nine units are:

1. Unit Number One:
    a. Joinder of claims;
    b. permissive joinder of parties; and
    c. compulsory joinder of parties.
2. Unit Number Two:
    a. counterclaim;
    b. crossclaim; and
    c. third party claims.
3. Unit Number Three:
    a. intervention;
    b. interpleader; and
    c. the class action.

§4.2: Unit One: Joinder of Claims and Parties

I. Joinder of Claims

A. Permissive Joinder of Claims: what claims may a party join in one action? Under the code system, and in a fair number of states today, a plaintiff is permitted to join any claim

that spring from the same transaction or occurrence or a series of related transactions or occurrences. So all you have to do on a law school exam is figure out whether or not the claims to be joined by the plaintiff come from a transaction or occurrence—an auto accident, a contract, a transaction with regard to a piece of property, a conspiracy, a pattern of discrimination—all would satisfy the transaction or occurrence test.

1. In federal practice, and in the practice of many states, joinder of claims by a plaintiff is very simple concept. Indeed the standard can be articulated in one word—ANY. In federal practice, a plaintiff may join *any* claims that he has against the defendant. In other words, anything goes. It is absolutely wide angle 360 degree permissive claim joinder, the claims don't have to have a transaction and occurrence relationship, the claims don't have to have the same substantive background, or even be related in any way.
2. So it is very interesting, if you claim joinder question on a federal court action, all you have to right is one sentence—in federal practice a plaintiff may join any claims he or she has against the defendant so joinder is proper. Once sentence is sufficient, if you write any more than that, you are wasting you time.
3. In a state based action on the exam, you have to do one the one hand, on the other hand method. If state X is a state that follows the federal rule on claimed joinder any claims may be joined by a plaintiff, and therefore joinder is proper. On the other hand if state X follows the more traditional rule of demanding that claims that claims be transactionally related to be joined, then on the facts on the problem given to me since all the claims come from a single auto accident (or whatever) the transaction and occurrence requirement is satisfied and joinder of claims is proper.
4. Now understand, that claim joinder is not a serious issue—it can be written up in one, two, or at the most three sentences. So claim joinder is never a full essay it is a paragraph at most. So if you see it on an exam, it is telling you the guts of the essay question really lies elsewhere.

II. Permissive Joinder of Parties

A. Two Part Test: the permissive party joinder is universal in the United States, all courts follow a two party test:

1. You can join any parties whose claims (plaintiff joinder) or whose potential liability (defendant joinder) stem from a transaction or occurrence or a series of related transactions or occurrences; AND
2. there is a common question of law OR fact that ties the parties together.

**[Transaction or Occurrence = T & O; Common Question = C.Q.]

*** T & O + C.Q. = permissive party joinder

B. Note: Now the truth is it is virtually guaranteed that if there is a single transaction or occurrence that ties the parties to be joinded together, you've also got the common question of law or fact.

1. Just think about it, you've got three cars in an accident and they all bounce off Paula the pedestrian (P), and P decides to sue all three drivers. Well obviously the crash is one transaction or occurrence and the question of whose fault it is, is a

common question tying everyone together. So there it is: T & O + C.Q. = permissive party joinder.

C. Note: permissive party joinder problems are not full essay questions, at most it's a paragraph. What you've got to do is tell the reader that you know that permissive joinder of parties requires T. & O. + C.Q. Then simply go to the facts of the exam and prove that you do have T. & O. + C.Q. and that can typically be done in one or two sentences, this is not hard, there is no reason why anyone should this up. EXCEPT if you don't keep claim joinder separate from permissive party joinder, you may be applying the wrong standard. But if you keep the standards straight it is easy.

**The honeymoon's over.

III. Compulsory Joinder of Parties

A. Analytical Framework: Compulsory joinder of parties is tough subject. It can be a full essay question. If the professor really wants to jam it to you, under compulsory joinder of parties it can be a 30-40 minute essay. You've got to think of compulsory joinder issues three different levels. It raises three analytical questions and you should go about by answering three questions:

1. **Question #1**: Who must be joinded? Who are, in the words of **Federal Rule 19(a),** *necessary parties*, or parties without whom the action should not proceed. Parties needed for a just adjudication, persons who should be joined if feasible.

a. **Federal Rule 19(a):** requires that people be joined if the outsider's absence from the case prevents complete relief from being given to those in the case; OR if the party on the outside will be prejudiced as a practical matter, his rights will be impaired or impeded, if you do not join him.

(i) Category 1 (people before the court and giving them effective relief): More simply, you've got two kinds of people, two kinds of situations, in which the joinder is necessary or desirable. First, you've got situations in which if you don't get the outsider in, you cannot grant complete relief to the parties who are in.

--Ex: if you have a contract, and you want specific performance of the contract, you really need all the parties to the contract. You've got 5 people to the contract and each is supposed to supply a performance, and you want specific performance. Unless you can get all five of them before the court, you are not going to get effective specific performance, similarly you're not going to get effective reformation of the contract.

--Ex: Similarly if you've got five owners of a piece of property and you're trying to subdivide it, or partition it, you really need all five co-owners. This is very common sensical.

(ii) Category 2 (the outsider who might be prejudiced): what were really saying is if this action goes forward without the outsider, then his rights will be prejudiced.

--Ex: In any case in which you are adjudicating the rights to a limited fund (an insurance policy), you've got four people before the court on a $100K policy, and a fifth person is not present. Those four people before the court may exhaust the insurance policy leaving nothing for the outsider. In the words of Federal Rule 19(a) that persons absence may as a *practical matter may impair or impede that persons ability to protect his interest.*

b. In both half's of Rule 19(a) you are trying to avoid prejudice; prejudice to the people actually in the court house, or prejudice to the person outside the courthouse.

** Your mindset should be that the outsider somebody you should join, mathematically that will be true. **Except** and here's a big trap for you, there is one kind of party who emotionally or instinctively you may think should be classified as a compulsory joinder party—someone without whom the action should not proceed. And that is a joint tortfeasor. Remember the three car accident with Paula pedestrian where she is hit, those are joint tortfeasors, A PLAINTIFF has always been given complete freedom to pick and choose among joint tortfeasors. Paula can sue the driver of one car only (probably because he is rich); and doesn't want to sue driver two because he is as poor as church mouse, it would be silly to sue him, and she doesn't want to sue driver three because he is her uncle Jake. That is all her choice.

G/R: Under the historic rule, the plaintiff some all of the joint tortfeasors, some of the joint tortfeasors, or only one of the joint tortfeasors. But absent a joint tortfeasor situation, your probabilistic mindset on a law school examination should be that the outsider should be joinded.

2. **Question #2**: Can you join the outsider? Why couldn't you get the outsider? You might not be able to get the outsider because in a federal court action the outsider would destroy complete diversity. Or you might not be able to get the outsider because you can't get personal jurisdiction over the outsider.

**Here's back door testing again, if you decided that there is a party who should be joined, who is subject to Rule 19(a), you must go on and analyze whether you can join them because you discover that you can't, you may discover that the reason this is a big fat essay is because the professor is backdoor testing you on subject matter jurisdiction and/or personal jurisdiction. And you've got to take that very seriously.

***That is what Question #2 is all about.

3. **Question #3:** (okay, I should join that outsider, he is an Rule 19(a) party, BUT because of subject matter jurisdiction or personal jurisdiction, I simply cannot join that outside party) What do you do now?

a. Historically, the answer was very simple, if there is an outsider whose presence is essential to the action, an outsider who is indispensable (the term used in the old days) to the action and you couldn't get that outsider, you had to dismiss the

action for want of an indispensable party. A vestige that practice is preserved in **Federal Rule 12(b)(7)**.

b. Today, the simple truth is that modern courts do not like to dismiss for want of an indispensable party. Why? Common sense, it means that nobody gets anything, if you have to dismiss that means nobody gets relief, if you have to dismiss and there is no place you can get the indispensable party and everybody else you've got a totally paralyzed stalemated situation. Therefore, modern courts are loath to declare the outsider indispensable, in the sense that it would require dismissal if you can't get that person.

(i) There are certain instances, particularly when you're trying to partition land, something like that, where you really do insist on the presence of every part owner of the property. But short of that what a court will do, is rather tough for first year students…(see (c)).

c. **Rule 19(b):** Rule 19(b) gives the court discretion to shape relief and do partial justice to the parties before the court (rather than dismissing for the lack of that indispensable party). In other words, to go forward and do the best job it can.

(i) Ex: in a case with an insurance policy, with four claimants in court and a fifth party that you can't get in. Rather than abandoning ship, what a judge can do, is say okay, lets try and figure out what that fifth claimants right is, is it 20% of the policy. If so, then the judge will protect that outsider by putting 20% of the policy in escrow and if he shows up, it's there. The judge will then only distribute 80% of the policy to the parties before the court. In other words, you do the best job you can.

**This is tough for fist years because to deal with it, you have got to sort of make it up, you have got to sort of fake it, but just show your professor that you understand that you do not have to dismiss for indispensability. You can shape relief and do the best job you can.

§4.3: Unit Two: counterclaims, cross-claims, and third party claims (impleader)

I. Counterclaims

A. Overview: this is a relatively easy trilogy, you have to know what the devices do, when there used, what the standards are, and at least for any question in a federal court context, you've got to look out for the possibility that your professor is testing you on supplemental jurisdiction.

B. Counterclaims: a counterclaim is claim back by the defendant across the "v." against the plaintiff. All systems permit counterclaims. Some systems, notably the federal courts but many state systems, draw a distinction between two types of counterclaims:

1. Compulsory Counterclaims: [**Rule 13(a)**]: a compulsory counterclaim must be asserted, if you do not assert it, you have waived it, you cannot assert it in a subsequent action. A compulsory counterclaim is a counterclaim that arises out of the transaction or occurrence that is the subject matter of the main claim or a related series of transactions and occurrences. The system says you must assert those and the reason why the system makes this form of assertion mandatory is

efficiency and economy. If the claim and counterclaim are in fact from the same transaction and occurrence then there is obviously an evidentiary overlap. It makes very good sense to try them together and therefore it makes very good sense to make the defendant assert the counterclaim.
2. Permissive Counterclaims: [**Rule 13(b)**] permissive means permissive, you may assert it, you don't have to assert it. Rule 13(b) defines permissive counterclaims literally as any counterclaim that is not a compulsory counterclaim.
3. You put permissive and compulsory together and you realize that a defendant may assert any claim he has against the plaintiff by way of counterclaim because permissive and compulsory counterclaims embrace everything a defendant may wish to shoot at a plaintiff.

C. Transaction and Occurrence Test: the federal courts have taken very common sense attitude and they basically say that we are not looking for some magic transaction or some magic occurrence, what we are looking for is a pretty good logical relationship between the claim and the counterclaim.

1. Ex: Two cars collide. Driver A is in the front car, Driver B is in the back car. Driver B gets out of his car and walks over to Driver A instantly after the collision and punches him in the nose and says "you stupid jackass, you must have loathsome social disease." So the question now is does the defendant's (Driver B) conduct create compulsory counterclaims in Driver A. Well quite clearly, when two cars collide the first drivers and the second driver's property damage and personal injury claims stemming from the collision all involve the same transaction and occurrence. So Rule 13(a) would say to driver A look if you think that it is the defendants, or Driver B's fault, that this accident occurred you must assert by way of compulsory counterclaim any personal injury or property damage claims you have arising out of collision. What about the battery, Driver B punched Driver A it is a different cause of action. You could say there was a moment in time that separated the collision and the battery. But it is a related series of transactions and occurrences. There is a logical relationship between the battery and the collision. So many courts would say that is a compulsory counterclaim too. And using exactly the same reasoning, many courts would say that the defamation, the accusation that driver A had a loathsome social disease, also has such a logical relationship with the collision that it is all compulsory.
**Keep in mind, that if you fail to assert a compulsory counterclaim you cannot bring that unasserted compulsory counterclaim, clearly you can't bring it in a separate action in the same federal court, and it is very clear you cannot bring that action in a different federal court, and is probably true that you cannot bring it as a separate action in a state court because the state court would probably give effect to the federal principle that the counterclaim is compulsory. There is a little doubt about that, there has never been a definitive ruling as to whether a state court should, or must, in effect grant comity to the compulsory counterclaim rule found in Federal Rule 13(a); some states will, certainly any state that has its own compulsory counterclaim rule is likely to give effect and say no you didn't assert it, you can't bring it now.

D. Diversity Actions: what if you have a diversity action and the compulsory counterclaim is for less then the jurisdictional amount? In other words, you couldn't bring the compulsory counterclaim as an independent separate action in a federal court because you would be thrown out for lack of subject matter jurisdiction, lack of jurisdictional amount. Well, here's were supplemental jurisdiction comes in, 28 U.S.C. §1367. This is a perfect supplemental jurisdiction instance. You've got a common nucleus of operative fact, you've got the same case or controversy, so there's not much doubt that a compulsory counterclaim can ride the jurisdictional coattails of the basic claim.

1. So that means if compulsory counterclaim lacks diversity of citizenship or lacks amount in controversy, it can still be brought under the courts supplemental jurisdiction.

II. Cross-claims

A. Cross-claims: a cross-claim is between co-parties. It is one plaintiff against another plaintiff, or it is one defendant against another defendant. Notice the cross-claim does not cross the original "v." It is a claim on the same side of the "v." This is found in **Federal Rule 13(g)** which says that one defendant may cross-claim against another defendant if there is a claim that arises out of the same transaction or occurrence or related transactions or occurrences.

1.Cross-claims are never compulsory, they are *all* permissive.

2. Cross-claims also take ancillary jurisdiction, now called supplemental jurisdiction. §1367 says if the cross-claim arises out of the same transaction and occurrence, it is part of that case and controversy and even if there is no diversity of citizenship or amount in controversy, it can ride the coattail of the base claim. Once you have original jurisdiction, cross-claims will take supplemental jurisdiction.

3. By the way (this is sort of an aside) lets suppose you're taking the exam and in the middle of the exam you draw a blank, you simply cannot remember what the standard is for something, you've got a choice: you can sit there a panic, sweat, strain, and try to remember getting increasing frustrated and burning up valuable time or you can guess. As anti-intellectual as it is, you should guess, you should get off the dime, you have to avoid stress and save time, SO GUESS. What do you guess? The best guess when you can't remember a standard for something in a civil procedure context today, is the standard of *transaction and occurrence*. That is no guarantee that you will be right, but probabilistically you have got a shot at it because these days most things in the civil procedure context are measured by the transaction and occurrence standard. So you boldly assert it and move on. Another good thing about doing the guess is if you state of calm and move ahead there is a very good chance the standard will click into you head and if you were right, fine, if you were wrong you can go back and fix it.

III. Third Party Claims (Impleader)

A. Third Party Claims: [**Rule 14 and particularly Rule 14(a)**]: the third party claim, or the impleader, is the action over contribution or indemnity—the action to pass the buck along.

1. Ex: Alicia Aardvark goes down to Macy's and she buys a new pair of PJs. Happy as a clam, Alicia takes her new PJs home, puts them on, she lights of up a cigarette and she literally "lights up" the PJs burst into flames. Scarping her charred remains up, Alicia brings a products liability suit against Macy's. The store, says "what the fuck? All we do is put these PJs on our shelves and sell them, we don't manufacture them." So the retailer (Macy's) brings a third party action over against the manufacturer Jansen. That is what Rule 14(a) permits—it is an action over. The store is saying "hey if we are liable to Alicia, you manufacturer are liable to us because it is you garment." Now the manufacturer, Jansen, says "hey, who us? All we do is cut the pretty cloth, stitch it up, and put it in a box." So it brings a fourth party action over against the fabric finisher. The fabric finisher says "hey, who us? All we do is put the pretty little multi-colored pattern on the fabric." It brings a fifth party action over against the gray goods manufacturer. The gray goods manufacturer says "hey, who us? All we did we was manufacturer the cloth." It brings a sixth party action over against the flame retardant chemical company. And so it goes in theory there is no limit on third party practice, you can go all the way back to the bowl weaval if you want.
2. The interesting and different thing about third party practice is that, unlike the counterclaim or the cross-claim, *you are adding a new party*. That is very important to realize because you've got to get personal jurisdiction over the third party defendant.
    a. This is yet another example of potential backdoor testing, where you're looking at a third party problem but the core of it is really can you get personal jurisdiction over against that third party defendant.
3. What if there is no diversity or no amount in controversy when you look at the third party unit, namely the original defendant who we now call the third-party plaintiff and the third party defendant? Well, this is supplemental jurisdiction, this is same case and controversy, although the action over isn't spoken of as a transaction and occurrence you understand in reality that is what a third party action is. So as between a third party plaintiff (the original defendant) and the third party defendant you can use supplemental jurisdiction AND if the third party defendant counterclaims back against the third party plaintiff, and it is a compulsory counterclaim (keep in mind permissive counterclaims are not transactionally related and therefore they do not fall within supplemental jurisdiction) but if the third party defendant compulsory counterclaims back against the third party plaintiff, there is supplemental jurisdiction.
**A good exercise is for you to draw all these possibilities and many others that he hasn't mentioned out on sheets of paper so that you can visualize how these things together.

B. **Federal Rule 14(a):** a further complication that ties to together your knowledge of third party practice and your knowledge of supplemental jurisdiction. Federal Rule 14(a)

says that once the defendant brings in a third party defendant, the original plaintiff can amend and assert a claim directly against the third party defendant.

1. What if there is no subject matter jurisdiction over that claim? This brings us to the Supreme Court decision in *Owen Equipment and Erection Co. v. Kroger*.

C. *Kroger* Case: (1) *Facts:* Mrs. Kroger's husband got zapped (killed) by a high-tension line. She as the executrix brings an action against the Omaha public power because it was their line which hit Mr. Kroger. Mrs. Kroger is from Iowa, Omaha public power is from Nebraska, so there is diversity. Omaha says hey wait a second, the reason Mr. Kroger got zapped was because there was a crane in the area which came into contact with the high tension line and that is what caused the death. So Omaha brings a third party action over against Owen Equipment and Erection company (Owen). Owen as far as anyone can tell is a Nebraska corporation. *Notice, this is a perfect illustration of supplemental jurisdiction—you've got an Iowan versus a Nebraskan (diversity) but then you've got a Nebraska third party plaintiff and a Nebraskan third party defendant (it is jurisdictionally improper) but it is supplemental jurisdiction under §1367. Mrs. Kroger now aware of the defendant Owen and its relation to the death of her husband exercises her right under Federal Rule 14(a) and amends and asserts a direct claim against Owen. Now a couple of funny things happen:

1. Omaha public power drops out of the case on summary judgment. So it is now Mrs. Kroger v. Owen. They go to trial and low and behold on the third day of trial Owen stands up and says excuse me "but were not from Nebraska were from Iowa." Which leaves a direct claim by Kroger, an Iowan, against a third party defendant, Owen, also from Iowa. Owen argues, no subject matter jurisdiction; Kroger argues ancillary jurisdiction.
2. **Holding:** the Supreme Court held no ancillary jurisdiction, what you've got is Iowa v. Iowa, and that is no good. Ancillary jurisdiction is only available for a defendant, like a counter or cross-claiming defendant or a defendant bringing in a third party defendant; but it can't be used by the original plaintiff.
3. **Policy:** if Mrs. Kroger had tried to sue Owen originally there would have been no complete diversity so the action would have been dismissed. And if you wouldn't allow Kroger directly, you shouldn't allow her to do it indirectly by virtue of the third party practice procedure (Rule 14(a)).
4. **Result:** the result in *Kroger* which prevents the original plaintiff from asserting supplement claims has been codified in the supplemental jurisdiction statute for diversity cases. §1367(b) says that in a diversity case there is *no* supplemental jurisdiction over claims *by plaintiffs*, that is *Kroger*, no supplemental jurisdiction by plaintiffs against people who are made parties under Rules 14 (third party practice); Rule 19 and 20 (basic joinder rules), and Rule 24 (intervention). Notice it does *NOT* include Rule 13 (counterclaim and cross-claim rule). *Kroger* is codified, an original plaintiff cannot use supplemental jurisdiction to bring in people by third party practice, by basic joinder, or by intervention.

**THIS IS A VERY TESTABLE SUBJECT.

D. Test Pointer: it is very important in multi-party situations, so you do not get confused to draw a picture of the litigation with the parties and many times that will clarify things.

All three of these things raise supplemental jurisdiction questions and that is why they are testable!

§4.3: Unit Three: Class Action, Interpleader, and Intervention

TAPE OUTLINE II

CLUSTER 4 (cont…)

§1: CLASS ACTIONS, INTERPLEADER, AND INTERVENTION

§1.1 Class Actions: the frontier of modern civil procedure.

I. Overview and Jurisdiction in Class Action

A. The modern class action is the lineal decedent of an old equity practice that goes way back to mid-evil England, known as the bill of peace. It is basically, an efficiency and economy device that tries to aggregate claims, so that you have representative suing on behalf of the entire group or class and you can adjudicate everyone's rights in one action against the defendant.

1. The modern class action can be a mega case (tobacco, agent orange, asbestos, etc…). Some of them have unbelievable dimensions. They are very controversial, some people love them, some people hate them, and we happen to be in era in which the federal courts are showing some distaste for them. Or at least for the larger less manageable class actions.

B. Things You have to Know About the Class Action: you have got to know about various pressure points within the class actions that raise problems:

1. Jurisdiction in class actions.

a. Federal Questions: If the class action is based on a federal question, like a securities class action, or a civil rights class action, or an antitrust class action, the *normal rule* about subject matter jurisdiction continues. No problem at all.

b. Diversity Questions: problems arise in diversity cases.

C. Diversity Jurisdiction in Class Actions: the class action is a representative action. The historical rule in a representative action is that you determine diversity, not by looked at the *represented*, except now by statute you do in actions involving executors, incompetents, or infants. But in a class action, which is in none of those cases, diversity is determined by looking SOLELY at the citizenship of the *representative*. That means you can have a huge class of millions coming for every State, and all you have to do as the plaintiff's attorney is pick a representative whose citizenship is diverse from the citizenship of the defendants. And that is what happens, and the issue becomes irrelevant.

1. Amount in Controversy: Not so, however, in terms of amount in controversy. The Supreme Court in two class actions, one named *Snyder v. Harris*, and the other named *Zahn v. International Paper* announced that in class actions you CANNOT aggregate the claims of the class members. Each and Every class member MUST have a claim in excess of $75,000. What that did, of course, is close the federal court house doors to small claim class actions and really limited

diversity based federal class actions to cases involving products liability, personal injury, mass disasters, and toxic torts—big claim class actions.

2. §1367: An interesting thing happened after the enactment of 28 U.S.C. §1367 (supplemental jurisdiction statute). If you look at the text of that statute its plain language indications that you can have pendant party jurisdiction. You can have supplemental jurisdiction by having one class member with a claim for more than $75K, and treating all of the other class members who might have claims for less than $75K as supplemental parties. The PLAIN LANGUAGE of the statute leads you to that conclusion. But that is precisely what the Supreme Court said you could not do in *Zahn v. International Paper*. And if you go to the legislative history of §1367 you discover that the people in Congress made it clear that there was no intention in enacting §1367 to overrule the decision against aggregation and against pendancy in *Zahn*.

a. This issue came to the 5th Circuit in a case called *Abbot Laboratories* and the court was trapped. Here's the language of the statute that says supplemental jurisdiction works, and here's the legislative history, which says supplemental jurisdiction does not work—*Zahn* lives. Well, curiously the court using a traditional rule of statutory construction, said we are governed by the language of the statute, not by some guess as to what the intent of the legislature was. So *Abbot Laboratories*, and a few other courts have now declared that the *Zahn* rule against supplemental jurisdiction is dead. And you can aggregate in a class action.

**LOOK AT *Abott Laboratories* case (Supreme Court) in supplement and SEE IF THAT IS STILL TRUE!

D. Personal Jurisdiction in Class Actions: Miller is not talking about the defendant; he is talking about the absent class members. Under classic due process notions, the rights and property of absent class members is in jeopardy in a class action. Here is a representative advancing their claims and if the representative loses, principles of *res judicata* and collateral estoppel mean that the absent class members are precluded from attempting to assert their own claims; in other words, their property rights are at stake and shouldn't they get due process protection.

1. *Phillips Petroleum Co. v. Shutts*: the argument was made that when you have a national class, people from all over the country, as in true in many classes, there must be personal jurisdiction over each member of the class. That means the standards of *International Shoe, Denckla, and Volkswagen* have to be satisfied. That would have cut the heart out of national class because you just won't have minimum contacts with the forum for people in a national class, they just will not have had contacts with the forum state. Well, the Supreme Court saw that and did not want to destroy the national class and held in *Shutts:*

a. **Holding:** Yes, absent class members are entitled due process, BUT since absent class members do not really have to appear, are not vulnerable for cost assessments, and they are not subject to discovery, they can get along with a different kind of due process protection. Not *International Shoe, Denckla, or Volkswagen* what they get is: (1) an adequate representative, that is constitutionally essential; (2) notice

[*Mullane*]; and (3) clearly they must given the right to opt-out—to say no no, I am going my own way, I'll get my own damn lawyer, or just forget about it.
b. The Court in *Shutts* said those are constitutional rights, but the Court limited its opinion to money or damage class actions and said we are not deciding these due process protections must also be given to class members in injunction class action or declaratory judgment class action.
c. Once you are past the jurisdiction questions, the biggest issue becomes should the action be certified as a class action.

II. Certifying the Class

A. Certifying the Class in a Class Action: there are number of prerequisites that must be met by the class in order to achieve certification. And certification has really become a big deal because it makes a world of difference if an action is a class action or an individual action—the stakes are just staggeringly different. So everybody takes the question of certification seriously.

B. Prerequisites for Certification: here are the prerequisites, some of them are implied as a common law matter, some of them are set out in Rule 23(a) and one is set out in Rule 23(b):

1. *The Class:* you have to have a class: it cannot be a wooly mammoth, you can't sue on behalf of all poor people, it has to be a class, it has to be all of the people who bought stock and were subjected to a fraud, all of the people who were hurt by an antitrust violation, all of the people who were hurt by a discrimination policy in a civil rights context—it is very common sensical.
2. *The plaintiff representative must be a member of the class.*
3. *Numerosity:* the class must be large; otherwise you do not get the cost benefit, the efficiency of aggregated adjudication, which justifies the use of a representative action. We in this country prize the right to an individual day in court. Well, you lose that in a class action, you only get a representative day in court. And before we do that, there must be the efficiency and the economy that comes from group adjudication. And that means a group of at least 40 or 50. Of course, many classes are in the millions.
4. *Commonality:* there must be a common question of law or fact that ties the class together. That too, is efficiency, try like things together, you have to commonality. For example, in a mass disaster, like an airplane crash there is common question of fault, in contract claim its breach, in the civil rights case it is discrimination. These days the common issue is typically obvious.
5. *Typicalality:* the class representative's claim must be typical of the claims of all the members of the class. That is a safety notion, you want the representative to be out of central casting, to be someone who looks like every other member of the class, someone whose claim is the same, not someone with a special claim or someone who is vulnerable to a special defense. Or someone who is litigating out of grudge, or for some reason other than the claim itself. That is typicality.

6. *Adequacy of Representation:* that is a due process requirement! That is not a piece of procedural trivia. If absent class members are being subjected to litigation that is binding on them in the *res judicata* sense then you want them adequately represented. Due process, that is what the Supreme Court said in *Shutts* and as a matter of fact, the Supreme Court said that 50 years earlier in a case called *Hansberry v. Lee*.

a. What is adequacy? It DOES NOT mean that the plaintiff himself has to be brilliant, rich, beautiful, that would be a denial of access. The truth is, in the modern class action the class representative, the party, is often figure head; often somebody that is not that bright, or that rich, or that pretty. What the Court relies on is the ADEQUACY OF THE LAWYERS because the court knows these are very often lawyer driven cases. So the court wants lawyers that are honorable, litigators, experienced in the class action; and especially in the class action. The courts are very rigorous about that in making sure that there is adequacy. Indeed, the principles are that the court is really acting as a fiduciary for the absent class members in assuring that the representation is adequate. And according to a very important federal appellate decision, it is not enough that the representative and the lawyer be adequate at the time of certification, the representative and the lawyer must remain adequate THROUGHOUT THE CASE or the court must take action. The court can give the inadequate lawyer a pep talk, tell him to shape up, the court can say hey hey hey get additional resources and lawyers to help you if the case is too big for you. Or the court can I am going to de-certify the case, I am not going to allow the rights of the absentees to be prejudiced by an inadequate representative.

7. *The action must fall within a category that is recognized as legitimate class actions:* here were talking, in the federal context, about Rule 23(b) which contains 3-classes of legitimate class actions:

a. Anti-Prejudice Device: it says if you don't proceed on a class basis you have got individual litigation, and sometimes you can get inconsistent results in individual litigation and if those inconsistent results would produce prejudice either to (a) class members, or (b) the party opposing the class, then it is legitimate to have a class action.

b. Injunction and Declaratory Judgment Cases: where everybody wants the same thing. This is the device, the Rule 23(b)(2) class action that is used in discrimination, environmental, prisoner cases because everybody wants the same thing. All the female employees want equal pay, all the Hispanics want certain educational rights, all of the people are together in seeking the injunction or declaratory remedy. This is the class action that is very powerful and has been extremely effective in achieving social therapeutics in the environment safety and discrimination fields. Now we come to the troublesome one…

c. The 23(b)(3) Class action: which is not a natural class and simply embraces a group of people who have been injured by a common practice and all want damages. It is frequently called the damage class action. The

23(b)(3) class action is the heart of the controversy over the modern class action. Here what you got is a class, an aggregation of people, who really have no prior association. They have been thrust together solely because they have been injured by a particular toxic substance, product, or in a disaster. This is were you get all of the class actions that have been in news—the TITTY (breast, and oh are they nice) implant class action, the agent orange class action, the Pan Am 103 class action, the tobacco class action. When the rulemakers were creating this class action as part of the 1966 revision of Rule 23 they realized this was new kid on the block and they hedged this class action in by a couple of prerequisites that do not apply to other class actions—predominance and superiority, which make the Rule 23(b)(3) class action more difficult to get certified than a Rule 23(b)(1) or (b)(2) class action.

i. Predominance: for example, for a Rule 23(b)(3) class to be certified, the court must find that the common issues *PREDOMINATE*. Earlier Miller said there must be commonality, every class action must have one reasonably significant common question of law or fact. In the Rule 23(b)(3) class action, that is not enough, in the Rule 23(b)(3) class action requires PREDOMINANCE of the common question. In other words, there is a real insistence that you get the efficiency and economy of group adjudication through the predominance requirement. It has been a very troublesome requirement to administer.

(A). What does predominance mean? Does it mean more than half the issues quantitatively, or more than half issues qualitatively; that is, in terms of importance or in terms of the amount of effort that has be expended in adjudicating those common questions. We can sort of make this judgment: if the liability issues are common, things like fault or causation, and ONLY the damage issues are individual, and damage issues, of course, are always individual, that is predominance. Some courts go further and say look, if there is a core of important common questions, that is enough. Other courts do not go that far and really do insist on very substantial amount of common questions before they are willing to conclude predominance.

ii. Superiority: Rule 23(b)(3) also requires that the class action form be superior; not simply that the common questions predominate, but that class action be superior. Superior to individual actions, in some famous cases the courts have not been willing to certify; saying individual actions are superior. That would be a case in which the individual damages are large, so that the individual plaintiffs could afford to bring individual actions. Or situations in which there had already been enough individual action so that was reasonable to conclude that people preferred to

do it on an individual basis. Sometimes superiority is not satisfied because the matter could referred to an administrative agency, or dealt with by legislation or by test cases.

iii. Rule 23(c)(2): these two requirements, predominance and superiority, act as great inhibitors on these Rule 23(b)(3) damage class actions. In addition, the Rule 23(b)(3) action permits each member of the class to decide for himself whether to opt out of the class and thereby go a separate way. In addition, because of the great delicacy and concern about the (b)(3) class action, Rule 23(c)(2) has a very special and demanding notice requirement. It says in a Rule 23(b)(3) class action the court must direct that each *reasonably identifiable member of the class be given the best notice practicable under the circumstances*, that sounds like *Mullane*, but the Rule goes on and says including individual notice to all members who can be identified with reasonable effort. That is super-*Mullane*, Mullane did not really demand anything more than what was reasonable under the circumstances. This rule demands what is reasonable under the circumstances *including* individual notice to all class members who can be identified with reasonable effort. That means if you have a very large class, the cost of giving notice, which must be borne by the class, can be hundreds of thousands of dollars. Some courts have experimented at the fringe of this rule with media notice, but that is not what the rule literally requires.

d. Now, the real frontier of these damages class actions are in the fields of products liability, mass disasters, and toxic torts. Because here you usually have national classes which means that you may have to apply under the *Erie doctrine* the substantive law of each and every state. Which, in effect, means that you have to form 50 different sub-classes of class members. You generally have difficult problems of general causation and individual causation. For example, in the breast implant case, or the agent orange case, did these substances cause the individual injuries claimed by each member of the class and at a more general level are these products capable of causing the kind injury claimed. These are difficult problems of proof, scientific proof, individual causation is a very complicated individual question and it is not surprising that many federal courts simply do not like these mass tort questions under Rule 23(b)(3). On the other hand, when you have a single event, like an airplane crash, were the causation is the absolutely common, and where there are no individual defenses to liability, that is a mass tort case that really cries out for class treatment, since you can get the incredibly efficient effect of a single adjudication of a situation that may involve hundreds or thousands of different plaintiffs.

C. Other Things to Know About the Class Action:

1. Keep in mind that a class action is binding on all members of the class who do not opt out;
2. there is a *res judicata* collateral estoppel effect to class actions;
3. decisions to settle class actions must be approved by the judge. In all litigation situations other than the class action the parties are free to settle case quietly secretly and the judge never interferes. The judge acts as a fiduciary for the absent class members and the adversarial system really breaks down when the parties agree to settle. Instead of being adversaries, they now have a common interest, in terminating the case. And in many instances there is a legitimate question of whether the settlement is fair and reasonable and adequate for each member of the class and with the absent members being absent somebody has to look out for their interests, due process demands it. That is why rulemakers wrote into the rule, and the counterpart State rules, a provision that says that there must be a determination and approval by the court that the settlement is fair, reasonable, and adequate. Very often these settlement dynamics require extensive hearings, expert proof, some judges will appoint representatives for the absent the class members to make sure their interests are protected. The federal rule requires that the class members get notice, it doesn't have to be individual notice, but the class is to be notified of the terms of the settlement and be given an opportunity to come in and object. The history of class actions has revealed many instances in which individual class members are unhappy with the proposed settlements and they come in and challenge and succeed. The judge refuses to approve the settlement. In recent years there have been a couple of very noteworthy cases, one involving the asbestos litigation, in which the appellate court has second guessed the trial court and said no the settlement is not fair, reasonable, and adequate—go back and do it again.
4. So you see the class action is really a microcosm of all the problems of contemporary litigation—problems of aggregation of claims, jurisdiction, fairness, and problems of whether the system can really afford to try and give effective relief to everybody in society. You know, some people believe the class action is not simply a procedural device to achieve economy and efficiency, some people believe the class action is really the only conceivable procedural device that enables people that have been injured in small ways, whether financially injured by a fraud or scam, or property injured in terms in of a product failing and not providing the quality of service it was designed to or actually injuring the plaintiffs. When the claims are small, no one can bring an individual claim for a few dollars, but when the claims aggregated you get an economically viable case. And that is what the class action is increasingly be used for, particularly at the State level, in the consumer environment. But many people say it is just not worth it, it is not worth energizing the complex procedural activity known as the class action. It is not worth devoting the judicial resources to a litigation situation that will only net individuals a few dollars. Some people are very angry at that, they say those are lawyer's cases, and don't belong in the courts. Well the obvious answer to that which is voiced by many people who are pro-plaintiff in their orientation or are interested in consumer rights say look, if a major economic entity or corporation has cheated a million people out of a dollar a piece, or ten

dollars a piece, or a hundred dollars a piece, that means that the corporation is getting away with ill gotten gains of a million or ten million dollars or 100 million dollars and it is proper for the judicial system to care about that and energize itself and that is what the class action is all about. Otherwise if you couldn't bring class actions for these small claims you basically be saying to these people go out and cheat as many people as you can for small amounts of money because there is no way you can be liable. So there is the nub of the modern controversy over the class action—is it worth it or not worth it to invest enormous resources, both human and judicial, in the vindication of these small violations of rights. Most people would say that in the federal question context where you are talking about securities policy, or discrimination policy, or consumer or antitrust policy because that is a matter of social therapeutics. But the doubts arise in diversity cases, where many people say look those cases are not worth bringing, or if you are going to bring them, bring them in State courts.

§1.2: INTERPLEADER

I. Interpleader Overview:

A. Overview: interpleader is an equity device which has roots way back in mid-evil times that has been with us for centuries. Its design is to protect people who have a piece of property; it could be a painting, bank deposit, a securities account, it could be clothes at dry cleaners. And they find that more than one person claims the property; in other words, they are being subjected to the risk of litigation eventually multiple liability.

B. Function: what interpleader does is allow the person that is holding the property, to go into a court and to deposit the property and say look, I have this property, I am custodian, I have this property, but I don't own it and I don't claim it. Jones, Smith, and Brown are claiming it and I'd like to deposit this property with you, here in court, and let Jones and Smith and Brown duke it out as to which one really owns it. Just let me get the hell out of here.

1. That is interpleader; in effect, the stakeholder (the person holding the property) deposits the property in court, and then interpleads (gathers together all of the claimants) and at the second stage of interpleader it is the claimants that litigate among themselves as to whose property is it. The stakeholder typically disappears.

a. There are situations, and it is perfectly legitimate, in which the stakeholder is also a claimant. Also says the property is mine. It is perfectly legitimate for the stakeholder to become a claimant.

b. Sometimes you get interpleader *defensively*; in other words, one of the claimants actually goes out and sues the stakeholder, and it is at this point that the stakeholder says defensively, let me deposit it in court and lets interplead the other claimants so that I am not hit with multiple liability.

C. Federal Interpleader: you should know that on the federal side, that there is interpleader under **Rule 22**, sort of quaintly called "Rule Interpleader" and there is interpleader under a federal interpleader under a statute which has unique characteristics:

1. the stake need only be $500 in amount, whereas most Rule interpleader cases diversity cases and the stake has to exceed $75K;
2. also in statutory interpleader under 28 U.S.C. § 1357 there is nationwide process and if it is diversity based, you need only have minimal diversity—diversity between two of people. You don't have to have complete diversity as you must have Rule interpleader because that is what Congress provided for in the interpleader statute.
3. Obviously interpleader is only effective if the court is able get all the claimants before it to determine who owns the stake and particularly in the context of Rule interpleader that means you have to have personal jurisdiction over all the claimants. That is another context in which you could get back door testing on an interpleader question which is really a personal jurisdiction question.
4. As Miller said a minute ago, you have national service of process, so personal jurisdiction is less of a problem. But if one of the claimants in either Rule or Statutory interpleader is in a foreign country the problem compounds itself.

§1.3: INTERVENTION

I. Overview

A. Generally: systems permit the outsider to drop in, to parachute in. It is almost as if the outsider has a death wish. Why would any sane person want to get involved in litigation. Well, you know the answer to that you dumb jackass:

1. In many instances the outsider wants to intervene because its rights are in jeopardy. Something it claims is in litigation, property it thinks its owns is litigation, and it demands the right to intervene.
2. Most systems have to forms of intervention, and you see this quite clearly in federal Rule 24.

B. **Federal Rule 24:** first there is intervention of right, and then there is permissive intervention.

1. Intervention of Right: that means that the intervenor has automatic uncontestable right to enter the case. Rule 24 says you can have intervention of right when a federal statute says so. Or you can have intervention of right when the lawsuit is about an interest or property and the disposition of the action: (a) as practical matter impairs or impedes the intervenor's ability to protect himself.
2. Permissive Intervention: is a matter for judicial discretion. It is permitted when a federal statute provides a conditional right to intervene or when the intervenor's claim or defense has a common question of law or fact with the rest of the case. This is a matter of judicial discretion, courts are not going to allow intervention if they think the intervenor is just going to muck up and complicate the case in a way that is counterproductive. There is no ancillary jurisdiction on behalf of, and by that Miller means there is no supplemental jurisdiction under §1367, for

permissive intervention. There is probably is for some forms of intervention as of right.

CLUSTER #5: DISCOVERY

§2.1: Discovery Overview

I. Testable Discovery Matters and Overview

A. Testable Material: what is there that is testable about discovery in a first year course?

1. What is discovery; in other words, an essay question that involves the scope of discovery.
2. You could get a question that really forces you to tell your Prof what is you know about a particular discovery device, sometimes that almost takes the form of an essay question, rather than problem-solving question.
3. You could get a question about the so-called work product doctrine, which many people know under the name of the great Supreme Court case which gave rise to it—*Hickman v. Taylor*.
4. Finally, if your Prof is federal rule oriented (like ours is) you could get a question that causes you tell the Prof what is you know about the 1993 amendments to the discovery rules. In 1993, some fundamental changes to discovery were made and it is reasonable thing to test on.

**Keep in mind that discovery is very practicable subject, and that in reality, in modern litigation discovery is the absolute centerpiece of litigation. But we are involved in a procedure course, not a trial course, so you have to ask yourself: What is it that your Prof actually taught you? Some Profs teach discovery in a very generalized and conceptual level; in other words, those not are Profs which require to memorize Federal Rules 26-37 (the discovery rules). Other Profs are at the end of the spectrum and spend a great deal class time on discovery—tactics and strategies. If that is your prof then you are advised to spend a fair amount of time getting familiar and cozy with the discovery rules. Most profs are in the former category in the former category than the latter category (and I think Selig is too).

§2.2: Scope of Discovery

I. Scope of Discovery

A. What is it that is Discoverable? An Overview: The codes imposed very significant limitations on the scope of discovery. Discovery as we know it today under the federal rules really came in with the federal rules. Various states restricted discovery to issues on which you had the burden of persuasion, you could not discover, if you were a plaintiff, anything relating to the defenses interposed by the defendant because the defendant had the burden of persuasion that. Some States restricted discovery to matters that were admissible in evidence and you couldn't get answers to questions that involved hearsay or a violation of the best evidence rule. Some States restricted discovery to issues formed

in the pleadings, and that was okay in a fact pleading environment, but as we learned when we discussed pleadings, the federal rules don't have fact pleadings and the federal rules don't seek to formulate issues in the pleadings.

B. Discovery under the Federal Rules: when the federal rules were formulated the drafters had to come up with a completely different philosophy of discovery. They decided to go to wide-angle discovery. Since the pleadings did not reveal the facts or formulate the issues the federal rules of discovery had to bear that burden. And of course, the FRCP come out of an era that really reflected a liberal permissive attitude towards litigation. A desire to giver everybody access to the court system, give everybody a full day in court, and to try like HELL to decide cases on their merits. And in that environment, and that is not the environment we live in today where court congestion is so great and people deplore the litigation explosion and the over lawyering of our society. In that environment though, there was a cardinal basic philosophical principle that underlies of all the discovery rules and that is:

1. Since we are trying to get at the truth you must give every litigant equal access to *all relevant data*. Indeed, that is the principle of the federal discovery rules. It is American as apple pie, you can't quarrel with a system that tries to give equality of information opportunity.
2. Nothing makes this point more clearly than the provision in **Rule 26(b)(1)** which defines the scope of discovery.

C. Scope of Discovery: **Rule 26(b)(1)**: defines the scope of discovery and the scope of discovery is that you may get *anything that is not privileged* that is relevant to the subject matter of the action. That is a very broad embracive standard. Notice there is no burden of persuasion limitation, there is no issue formulated in the pleadings limitation, there is no admissibility limitation.

1. Indeed, the last sentence of Rule 26(b)(1) says "the information sought need not be admissible at trial as long as it is *reasonably calculated* to lead to the discovery of admissible evidence." In other words, admissibility is not required, but you can't go fishing either, it has got to be information that's reasonably calculated to lead to the discovery of admissible evidence.
2. Well, the truth is, that virtually everything is discoverable. And that would lead you to think that on a law school examination question your mind set should whatever it is that is presented in my exam question I should error on the side of saying that it is discoverable. That is a natural tendency and it comports with reality BUT the reality of examination is the more interesting examination questions on the scope of discovery really are questions that test your knowledge of what IS NOT DISCOVERABLE.
3. Example: lets suppose that you have a normal civil action in progress. The plaintiff is deposing the defendant in a tort action and the plaintiff asks the defendant all sorts of questions relating to the accident and the repair of the defendant's car, and all of that. And then suddenly the plaintiff begins asking the defendant this line of questioning—Ms. Defendant do you own your own home? Objection. Do you have a securities account? Objection. Do you have any debts? Objection. How much money do you have in your bank account? Objection.

Your supposed to rule, that is what the question is—write the court's result in an opinion.

a. Alright, lets look at that, what is it that plaintiff is trying to get at? Obviously the plaintiff is trying to determine what assets the defendant has. Why? Well, there is no sense litigating your brains out and then discovering after you have won that the defendant is a dead beat. A plaintiff wants to know what the resource or net asset situation of the defendant is. That is strategically important, it tells you hard to fight and when to settle. So it is something that seems quite relevant to the subject matter of the action. But what is the subject matter of the action? Miller has hypothesized an automobile case. What is relevant to the action is fault, who caused the action, contributory fault, defensive matters like the last clear chance doctrine and damages. Are questions directed towards the defendant's assets in any way relevant to any of those issues, Miller thinks the answer is quite clearly NO. Moreover, remember the language of that last sentence in Rule 26(b)(1)—that matter that is being inquired into must be reasonably calculated to lead to the discovery of admissible evidence, questions about the defendant's assets under no stretch of the imagination could lead to admissible evidence. The defendant's net worth is simply irrelevant for trial purposes. So, in spite of the practical significance of knowing the defendant's net worth, its value for appraising settlement, it simply is not discoverable, it is beyond the scope of discovery as described in Rule 26(b)(1).

b. But watch its, questions on the scope of discovery are very contextual. And therefore you have to be careful and understand exactly what it is the professor is asking you. For example, Miller can take exactly the same situation and change one little fact and it will change everything. Let's suppose the plaintiff is asking for punitive damages. Well, punitive damages require knowing the defendant's capacity to pay them. You're not going to impose the same amount of punitive damages on Joe Dead Beat as you are, for example, on the Exxon Corporation. That is why in the Exxon Valdez case they assessed $5 billion dollars—they can pay that. So if the defendant's financial status and the capability of paying punitive damages is relevant and an issue in the case that means it is now perfectly legitimate to ask the defendant was his, her, or its net worth is. All of those questions in the hypo are now perfectly legitimate because they bear on the issue of punitive damages and would lead to admissible evidence.

i. By way of an aside, in many instances punitive damages are alleged not because the plaintiff thinks they are recoverable but in an attempt birth of discovery. Understanding that the defendant naturally goes out and tries to get the punitive damage allegation dismissed.

D. <u>More Scope of Discovery:</u> Now, having said that the scope of discovery is very broad, you have to keep in mind that in some situations allowing broad discovery can be very damaging.

1. Example: in a dispute between businesses that are in competition, if the court is not careful one side can rip off a lot of valuable commercial data from the other side, trade secrets, formulas, customer lists, methods of operation. In personal or individual litigation you have to concerned about rights of privacy, you don't want to allow one side to invade the privacy of the other side absolutely cavalierly and destructively.
2. As a result, the trial judge, no matter how broad the scope of discovery provision may be the trial judge has enormous discretion to issue protective orders.
3. Protective Orders: to say in an economic dispute between competitors, look you've got to bring the material to me to see if it is potentially damaging and if I give it to you got to promise that the only use the information will be put is this litigation. You can't turn it over to the marketing or manufacturing department, the sole purpose of the discovery is to adjudicate this dispute, not to destroy a competitor, not to destroy a human being by invading the privacy. This power to issue protective orders is very important.

a. The protective order provision can limit the scope of discovery, it can limit the utilization of the discovery yield, it can protect someone who is being subjected to an unduly long deposition, or unduly extensive document discovery, so in writing up a procedure discovery question always keep in the back of you mind, whether you're allowing the discovery, or not, there is always the protective order to even things out and avoid alterior motivation and improper utilization of the discovery process.

§2.2: Discovery Devices

I. Discovery Devices

A. Possible Exam Question: the second type of question you may get is really almost an arts and crafts question. It is question that says to you hey what do you know about one of the discovery devices. Remember there are several discovery devices:

1. oral depositions,
2. depositions on written questions,
3. there are interrogatories (which can generally only be used when they are directed at an adverse party),
4. there is document discovery,
5. there is tangible things discovery (in which one side is literally permitted to go in and look at the files, machinery, or manufacturing plant of the opposition) it is very powerful along with tangible thing discovery and it can drive an opponent absolutely wild,
6. In addition there is discovery by way of medical examination, physical or psychiatric examination, and
7. lastly there is request for admission. That is a situation in which you think something is so clear that the other side cannot in good faith deny it. So you ask the other side to admit it. And if it is admitted, it is out of the case, you don't

have to prove it. And if it is improperly denied, the party that issues the improper denial can be subjected to sanctions for failure to, or refusal to, admit.

a. Now the exam can come as to any one of these discovery devices. The two most important discovery devices are oral depositions and document discovery. But the truth is that the mathematics suggest that if you are going to be tested about one of the discovery devices it may be the physical or mental examination rule which in federal practice is found in Rule 35. It is not because it is the most important discovery device, far from it, but it is because it is the most testable discovery device. It has requirements for its utilization that do not exist in the context of the other discovery devices.

B. **Rule 35:** the physical and mental examination rule. Number one it requires a motion. The other discovery devices operate basically on notice.

1. But for a physical or mental examination you need (a) a notice, (b) a motion, and (c) a court order. Unless everybody stipulates to the examination.

a. This obviously recognizes the fact that you are dealing with something, a physical or mental exam, that is inherently intrusive. It sort of goes against the very basic notions of personal privacy.

b. This is an involuntary medical procedure, so you need that motion and you must show if you are trying to get the examination *good cause*.

2. *Good Cause:* you have got to show that you need it, you have got to show that you don't have the information, you can't get the information in any way other than examination—good cause. You've got show; also, that the opponent's medical condition is *in controversy*.

3. *In Controversy:* you can't just say I want a medical examination of my opponent, you have got to show, as you can show quite easily, in a personal injury case, that the extent of the physical injuries to the plaintiff's are in controversy.

4. Finally, the medical exam is limited to a *party* or someone in privity or under the legal control of a party. You cannot get a physical exam in federal practice, you can in some States, but not in federal practice of a witness. In other words, even though the whole case will turn on the testimony of an alleged eyewitness. If that eyewitness is not a party to the action you cannot say that I want that person subjected to an eye exam, you have got to establish the sight capability of the witness in other ways.

a. Again, limiting the physical exam to a party, someone in privity with the party or under the legal control of a party, means that we do believe in a right of privacy is this country. We are just not going to subject people who do not have that kind of nexus to the litigation to a physical examination.

b. It means an employee is not subject to physical exams, you've really got to be someone who is under the legal control a party. Now that may be an infirm person, an incompetent, or an infant. And some people think the application of the physical exam rule in those contexts actually violates the constitution.

5. **All of that put together makes a very nice little essay question. Of all the federal rules the one that comes to mind as being most vulnerable to a rules enabling act challenge is the physical exam rule.

a. In fact, the rule was twice challenged and the Supreme Court has upheld the validity of the rule. Despite its intrusiveness the notion is that it is a legitimate rule of civil procedure.

b. Just by way of aside, both of those cases preceded the Courts decision in *Roe v. Wade* and the *Cruzan* case. The right of privacy was given constitutional stature in the abortion and right to die context. Well, a physical exam is an invasion of the body. Now Miller thinks the rule will pass muster but it is quite possible that that is a good exam question.

6. Now, saying what Miller has said about questions involving discovery devices here's the best strategy to follow: if your Prof was discovery maniac then you better pay very close attention to the discovery rules, if your Prof however spent three to six class sessions on discovery then Miller thinks it is sufficient for you to read the discovery rules once, or twice, maybe three times.

a. Read some secondary material like a treatise discussion of the of the discovery rules and sort of get the basics. Know what a oral deposition is. Know that it operates on notice that is done under oath that if the deponent is non-party witness that you need subpoena.

b. Get some sense of document discovery, its extensiveness, and the fact that there is a lot of game playing as to who is going to call the documents, and who is going to decide which documents are relevant in terms of the document request which has to specify the documents that are produced and the possibility that the party who is being asked to produce can exercise the right to say here are the keys to my record room, go fish, go find what you want.

c. In other words, know a little bit about each of the discovery devices, but again Miller says he thinks that the favorite is physical and mental examination.

d. Just don't be a lazy fuck is what he is basically saying.

§ 2.3: Work Product Doctrine

I. *Hickman v. Taylor*

A. Overview: the Supreme Court's decision in *Hickman*, one of the great Supreme Court decisions of this century (if you're into that kind of shit), a decision that is basically codified now in **Rule 26(b)(3)**. The *Hickman* rule is to be found in Rule 26(b)(3).

B. The Trial Preparation, or Work Product, or *Hickman* Principal: can be stated very easily:

1. Under the federal rules and under the rules of just about all States: any materials prepared *in anticipation* of litigation are qualifiedly immune from discovery.

2. That means materials prepared in anticipation of litigation. That does not mean normal business records, it means interviews or documents or reports that are generated with an eye towards litigation.

a. A good benchmark is that cause of action has accrued and you've got an investigator or you've got someone preparing an accident report.

b. It has got to be something produced in anticipation of litigation. It does NOT who did it. It can be something generated by the lawyer, by the party, or by an employee of the party. NO MATTER who produced it, if it is produced in anticipation of litigation it is called work product or trial preparation or *Hickman* material.

3. *Qualified Immunity:* notice that Miller used the word qualifiedly immune. He is being prissy, humor him. Work product is NOT a privilege, privilege means attorney-client; priest-penitent; doctor-patient; executive privilege; spousal privilege; these are broad societal judgments that certain communications, certain relationships, are sacrosanct and in order to promote to communications within the relationship it is important to make those communications privileged and nothing can compel disclosure. Whether you're talking litigation or non-litigation.

a. Qualified immunity is something unique to the litigation system. Lets back up for a minute, remember Miller said that equal access to all relevant data is the basic principle/rule of discovery. Work product is a violation of that rule. It seeks to deny access to relevant data. The courts do that because they recognize that they want each side to do its own preparatory work. They don't like parasites, we want people to do their own work, that is the professional way to do it. Also if you didn't have the qualified immunity of work product, if you knew your opponent could rip you off, you might be discouraged from using the discovery procedures and that is very counterproductive. We want people to be prepared and keep records in files and if you didn't have work product people might not do it, it would destroy the basic fabric of discovery regime. That is why we got it.

4. However, there are many instances in which you have a true blue discovering party who is not a parasite or leech, and he just can't get access to the data, it just doesn't exist. In situation like that, the basic principle of discovery, equal access to all relevant data, trumps the work product doctrine. And the court says look, it is only a qualified immunity and qualification is overpowered if the discovering party can't get access to the information, it is unavailable.

a. When might that be? Use your common sense, you dumb fucker, remember you had a lot of common sense before you came to law school, don't let them drive it out of you. If the witness is dead, well it is unavailable, if the witness is beyond the jurisdiction, if the witness has forgotten, is old, hostile, those are situations in which the discovering party does not have access work product immunity becomes irrelevant and the basic principle of equal access to all relevant data must be honored.

b. Having said that you should know that there is a certain category of information that really is close to being absolutely immune from

discovery. And it all involves LAWYER WORK, it is the lawyers mental impressions, strategy and tactics and opinions. We don't like one lawyer trying to crawl inside of the head of another lawyer. If you could do that, you would depose lawyers, you would covert the lawyer who is an advocate into a witness and that sort of breaks the back of the adversary model and puts the lawyer in a position in which he or she may have to say something that is not in the best interests of the client. Which means that if you didn't make the lawyer's mental impressions really immune from discovery, you might do a lot damage to the attorney client relationship. That is really what was decided in *Hickman*.

c. The critical opinion in the *Hickman* case is really Justice Jackson's concurrence which is an essay about the adversary system. It is more import in many than the Court's opinion written by Justice Murphy.

d. In many instances there are documents in the file that are a mixture of work product and fact. Nothing in the work product doctrine is intended to hide facts. So what generally happens is that if one lawyer asks the other one for documents and the response is that is loaded with work product, then the document is handed to the judge and the judge will vet it and cut out what is work product and hand over what it left.

5. That is the work product doctrine and Miller really thinks that is a real live possibility for a law school exam.

§2.4: 1993 Amendments to the Discovery Rules

I. Overview

A. Generally: discovery is very controversial, there is a feeling that there is hyper activity, harassment, and games that are played as part of the discovery process. In order to contain discovery, in order to avoid it being used as weapon, rather than as it was intended to be used, as a way of leveling the information playing field. The people who revised the federal rules have been trying to change the discovery regime. And the discovery rules have amended several times in recent years, the most dramatic coming in 1993.

B. 1993 Amendments: for example, in 1993, a limitation was put on the number of depositions you could conduct (10, I think, double check). Beyond that you had to get court approval. Now obviously in a complex case the court is going to grant that request.

1. Similarly, the number of interrogatories you could ask you opponent was limited to 25. Beyond that you had to get court approval. Interrogatories are a very nasty business, questions are easy to ask and hard to answer. Interrogatory practice is very labor intensive.

2. **Rule 26(a):** In what is probably the most controversial aspect of 1993 amendments, it is found in Federal Rule 26(a) a whole new device was created. Mandatory disclosure at the beginning of the case, each party is required *automatically without request*, to make certain disclosures to the other side.

a. Miller's own judgment on this is that these things are not terribly onerous, they involve matters that would almost invariably be asked in depositions, document discovery, and interrogatories anyway. The rule makes it automatic, you must comply, you must give this up before you are permitted to use any of the other discovery devices.
b. For example, the rule requires you to give the name, address, and phone number of every person you know of who is likely to have discoverable information relevant to the case.
i. You've got to give up copies or at least inform you opponent of the location of documents, data compilations, and tangible things, of anything that is relevant to an issue in the case.
ii. You've got to give your opponent, if you're a plaintiff, the theory by which you compute your damages.
iii. And you've got to give up an relevant insurance policy.
iv. You've also got to disclose more and more about the experts that you might use at trial. Indeed, the new rule provides that experts are now subject to being deposed by the opposing parties. Let's face it modern practice expert testimony is something that is very common and important. And the 1993 Amendments rationalize the practice with regard to discovery of experts and what it is they are going to say at trial.
c. **Rule 26(a)(3):** in the same vein the rule also in Rule 26(a)(3) that you disclosure to you opponent the names of the potential witnesses, and the documents you intend to use at trial.
d. Now, overarching all of this, is the fact that modern litigation is under the management of the judge in a way that was unheard of 20-years ago. We now even call them management judges.

3. **Rule 16:** Pretrial Management: the way discovery operates in modern litigation, particularly complex litigation, is under schedules, plans, programs, and sequences ordered by the judge in a series of pretrial conferences under Rule 16.
a. The design of course is to make sure there is little or no game playing, to make sure everything is put on schedule, that is everything is done fairly. The modern litigation judge is really a manager as much as he or she is an adjudicator.

CLUSTER 6: SUMMARY JUDGMENT

§3.1: Summary Judgment

I. Rule 56: Adjudication without Trial

A. Generally: the first thing that you have to learn about summary judgment or adjudication without trial is that it is filtration device. The purpose of the summary judgment is to filter out those cases that are trial worthy and allow them to go to trial. And those cases that are trial worthless, they are siphoned off, taken off the court's docket, adjudicated on summary judgment and disposed of.

1. The summary judgment motion literally asks the case or you trial worthy or trial worthless, and if you're worthless you are siphoned off and disposed of you outside of court.
2. That raises the question, what is trial worthy and what is trial worthless?

B. Judgment as a Matter of Law: Why do we have trials? To resolve disputed questions of fact, and that is the only reason. We don't need a trial if there are no disputes about facts. If there are no disputes about facts, then the judge can resolve the case as a matter of law. That is why every summary judgment rule has the same standard.

C. Standards for Summary Judgment: the moving party is entitled to summary judgment if he can show there is *no genuine issue of material fact.* Something that matters, because if there is no genuine issue of material fact, you don't need a trial. The judge can decide the case as a matter of law, and terminate it short of trial and that is the purpose of the of the summary judgment motion. That is probably the single most important thing to understand about this procedural device.

1. When thinking about summary judgment always keep in mind that it is an extremely draconian motion. If the motion is granted, judgment is entered. That ends the case. That means the losing party on the motion never gets to trial and never gets before the jury. Therefore, the system tries to be extremely sensitive about the right to trial, the so-called day in court which is so much a part of American due process, and the right to trial by jury which is also guaranteed by the Constitution.
2. In order to be sensitive to these two great rights, over the centuries the judges have engaged in what is called a bend of backwards practice. They bend over backwards in favor of the non-moving party because that the party whose rights and trial rights are in jeopardy. The bend over backwards rule means that there is an extremely heavy burden of persuasion on the moving party. It means that the judge draws *all inferences* in favor of the non-moving party. Resolves all questions in his head about the credibility of the affidavits or the depositions or the documents in favor of the non-moving party. That is designed to make sure that you don't have a premature entry of summary judgment.
3. Always keep in mind the one thing a judge does NOT do on a summary judgment motion is resolve any question of fact. Indeed, in thinking about the summary judgment motion you should realize that the mission of the judge is to ascertain whether there is an issue of fact—that is what the rule says, is there genuine issue of material fact.
4. Once the judge determines that there is an issue of fact that is worthy of trial that is it. That means the motion must be denied.
5. It is very common in examining first year students in civil procedure to present a fact pattern on the exam question that seems to cry out for summary judgment and unless you are very careful and look at it, you may miss the fact that there really is something in the nature of a trialable issue of fact.
    a. Example: the plaintiff gets his ass ran over on a cross walk and sues the driver of the car. There's a lot of pretrial discovery and then the plaintiff moves for summary judgment. The plaintiff accompanies the summary

judgment motion with the depositions of 25 priests, rabbis, nuns, and ministers and they all say the same thing [this could very well be in violation of the new amendment which limits the number of depositions you can take, but I said that, not Miller]—they say we saw the defendant driving at least 90 miles per hour, through a red light, in this hospital cross walk, he was really fucked up, that is, dead drunk, he was steering the car with his feet, smoking a joint, with the lights out and he was sitting in the back seat. The defendant simply introduces the affidavit of a nearsighted wino who happened to see the accident. The wino says "I saw the defendant driving through the intersection with all deliberate speed." In that case, the plaintiff will win, but the point is that you have an issue of fact. You've got an issue of credibility. There is a trialable issue of fact there, and at least conceptually, theoretically, the motion should denied.

i. Now that was rock-solid until 1984 when the Supreme Court decided three cases, all of which involve the summary judgment and are probably in your casebook.

D. *Katricht, Anderson, Motsusheeta Cases:* the net effect of these three cases was to breath enormous new life into the summary judgment motion. The Supreme Court said, at least to all the federal courts, look the summary judgment motion is an important, valuable procedure and do not give it short shrift and make sure that it works.

1. What has happened since 1984 is that the federal courts have been MUCH more willing to grant summary judgment motions. Part of that is influence of the three cases and part of it is the increasing conservatism of the federal bench throughout the 1980s and early 1990s.

a. At this point in time there are many people who believe that judges very quietly under the guise of these three decisions really are making judgments that certain issues are not reasonable for the jury when at an earlier time those cases may have gone to the jury.

2. Another important aspect of the 1984 trilogy is a philosophical or conceptual one. The Court made it very clear that when a judge sits on a summary judgment motion the judges is to conceptualize himself as being at trial. And to ask, if this was the evidence at trial, would I grant a directed verdict motion, which is now called the judgment as a matter of law. Although the judge is sitting in a summary judgment, the test is EXACTLY the same.

a. This is a very important insight. The summary judgment motion is exactly the same as the directed verdict motion, it is just that the occur at different moments in time—one is pretrial one is in effect post trial. The standards are verbalized differently, but essentially what the judge is saying is that I am going to look at all the evidence, in the light most favorable to the non-moving party. I'm only going to look at admissible evidence, and that is true on the summary judgment motion, never forget that depositions and documents and interrogatories might bring in a lot of information that is not admissible at trial when the judge sits on summary judgment the judge only looks at the portion of the discovery product that IS admissible at trial.

b. So the judge says would I take this away from the jury if we were at trial, would I grant a directed verdict motion? And that is another way of saying there is no genuine issue of material fact. If I take it away from the jury, if I grant a directed verdict that is like saying there is no reasonable way a jury could find for the non-moving party, that means there is no genuine issue of material fact. And that means I should grant summary judgment. Again, summary judgment, directed verdict motion, really the same motion.

E. Other Things to Know about Summary Judgment: it is a good idea to get into your head the contexts in which the motion is most likely to be granted. There are three contexts really, and this will help you spot it in the fact pattern of an exam question:

1. Summary judgment is appropriate when you look at all the material presented on the motion and you realize that the plaintiff's case has no legal basis. There is simply is no legal basis for the claim, it is not a recognized wrong.
    a. Ex: The defendant gave me a dirty look and maybe affidavits and the depositions show that there is a fact disagreement about whether the defendant gave the dirty look, maybe the material on the motion show that the defendant, that fucking asshole, did in fact give the plaintiff the dirtiest look known to human kind. Well, tough shit, the fact remains there is no such thing as a dirty look tort. Therefore summary judgment granted.
2. Summary judgment is appropriate when all the material on the motion sings the same song. All the witness depose the same way, all the documents are consistent. In that situation there is nothing trialable. No reasonable jury could disagree with what everybody says, and what all the documents say. So there not being a genuine issue of material fact, summary judgment should be granted.
3. Summary judgment is appropriate when the summary judgment material may look very favorable for the plaintiff, the problem is that summary judgment material also demonstrates an ironclad defense, like the statute of limitations or *res judicata*. No matter what else is on the table before the judge, the fact remains, that there is no genuine issue of material fact, the case should be resolved on the motion because the defense stops it.

F. A Final Point: don't forget it is a motion that is addressed to the discretion of the court. There are instances in which the display on the motion seems to be very powerful for the moving party and something is nagging at the judge in a better safe than sorry sort of frame of mind, might say in exercising my discretion I am going to deny the motion. Now, when might the judge do that, and this might come up on the fact pattern of an exam question. There really are four situations that you should be looking for on the exam for a discretionary outlet:

1. Is a situation in which the moving party puts in very powerful depositions or affidavits but there just seems to be something fishy about it. All of the deponents or affiants are blood relatives or employees of the moving party, or the depositions were given by someone convicted of perjury. In a situation of that kind, motion denied.

2. Courts exercise this negative discretion very often when there are issues of credibility in a jury trialable case the judge says lets get the trier of fact to look at the credibility question. That is why summary judgment is more likely to be denied in a tort case, than it is in property or contract case. The more the case documentary the more subject it is to summary judgment; whereas, the more a case depends on eye witness type testimony the more likelihood there is credibility type issues that should be left for the jury.
3. A court will rarely grant a motion for summary judgment in favor of the party with the ultimate burden of persuasion at trail. A jury is free to disbelieve, and if a jury disbelieves the witnesses of the party with the burden of persuasion, that means that the other party wins. So when the party with burden moves for summary judgment it is just less likely to be granted.
4. A court may exercise discretion and deny summary judgment when there is a gap in the material presented on the motion.
    a. Ex: there is auto accident and there were three witnesses and on the motion for summary judgment only two of the three witness are presented. A court is quite likely to say I would like to see what that third witness says and as a matter of discretion I am denying the motion.

CLUSTER # 7: THE JURY TRIAL

§4: The Jury Trial

I. Overview: Jury Trial

A. Generally: keep in mind this is a first year course in procedure, so we are not talking about trial practice, and not we're not talking evidence. When we think of a first year course in civil procedure, we are basically thinking about the institution of jury trials.
1. Keep in mind a bit of sociology. We are relatively unique in the world in having a jury trial system. Sure it was born and grew up in the common law countries, but most of those countries have really sharply limited, if not almost eliminated the availability of taking a case to a jury in a civil context.
    a. We keep in the criminal context, don't ever get the two types of jury trials confused. Remember the criminal jury trial is under the 6th Amendment and the civil jury trial is under the 7th Amendment. They are different institutions.
2. You understand that we impanel juries to resolve disputes of *fact.* So juries are fact adjudicators.
3. You should also keep in mind that the jury trial institution grew up on the law side of the English courts at a time when the law courts were separated from the equity courts.
    a. The equity courts operated historically without witnesses at all. Equity operated on paper. So you had jury on one side, no jury on the other side, and then the systems fused.
    b. The systems starting fusing in the middle of the 19th Century, both in Britain and in the U.S. Then the question arose, what do you do in a mixed

law/equity case. There are many instances under fusion and particularly instances given modern claim and party joinder, when you look at a case and see that it is not purely a law case or purely an equity case from a historical perspective—its mixed.

i. For example, suppose the plaintiff comes in and says I want damages and an injunction against what the defendant is doing. That is a mixed law/equity case.

ii. Also, suppose the plaintiff interposes a legal claim and the defendant interposes an equitable counterclaim, that is a mixed law equity case.

iii. Or suppose the plaintiff comes in and says look the defendant has breached the contract and the contract involves land or a unique chattel, so I want specific performance, I want the land or the chattel. I understand your worship that specific performance is an equitable remedy and you may choose not to exercise your discretion and give it to me, so in the alternative to specific performance I want damages. Another mixed law/equity case.

B. History: in the old days, what happened at common law. Lets suppose the plaintiff and the defendant are adjacent landowners on a river. And the plaintiff walks into court and says "This nasty fucking defendant is polluting the river." And by polluting the river, the defendant is also polluting my land. Now that is an equity case, because what the plaintiff wants is an injunction against the pollution. So in the old days, the plaintiff would go to the equity side of the English courts and say your worship give me one those "though shall not" orders and tell him to stop what he is doing.

1. In that situation the plaintiff and the defendant went before a judge on paper, no jury. Let's suppose that in this particular case the plaintiff establishes that there is pollution, damage to his land, and that the plaintiff is entitled to an injunction and the court grants the injunction.

a. Now the plaintiff says thanks your worship, that's wonderful that we've ordered this bounder to stop polluting, but it is going to cost me a few pounds and shackles to clean up the mess his pollution has caused so I would like some money relief. And the judge would look down and say, sorry, tough shit loser, we don't do money here, this is a court of equity. Go across the hall to the law court and get your money over there and that is what happened.

b. Overtime, plaintiff's began to say, your worship look over there, there is a huge line, I would have to get into cue, I'd have to back and reprove my case, come on I'm here, I've shown you the nasty behavior by the defendant, can't you just give me the few pounds or shillings, that will compensate me and enable me to clean up my property. Can't you sort of clean up the litigation between us. The clean up doctrine, that was literally what it was called.

2. Clean Up Doctrine: the equity court would say we got equity jurisdiction, we granted an equitable remedy, and now simply to end the litigation we will clean it up by awarding money damages, as an incident to the injunction. NO JURY!

a. We inherited that clean up doctrine. And in the U.S. for almost 200 hundred years, with some variation, the federal and state courts continued to pursue this clean up notion. There was some court that would say well look if the center of gravity equitable—no jury; but if the center of gravity of the case is legal then a jury.
b. In 1959, almost two hundred years after the 7th Amendment came into force, there was a stunning reversal by the Supreme Court, that was a very liberal court in those days, the Warren court, with Justices Black and Douglas. They were pathologically addicted to the jury trial, Miller calls them the bobsy twins because they always voted together on jury trial issues.

II. Beacon Theaters v. Westover

A. The decision is really an essay of praise for the jury trial system. *Beacon Theaters* really magnified the availability of the jury trial in mixed law/equity cases. If your Prof is going to test you on the jury trial, this is a high probability subject.

B. **Facts:** the case was mixed law/equity case. There was an equitable claim, and legal counterclaim. Indeed, it was a compulsory counterclaim. The plaintiff and the defendants were really litigating opposite sides of the same coin.

C. **Issue:** the question was did you use the clean up doctrine, did you look at the center of gravity of the case?

1. The Supreme Court, with Justice Black writing, said you really did NOT do either one.
2. First, the Court reminded the reader that the clean up doctrine was simply a function of the historical fact that there were divided courts in England—law and equity. He pointed out that was no longer true, that a single judge in a single court administered both forms of relief.
3. Then Black began to focus on the fact that the jury trial in civil cases is constitutionally guaranteed. It is a constitutional right embedded in the 7th Amendment. Black said if really understand that it is a constitutional right then we should embrace opportunities to expand it, not contract it by using the clean up doctrine or such unpredictable things as the center of gravity approach, which after all allowed a judge to determine if the right to a jury trial was available.

D. **Holding:** the Supreme Court said that in a merged law/equity system we should try and make sure that any *ISSUE*, that is critical, any issue that historically would have been tried to a jury continues to be tried to a jury.

1. Black then divided the universe of issues into three categories:
   a. there are purely legal issues, such as computing damages, that is always been a purely legal issue. If it is purely legal issue it goes to the jury;
   b. there are purely equitable issues, such as the exercise of discretion in deciding whether or not to make a certain equitable remedy like the injunction or specific performance available. Equity has always been a

discretionary system and the question of whether its remedies will be used has always been left to the judge. According to Black in *Beacon*, that should continue;

c. then there is the third category—the critical one. There are issues that are common to both the legal side of the case and to the equitable side of the case. If the case were purely legal, they would go to the jury, if purely equitable those issues would go to the judge. Here is were the presumption in favor of jury trials comes into play.

i. **G/R:** Black said, look just because you get a case in which there is an amalgamation of legal and equitable issues, that should not cause anyone to lose the jury trial simply because it is mix law/equity case. That issue should go to the jury, and of course the jury's resolution of that issue should be binding on the judge. That is the key central aspect of *Beacon*.

ii. A major element of the case is Black's almost cavalier assertion that you determine the jury trial right in terms of issues and not simply at the wholesale level in terms of characterizing the entire case and asking what its center of gravity is.

2. **So understand, on the exam, if you get a *Beacon Theaters* type problem, your job is to take the case your Prof gives you, which will come out of one of the first year courses, you announce your *Beacon Theaters* proposition, and then you analyze case and break it down into its constituent issues and one by one you decide whether each issue is (a) legal, (b) equitable, or (c) common and assign it to jury trial or not to jury trial depending your characterization.

3. Example #1: back to the stream pollution example. Now we've got a fused system. You've got a plaintiff walking in and saying to the judge he's polluting the stream, enjoin him and give me damages for his pollution. The judge looks at him and says *Beacon Theaters* requires me to break it down into its issues, what are the issues?

a. Number one, is there pollution? Well that issue is central both the question of whether an injunction should issue whether there should be damages. It is both legal and equitable, its common and goes to the jury.

b. Next question, what are the damages caused by this pollution? That is purely legal, it goes to the jury.

c. Finally, you've got the question, on these facts, should I exercise my discretion grant the injunction. That is purely equitable, the judge decides it on the basis of the facts ascertained by the jury.

*Look at the difference between that and the old clean up doctrine, in which nothing would have gone to the jury, and *Beacon Theaters* doctrine in which 2 of the 3 issues go to the jury.

4. Example #2: lets say that the plaintiff walks in to court and says "judge this bounder, whatever the hell that is, has breached his contract with me and the contract involves some very unique chattels—a Chasey Laine autographed pornography video. I want specific performance of the contract and damages for his breach for failing to perform. Mixed law/equity case. Do your *Beacon Theaters* analysis.

a. What are the issues? It is contract case.
b. Issue number one, is did the minds meet, was there formation, was there a bargain. Well, you can't specifically perform a contract unless there was a contract, and you can't award damages unless there was a breach. So this is a common issue—Jury.
b. What's next? Was there consideration? You need that for both forms of relief—common question. Jury.
c. Next, is plaintiff capable and willing to perform his side of the agreement? Same point—common question. Jury.
d. Next, breach. Well you can't specifically perform without a breach, you can't award damages without a breach. Common question. Jury.
e. Next, what are the damages, pure law question. Jury.
f. Next, should I as a chancellor exercise my equitable discretion and award the equitable remedy of specific performance, purely equitable, it goes to the judge without the jury.
**At the common law, you could have brought that case on the equitable side of the law and there would be no jury anything. And if Miller's count is right, now 5 of the 6 issues go to the jury. That is the process you should use if you get a *Beacon Theaters* case.

E. Other Decisions: now it took a number of additional Supreme Court decisions to make it clear that *Beacon Theaters* was the real McCoy. They're in the casebook.

1. *Dairy Queen v. Wood:* the first important case is *Diary Queen*. That case is really basically all equitable. The Plaintiff says you're misusing a franchise trademark, stop it, and give me an accounting for damages. Give me an accounting for your utilization of the Dairy Queen paraphernalia. There is no doubt that that case involving injunctions, and declarations, and accountings. That historically a purely equitable case.

a. In *Dairy Queen* the Supreme Court says look, that is all historical artifact. We've got the FRCP, we can join these claims now, we can try it at one time, the reason we gave all that accounting to judges in Stupid old England is because jurors were illiterate. Now we've got literate jurors, and it is a very complicated accounting we'll get masters and experts in to help them. Again this is the Black philosophy that the right is constitutional, you embrace opportunities to expand it, not contract it.
b. So in *Dairy Queen*, which is in many ways more striking than *Beacon*, the Supreme Court literally moved an entire area of law—accountings—that historically were equitable over to the law side and extended the jury trial right.

2. *Ross v. Bernard:* that was a shareholder derivate suit. Shareholder derivative suits and class actions were created by equity. No one would have ever dreamed that if you had derivative suit or a class action in an equity suit that you could get a jury. Well, now we have got the merged system.

a. *Ross* says it doesn't matter that a dispute comes into court in an equity procedural vehicle, like the derivate suit or the class action. You use

equity principles, which means the judged exercising his discretion, to decide whether or not the procedural vehicle is properly invoked.

i. That means, for example in the class action context, that it is the judge sitting without the jury that decides on all of the prerequisites for class action certification, like numeroisty and predominance and commonality and superiority.

ii. But once you decide that the equitable vehicle is appropriate, then you look at the *nature of the action* and then you do your *Beacon Theaters* analysis and treat it as you would under any other *Beacon Theaters* problem.

iii. **G/R:** the equity vehicle doesn't destroy the jury trial for the underlying issues for legal or common claims.

3. *Katchin v. Landy*: that has to be understood as being bankruptcy. Bankruptcy, historically was equitable, indeed, it probably had its historical roots in the ecclesiastical courts. Also, bankruptcy is a matter of intense federal congressional regulation under the bankruptcy clause of the constitution. It is not at clear, that bankruptcy proceedings, even though they involve money, are really judicial proceedings in the sense that Black was looking at them. It is a bit of an aardvark and you have understand it as bankruptcy.

F. **7th Amendment:** is it historically pinned in 1791, when the Bill of Rights were ratified. The 7th Amendment speaks of "actions at common law."

1. The basic understanding of the 7th Amendment for about 2 centuries was that it provided a constitutional right to jury trial for all of the actions that existed at common law in 1791. But what about actions created by Congress after 1791.

a. Keep in mind that most of the federal jurisprudence that we have today, like antitrust, civil rights, securities, and most of the interstate commerce actions—are all creations by Congress after 1791.

b. The issue never arose because anytime Congress would create a new right, it would provide for a jury trial. There was metaphysical discussion of whether the jury trial was constitutional derived from the 7th Amendment or whether the jury trial was merely statutory. But it didn't make one fucking bit of difference.

i. Then came the Civil Rights laws of the 1950s. Congress worried about white southern jury nullification did not include a jury trial provision in some of the titles of the Civil Rights Act. In particular, the housing accommodation, Title VIII, does not contain a express right to a jury trial, so a case arose, *Curtis v. Loether*.

III. Curtis v. Loether

A. **Facts:** in Wisconsin, a black family tried to rent from a white landlord. The white landlord refused, the black family said you're discriminating because we're black and brought an action under Title VIII. The white landlord demanded a jury trial. The black

family said there is no jury trial provision in the statute. The case goes to the Supreme Court.

B. **Issue:** this raises for the first time, 200 years after the adoption of the 7th Amendment, the question of whether the 7th Amendment has growth capacity or is really limited to what existed in 1791.

C. **Holding:** a unanimous Supreme Court, lead by Justice Marshall, said that if certain conditions are met, statutory rights carry the constitutional jury trial right even though they are post-1791. Those conditions are:

1. The right created by Congress must be vindicated in a court. By that, we assume Justice Marshall met an Article III court.
2. The remedy provided by the substantive right must be one traditionally granted juries in courts of law, and by that he meant damage remedies.
3. The right created by the statute must be analogous to a right that existed in 1791.
    a. He said they right involved in the housing accommodation case *Curtis* was analogous to innkeeper's liability or some dignitary tort. He was basically saying if you look hard enough you are always going to be able to find a jury trialable analogy. So this third element of the *Curtis* standard is not really a very great restriction.
    b. After all in a pinch, you can always say the new substantive right created by Congress is analogous to ever growing common law notion of trespass on the case. No one has really ever known what that covers. Trespass on the case actions were always trialable to a jury.

D. Summary: When you take *Beacon Theaters* and *Curtis* together you see that in the 50s, 60s, and 70s, the 7th Amendment jury trial guarantee of 7th Amendment for civil cases was dramatically expanded by the Court.

E. Note: Throughout this discussion, Miller has been saying federal here and can Congress do that there—you must understand that *Curtis* and *Beacon Theater* are 7th Amendment jury trial cases. The 7th Amendment has never been incorporated by the Court through the 14th Amendment and applied the States the way that so many other portions of the Bill of Rights have been incorporated, including the 6th Amendment criminal jury trial guarantee—the States must honor that.

1. Thus, a State court is free to apply *Beacon Theaters* and *Curtis* or to reject them in terms of the cases that come up in that State. Not surprisingly a number of State Supreme Courts have bought in to *Beacon* and *Curtis* and some have decided to ignore them.
2. That is why on a law school exam and you see that it is a jury trial question you've got to take very careful note of what court the Prof has put you into.
    a. If the question is put into a federal court context, then you do *Beacon* and *Curtis*.
    b. If your exam question is in State X, well now you've got to do that one the one hand, on the other hand routine. You've got to say particularly

when you don't know anything about the State; it depends on whether the Courts of this State follow federal precedents of *Beacon Theaters* and *Curtis*. If they do, then you do that analysis. But if this particular State has not followed *Beacon* and *Curtis* then you do your clean-up or center of gravity analysis.

c. The fact that States are not bound by the 7th Amendment shows up in other contexts. For example, a federal civil jury must unanimous whether it is a 6 person or 12-person jury, unless the parties stipulate otherwise. State juries are not necessarily unanimous (California has a 10-2 rule); and many States are 9-3, and some States have simple majorities for civil juries. That is fine in the State courts; it is NOT fine in the federal courts.

d. Now keep in mind that Congress is free, despite *Curtis*, to take certain areas and give them to administrative agencies and there is no constitutional requirement of jury trials in administrative agencies.

i. Thus, in *Atlas Roofing*, the Supreme Court said fact issues can be determined by the ALJ with regard to workplace safety.

ii. Similarly, Congress is free in creating a new substantive right to give no legal remedies, the injunction obviously; it can give remedies and leave them to the discretion of the judge.

iii. For example, there is no jury trial right in gender discrimination cases under Title VII, that is because the money remedies, which one thinks of as legal remedies and therefore jury trialable remedies, are discretionary. It is discretionary for the judge to give back pay. And the Courts have held that means it is an equitable remedy and not jury trialable.

iv. Some aspects of restitution, although they involve money, that is simply a restoration and is not a damage remedy in the historical sense of the jury trialability of damage remedies.

v. The Supreme Court has also held that penalties in various statutes enacted by Congress, need not if Congress so provides be calibrated by juries. It is like sentencing in the criminal case, it can be left to the judge.

vi. So the Supreme Court has been very active over the years on *Beacon* and *Curtis* and all of these cases involving administrative agencies and statutory penalties and non-damage money remedies and even a case involving the issues of public rights have to be distinguished private rights in terms of jury trial.

3. In 1996, the Supreme Court decided (9-0) the *Markman* case. That was a case in which you had an action for patent infringement. That is a case that is historically trialable, the question of infringement is a jury issue. The particular issue in *Markman* was who determines what the patent claims are, you know when you apply for a patent you put in a lot of paper work and that paper work is a description of what you claim is patentable, and this is very intricate stuff. And if the patent issues the patent issue determines which of the claims are entitled to patent protection. And the argument in the case involved the obvious question of who decides what the claims mean, a judge or a jury.

a. The Supreme Court, 9-0, said it is a judge issue. Since history did not give an answer, there was nothing you could find analogous to patent claims in 1791, the Court decided to leave the issue to a judge.
b. And in a very interesting line, something that is always been of interest to scholars, Justice Souter said "It really is quite relevant to consider the competency of the judge or the jury." The Court was saying the judge is the most competent adjudicator in interpreting highly complex legal documents that have the feel of statutes; whereas juries are better for determining issue of fault and so forth.

CLUSTER #8: POST TRIAL MOTIONS

§5.1: Post Trial Motions

I. Three Most Common Post Trial Motions

A. Overview: there are three motions that are often made in a civil case at the end of trial:

1. Motion for a new trial, in other words, lets upset the jury verdict and do it again;
2. Motion for a directed verdict, now called a judgment as a matter of law by the FRCP; and
3. Motion for a judgment notwithstanding the verdict (jnov); now called the renewed motion for judgment as a matter of a law.

B. Test Strategy: these three motions are very testable and the classic testing mechanism is to give you an exam question with two or possibly all three of the motions and the name of the game is for you to tell the Prof that you know what the motions are in terms of:

1. Their function;
2. You know what the standards for granting or denying them are;
3. You know what the differences are between them, it is sort of a tear and compare.
4. Some law Profs try and give you two or three of the motions in a combination that makes you uneasy about granting both, or denying both, or mixing them up.
5. Miller's advice is that you've got to learn these three motions as three different motions. You've got to pack your stupid brain with the relevant data for each of the three, then if you get a problem about these motions on the final exam—you must put blinders on, you MUST analyze EACH MOTION SEPERATELY. In other words, if you get a combination of a new trial and jnov motion, you sit and write up the new trial motion and then you write up the jnov motion, ignoring so that you are not confused by what you've said on the new motion. You must do that separately.
6. If you start writing up a post trial motion answer, across the motions, this sentence is on the new trial motion and that sentence is on the jnov motion, Miller guarantees that you will fuck it up, you will begin to be writing gibberish. It will

read like something written by James Joyce. Be very tough with yourself about separating out the motions when you write your answer.

II. The New Trial Motion

A. What is the New Trial Motion: metaphorically the new trial motion is a cleansing motion, it is a cleansing motion, it is a prophylactic motion. What the motion tries to do is look around at the case to determine if anything went wrong, and if something went wrong, to determine whether it was so wrong it dirties the case up to the point that you have to say lets do it again.

1. Remember, the new trial motion simply puts the film back in the camera and you watch it again, it is like watching a bad movie twice.

B. Analyzing a New Trial Motion: the key in analyzing a new trial motion question is looking for the error. Now, in a civil case, anyone can make a mistake that might lead to a new trial motion.

1. For example, the judge can admit evidence that he should have excluded; or vise versa. If that error on the evidence point seems grave enough, you grant a new trial.
2. Similarly, a judge can mischarge the jury, the judge can put the burden of persuasion on the wrong party; if that is the case, the new trial motion cleans it up.
3. The lawyers can make a mistake, they can appeal to the bias of the jury, they can improperly use the word insurance in a negligence suit, they can improperly ex parte contacts with jurors—the lawyer cannot take the jury out for some shots of whiskey and have sex with them all. All of those types of things will produce a new trial motion grant.

C. Error and Misconduct: the source of error that is very commonly tested in the first year course is error by the jury. The jury can do all sorts of things wrong:

1. It can go look at the accident scene without supervision; they cannot do that, juries decide cases based by on *in court testimony under oath* subject to cross examination. THAT IS ABSOLUTELY CRITICAL.
2. A juror can't bring a textbook into the jury room, one juror can't say well I studied mechanical engineering when I was college, that juror has become an expert, jurors are not expert witnesses. They are not witnesses, they are jurors. In *court testimony, under oath, subject to cross-examination* if you see anything else in problem what you're being tested on is should you grant a new trial.
3. Similarly, a jury can make all types of mistakes in rendering a verdict. This is very common.
    a. Lets suppose the case has been submitted and the jury goes out and the foreman says lets go it, its NCAA time it's the final four we have to get out here and go drink some beer, everyone take out of piece of paper write down what you think the plaintiff should get, we'll add it up divide by 12 and that will be our verdict. Well, that is a complete abdication of what the jury should do. There is no discussion, analysis, evaluation, and that is no good.

b. But beyond that, lets suppose 4 jurors write down $30K, 4 write down $20K, and 4 write down $0. You add that up, divided by 12 and get a verdict of $20K. It looks fine, it is a rational figure, but what you've really got there, most people would say, is a vote 8-4. What the four people who said zero might be saying is no liability, no negligence. If you've got 8-4 and you're in court that requires a unanimous verdict—you don't have a verdict at all. And this quotient verdict is masking the fact that you don't have a verdict.

c. Another mistake is that a jury may try to apportion damages when it is not permitted to do so. For example, there is a railroad crossing accident and the only theory of liability is that the train engineer was dead drunk at the throttle. The case is submitted to the jury, the jury returns and says we find for the plaintiff against the railroad in the amount of $6 million, and we find for the engineer against the plaintiff. That is impossible, what they have done is rendered an *inconsistent verdict* trying to apportion damages and liability in an impermissible manner. If there are earmarks of a jury compromise it is probably impermissible. You've got to throw that out on the new trial motion.

3. These were all forms of *error and misconduct*. There is another big source of new trial grants.

D. Verdicts Against the Weight of the Evidence: the judge is a professional, in theory he has watched many trials, and sometimes a jury will come in and the judge says "I don't simply disagree with the verdict reached by the jury, I think it is DEAD WRONG, I think it is against the weight of the evidence. I think it is against the *clear* and *overwhelming* weight the evidence. Either on liability or damage issues.

1. A trial judge, under the new trial motion practice is given the discretion in a case, in which he can really make those statements. Not simply that he disagrees, but that is against the clear or overwhelming weight of the evidence to say we have to grant a new trial. Motion for new trial granted. The verdict is against the *clear, great,* or *overwhelming* weight of the evidence.

E. Forms of New Trial Motions: there are two forms of new trial motions that you should know:

1. *Partial New Trial Motion:* sometimes a verdict will come in and a judge will look at it and say it is absolutely right on liability but it is screwed up on damages. They obviously did not understand the damage computation. Then he says let just re-try the damages. Partial new trial, it is a way of salvaging part of the first trial.

a. It is really a dangerous thing if you're really a purist about jury trials. Thus, the utilization of the partial new trial is very limited. It is primarily limited to documentation cases, contract and property cases, and less common in tort cases where there really is something to the notion that you can't separate liability and damages.

b. But it is constitutional, judges do it, it just has to be done with great care.

2. *Bifurcation:* it is the first cousin to the partial new trial motion and it is fairly common and appears to be constitutional. Because cases are so complex these days many courts bifurcate, particularly federal courts. That is, what the court does is try liability, and once that trial is over, if the jury finds liability then we will come back and try damages. And if jury finds no liability, everybody goes home and we don't have to try damages at all. So there are several values to this:

a. You separate out the emotional from the unemotional, you de-link with liability and damages and get the jury to focus on them one by one.
b. It also promotes judicial economy because if they don't find liability you save all that time that would be consumed in trying the damage question.
c. Bifurcation, properly used, is constitutional.
d. The federal courts even have trifurcation. The court will try issues of general fault, followed by individual causation, and then we'll try damages.
e. All this done within the constitutional confines of the right to a jury trial

F. Conditional New Trial: also referred to addittur and remittitur. Its benchmark is that the damages seem super high or inappropriately low and what the court wants to do is avoid a completely new trial just because the damage calibration was wrong. And what the court does is it very unique and controversial.

1. *Addittur:* addittur simply means add to. The verdict in the mind of the judge was simply to low and should be added to. It works this way:

a. There was a serious accident, the plaintiff is a quadriplegic, the go to trial and the jury comes back and says we find for the plaintiff in the amount of $20K. Well, $20K does not even begin to cover the medical costs, so the plaintiff's lawyer will come in and say I move for new trial on the grounds that the damages are grossly insufficient. The judge will say it will takes years to retry, and I don't want to use the judicial resources, so he calls the defendant's lawyer and says "look $20K in a quadriplegic case is ridiculous I am going to have to grant a new trial unless you are willing to add to the $20K, if you'll bring it up to $100K I'll deny the motion for a new trial." Now the defendant has to make a tactical decision, he knows he held the verdict down the first time, but also knows that the 2nd time the verdict could be in the millions.
b. So what is needed for addittur is to get the defendant's approval to increasing the pot. At that point the judge will issue an order that says motion for new for trial is denied *on the condition that*, the defendant consents to the entry of judgment in the amount of $100K.

2. *Remittitur:* works precisely the other way around. This time the verdict is too high. In comes the plaintiff with a bruised toe and jury says $250K. Naturally the defendant files a motion for a new trial because the award is grossly excessive. This time the judge says who wants to see a bad movie twice, and calls up the plaintiff's lawyer and says you got $250K for a bruised toe and I can't let that stand. I'm going to grant a new trial unless you consent to the entry of judgment

in the amount of $50K, and remember the next time you bring this case, you might not get one fucking penny you money hungry bastard and 1/3 of zero is a lot less than 1/3 of $50K. If this works, judgment will be entered saying motion for new trial denied on *condition that plaintiff consent* to the entry of judgment in the amount of $50K.

3. This is very controversial stuff, many judges do not like this sort of haggling because it is really, basically, a civil action plea-bargaining. Some court systems allow both systems of addittur and remittitur, some courts deny both saying it is not judicial behavior.

4. *Federal Courts:* have upheld the constitutionality remittitur but have struck down addittur. They did that in the 1930s in *Demick v. Shiet* (5-4).

a. The Supreme Court said that we cannot allow addittur because addittur was unknown at common law and therefore represents an improper change in jury trial.

b. Also addittur results in the entry of a judgment that the jury has not agreed to. The jury hasn't agreed to the added amount.

c. Remittitur is okay because if the jury said $250K they also must think that $50K is reasonable, that is something their mind passed over. *Demick* is an idiotic decision but it continues to be the law of the federal courts.

III. Directed Verdict Motion: Judgment as a Matter of Law

A. Overview: the directed verdict, in the federal courts, is called the judgment as a matter of law now. Most States still call it the directed verdict motion and so do most lawyers.

B. Directed Verdict Motion: this motion can come on at the end of the all the evidence, it can come on at the end of the plaintiff's case, it can even be made at the beginning of trial. At that point it is called a motion for judgment on the opening statement but it is really a form of directed motion verdict.

1. The directed verdict, and the summary judgment motion are the same motion. One is made pretrial and one is made at trial.

2. That tells the directed verdict is a filtration device, it filters out those cases that are jury worthy and those that are not. Why do we have juries? We have juries for the same reasons we have trials, to resolve disputed issues of fact.

3. The directed verdict asks if there is any issue of disputed fact worthy of the jury's consideration. If not, then the court can direct a verdict and enter judgment as a matter of law.

4. Because we are at trial, and because the directed verdict will deprive the losing the party access to a jury, historically courts bend over backwards in favor of the non-moving party. And what that means is to look at the evidence in the light most favorable to the non-moving party, draw all inference in favor of the nonmoving party and to resolve all questions of witness credibility in favor of the nonmoving party. It is a though motion to prevail on.

C. Directed Verdict Formula/Standard: the formulas of the directed motion are very varied around the country and various courts use various words and standards. Perhaps the most descriptive set of words, and one that has a great deal of acceptance, is that you grant the directed verdict motion *if no reasonable jury could find for the nonmoving party*.

1. That will be true if there is an ironclad defense, if all the evidence points in exactly the same direction.
2. Keep in mind that the consequence of a directed verdict motion grant is that it is OVER. It is terminated. If no reasonable jury could find for the nonmoving party then the judge is duty bound to enter judgment in favor of the moving party. It is a death motion, its over. Its none of this naby pamby lets try it again, as you get with the new trial motion.

IV. Judgment Notwithstanding the Verdict: Renewal of Motion for Judgment as a Matter of Law

A. J.N.O.V. Motion: Well, you know what it is. It is obvious what it is. The jnov motion is a second crack at the directed verdict. The case has been given to the jury, the jury has rendered a verdict, now the moving party is saying on the jnov, you NEVER SHOULD HAVE GIVEN IT TO THE JURY. No reasonable jury could do what this jury just did. That is a very high standard!

1. Trial judges don't like having to go to an appeal having deprived one of the parties of a jury verdict. It is a very hard motion to get and have upheld on appeal.
2. Why do we have a jnov? Why do we have both the directed verdict and the jnov?
    a. The logic is, the directed verdict comes in at trial in real time, you've got a jury sitting there, and sometimes the judge doesn't have the time or inclination to think it through. So he denies the motion, and lets it go to the jury sort of knowing that the jury is probably going to bail him out because most jury verdicts are consistent with the way the judge thinks.
    b. Okay, the jury surprises the judge, or now the post-verdict he has time to do some research, review the record, and to receive memoranda and read them. The directed verdict motion is hurried; whereas the jnov is done in a way that gives the judge the ability to think it through and gives him the ability to check on what the jury has done. If the judge thinks what the jury has done is nuts, the judge is second bite at the apple through the jnov.
3. There is also a very pragmatic factor here too. If the judge grants the directed verdict and it goes up on appeal and is reversed—the case comes back down and must be retried. That is a tremendous expenditure of resources and expenses. But if the judge grants a jnov and it is reversed on appeal—the original jury verdict is reinstated and the case does not have to be retried. So many people think the jnov motion is much more function than the directed verdict motion. And the judge should be given two bites at the apple to make this decision.

B. Motions in the Alternative: keep in mind that in many cases the losing party makes both a new trial motion and the jnov motion together. And under federal practice the court is obligated to make rulings on both, so that the appellate court can review both and take appropriate action on the basis of knowing what the trial judges thinking is on both the new trial motion and jnov motion. It drives trial judges both but it probably saves time and energy in the long run.

1. Now it should be obvious to you that bend over backward rule is in full force on the jnov motion. Here is somebody who has gotten a verdict, a jury verdict, and the judge is being asked to take it away. Judges loath to do that, so the trial judge will bend over backwards to bend over backwards in exactly the same way as he does on the directed verdict motion. All evidence looked at in the light most favorable to the verdict winner, issues of credibility and all inferences in favor of the verdict winner.

C. Effect of Grant of JNOV: keep in mind that the effect of a grant of the jnov motion is—it's a double whammy. The judge looks over at the verdict winner and says hey you, yeah you with the smile on your face and the bag of money in your hand. Give me the money back and step into the pine box because I am going to drive a stake in your heart and ship you out. You are DEAD, you've LOST, this is terminal.

1. The effect of the directed verdict and jnov is terminal, the new trial motion is not. It tells you instantly why it is much more difficult to prevail on a directed verdict motion than a new trial motion and why it is infinitely harder to prevail on a jnov motion than it is on a new trial motion.

D. A Final Point on These Motions: particularly the jnov. The Supreme Court has held that the directed verdict existed at common law and therefore there is nothing unconstitutional about the directed verdict.

1. Conversely, the Supreme Court has held that the jnov was unknown at common law, and represents a form reexamination of the jury verdict which is prohibited by the second clause of the 7th Amendment (the reexamination clause). So a naked jnov is considered unconstitutional. What has happened is, and is now embedded in language of Rule 50 that describes the jnov as a renewed motion for judgment as a matter of law. We consider the jnov to be a renewal of the directed verdict motion. That means if you have not made a directed verdict motion, there is no basis for renewing it through the jnov. So in federal practice, if you have not made a directed verdict motion, you have no ability to make a jnov. There is nothing to hook it onto. That is almost a definition of malpractice; namely, failing to make a directed verdict motion.

CLUSTER #9: APPEALS

§6.1: Appeals

I. Overview: appeals are not very test worthy in a first year course. You're just going to get the basics.

A. Two Types of Appeals: there are really two universes of appeals in the U.S. In one system, you can appeal a final judgment. That is called the final judgment rule. The most notable system of that kind is the federal court system. You are in theory only going up on appeal of a final judgment.

1. The other system is of course the reverse. It permits you to appeal from non-final judgments or as they are usually called—interlocutory appeals. New York has that system. It permits you take up on appeal matters that arise and are decided in the course of the case. They can be discovery orders, jurisdiction orders, NY does say that certain modest orders are not available in interlocutory appeal. So even the interlocutory systems are not pure.

B. Final Judgment System: the final judgment system, is not pure either. In the federal system, although the basic principle is that you need a final judgment before you can take appeal, there are several safety valves on that do permit you to go up on an interlocutory appeal.

1. For example, if you've got a case involving multiple claims or multiple parties **Rule 54** permits you to take an interlocutory appeal if you are one of the claimants or one of the parties with regard to whom the action is over. In other words, there is final judgment as to you, as to one of the parties or claims, even though there is no final judgment as to the rest of the action. The system recognizes the obvious point that it is rather silly to have you hang around in doubt while the rest of the case meanders along. You can go up in the multiple claim or multiple party system.
2. As is true of all systems there is a form of appellate review, its not called appeal, its called extraordinary writ. We call it mandamus or prohibition. You take the point up even though you don't have a final judgment when you're asking the appellate court to demand or mandate that the trial court do something or to prohibit the trial court from doing something. The scope of mandamus or prohibition varies tremendously from court system to court system. In some systems it is almost as easy as getting an appeal, so it really takes the heart out of the final judgment rule.
    a. In the federal system, and other systems, mandamus and prohibition are harder to get. In theory, for example, in the federal system mandamus and prohibition are really limited to situations in which you are saying that appellate court must review what happened below because the trial judge had *no jurisdiction* to do what it did, or that the trial judge was *jurisdictionally required* to do that which it did not do. So it makes the extraordinary writ availability more or less synonymous with a violation of the trial courts jurisdiction. It either did something it has no jurisdiction or power to do, or it refused to do something it was jurisdictionally *required* to do.
    b. The reality is, and it varies from circuit to circuit, that if an issue is a very difficult issue or contentious issue and is something that you need an appellate decision on not simply for the case before the court but as a form of giving guidance to other courts in the circuit; in other words, it is very important that the appellate court make the decision the appellate court

will come up with the necessary words to come to the conclusion that the writ of mandamus or prohibition should be granted and the review heard.

i. For example, think back to the class action, one of the hottest issues in civil procedure today is the propriety of using class certification in the Rule 23(b)(3) context, the damage class actions. And so many different issues arise which the district courts disagree on, that it is no unusual to seek a court of appeals taking on mandamus a question of whether the certification of a particular class, in a particular case, was proper or improper. Also because the cases are so big and complicated that if certain issue isn't decided it could take years of the courts time.

D. Collateral Order Doctrine: that is yet another safety valve on the final judgment rule. Sometimes you get issues that are not in the mainstream of the case, they are collateral, and it may involve the posting of a bond, or disqualification of the judge or law firm. It typically does not involve the merits of the case. That is why it is called a collateral order.

1. Sometimes you can get an appellate court to look at a collateral order. It is something that is collateral, but important enough to decide now. That certainly is true if you're taking about the disqualification of the judge.
2. The collateral order doctrine is a very unusual principle and there are very few cases that go up on collateral appeal.

E. **28 U.S.C. §1292(a):** is another exception to the final judgment rule. It is a statute that says whenever the district court (a) grants an injunction; (b) refuses to grant an injunction; or (c) modifies an injunction, you can get interlocutory review of that order.

1. It is pragmatic exception to the final judgment rule because very often injunctions are critical to a case and very often a case is lost or won on the basis of whether the court issues a temporary restraining order or a preliminary injunction.

a. Orders like don't print in the 1st Amendment area, or don't pollute the stream, or don't cut the trees. And these can have a big impact on people who are subject to the orders and Congress has simply made the decision that when you have an injunction, whether granted or denied or modified you should permit interlocutory appeal.

F. The Certification Practice: another exception to the final judgment rule. It is also found in the federal statutes and has many of the attributes and underlying philosophies of some of the other exceptions. Again, it is an issue of importance, it can be a jurisdiction issue or a class action certification question or almost anything.

1. If the district court believes that the issue is a *controlling question* which simply means very important, it can certify that question and indicate to the court of appeals that it needs resolution now. And in a way the district is begging the appellate court to take the question.
2. The case then moves to the court of appeals and the court of appeals can exercise its discretion to take the appeal or not to take the appeal on issue

embraced by the interlocutory order. The appellate court is not taking the entire case, it is just taking the certified issue.

3. Certifications are relatively infrequent, they are more common in complex and big cases for the reasons already stated. The certification is a good procedure when you have issues of constitutional dimension, issues on which the case turns and you don't want to waste a lot of years without getting the question right.

4. Understand the obvious, all of these forms of interlocutory review, all of these exceptions to the final judgment rule, will add at least a year or two years by way of delay while waiting for the appellate court to issue its ruling. So there is a lot be said for the final judgment rule and not punching to many holes in it.

G. Scope of Review: it is important to know that not all appeals involve plenary or de novo. Of course, if an issue is a matter of law: a summary judgment motion; the question of a meaning of a statute; or the existence or nonexistence of a particular legal theory. The appellate court, being a court of law and a collegial court the review is plenary or de novo. The appellate court can do what it wants, it has complete power over the legal issue.

1. At the other extreme is the jury verdict. If appellate courts could simply overturn jury verdicts whenever it felt like it, the net result would be that are constitutional right to jury trial would be completely eviscerated. So when a jury determination, particularly on issues of fact, come up on review, the appellate review is very narrow. Basically an appellate court will not overturn a jury verdict on matters of fact, which are in the province of the jury, unless that appellate court can say that the jury result is *manifestly erroneous.* And that is very hard, and point in fact if you have to take an appeal on the basis that the jury erred on an issue of fact, you are climbing up a vertical cliff.

2. Somewhere in the middle is a judge determination on a matter of fact, in many cases there is no jury, and the judge made the fact determinations. When these come up on appeal the scope of review is set out in the federal Rules and in most procedural systems the standard of review is *clearly erroneous.* The appellate court will not overturn the trial court on a factual matter that has been judge determined unless the appellate court can say it was clearly erroneous.

H. One little final note: in certain areas of substantive law, the truth is that the appellate court will not second-guess the trial court. That is certainly true in FELA actions—when a railroad worker has prevailed before a jury in an FELA action, the appellate court will do cartwheels to leave it alone. The notion is that FELA litigation is unique, jury determinative, and that judges should second-guess those decisions.

CLUSTER #10: FORMER ADJUDICATION

§1: The Effects of Former Adjudication

I. Res Judicata

A. Overview: this cluster deals with the effect that a decision in case 1 has on case 2. Former adjudication has various forms:

1. Res judicata and
2. collateral estoppel.
3. Nomenclature: a res judicata and collateral estoppel are the historic terms. The *Restatement of Judgments*, which is very influential in the US, has renamed these doctrines in a much more descriptive way:
    a. Res Judicata = claim preclusion. Because if res judicata applies it means that the claim is precluded, it cannot be re-litigated.
    b. Collateral estoppel = issue preclusion. Because in collateral estoppel you are talking about whether or not the parties are able to re-litigate an issue, not a claim that is res judicata, an issue that is collateral estoppel. Under the *Restatements of Judgments* collateral estoppel is now called issue preclusion.

B. Arts and Crafts about the Subject: it is a difficult subject. Very often procedure courses are reaching their end, and there is very little time to deal with it. Because it is metaphysical and time is short, res judicata and collateral estoppel get comparatively short shrift from procedure teachers. The bad news is that it leaves you somewhat a drift in terms of formal education. The good news is that profs know they have probably under taught former adjudication and that makes them feel a little more guilty about examining it to deeply. This is a rich and difficult subject. Law professors, if they really wanted to, could invent former adjudication questions that would kick your ass. The tendency is to test and see if you know the basic principles and rules.

1. Former adjudication has nothing to do with whether or not the first adjudication was right. In many respects res judicata and collateral estoppel are very harsh doctrines they are basically saying to a litigant: frankly shit eater, we don't care if it is was right or wrong, we just want you out of here, you're the bad penny, you've had you're day in court, you've litigated this claim or issue, go away.
2. Why? Life is too short, you've got to have FINALITY. Res judicata and collateral estoppel are about finality, and end, that is it and no more. Every time you re-litigate a claim or an issue, that represents recourses that could be used to do other things. Every case that is re-litigated prevents the next case on the docket from being heard. Finality prevents a litigant from reappearing on the docket.
3. Also, if we did not have principles of finality you could create a situation in which someone who wanted to harass, annoy, and oppress someone else would just re-litigate and re-litigate. Not only should people not be subjected to that, but someone who has ready litigated something, should be given piece of mind. You've been through a litigation, you've won, you're free. All of the resources that you've put aside in reserve in case you lost, can now be freed up and used for productive purposes. Get on with your life.
4. If we didn't have res judicata and collateral estoppel we would live under a constant cloud of re-litigation, it would be unstable, we would not be able to get on with our lives, and resources would be tied up.

5. Even though it has to be honestly faced that res judicata and collateral estoppel prevent us from getting it right every time, there are strong policies that lay behind res judicata and collateral estoppel and justify them. Also, keep in mind if res judicata and collateral estoppel would subject to all sorts of discretion, and picking between this and that case, well then you might as well not have the doctrines at all because every one would be fighting over whether the doctrines apply. The doctrines work best with the bright line rule.

C. Three Parts of Former Adjudication: there are three parts to this cluster, and you should approach it as if it raised three questions:

1. Does res judicata apply so that the cause of action, or the claim being asserted in the second action, is *BARRED* (cannot be re-litigated) and precluded.
2. If res judicata DOES NOT apply, does collateral estoppel apply, which means is there an issue or issues that were adjudicated in the first action that should not be adjudicated in the second action.
    a. In other words, res judicata deals with the preclusions with claims and causes of action, and collateral estoppel deals with the preclusion of issues.
3. Who is to be subjected to the principles of res judicata and collateral estoppel?
    a. Well quite obviously, the original parties are. But what about non-parties? To what extent are people not involved in the first action bound by things adjudicated in the first action; or conversely, to what extent can non parties to the first action benefit from the adjudication of any of the issues or claims in that action.
    b. Mutuality of Estoppel: In the old days, the answer was very simple. A non-party to the first action could neither benefit, nor be bound by the adjudication. The stranger was free to litigate completely, this was known as the principle of mutuality of estoppel. If you were not a party, you were not involved, you couldn't be bound, and you couldn't benefit. As you'll see, that law has gone toppsy turby.

II. Claim Preclusion; Res Judicata

A. **Res Judicata**: on the exam look for this first, it is the logical starting point.

1. **G/R:** once you have litigated a cause of action, and it has been finally adjudicated on the merits, you are *prohibited* by res judicata to attempt any re-litigation of that cause of action, even if you did not fully litigate all aspects of the cause of action.
    a. In other words, res judicata prevents you from reasserting any aspect of a cause of action have litigated, or *could have* litigated.
    b. A Metaphor: here is a metaphor that illustrates this. If you've been to Las Vegas, and you're standing at the blackjack table all fucked up off the free liquor they pumped into your veins, you've got a chip in your hands: you have two options: (a) bet, or (b) don't bet. The one thing you cannot do is break that chip in half, and try to play part of it. That is the metaphor. You simply cannot split a cause of action! You either play the

cause of action, or you don't play the cause of action. Once you try play any portion of the cause action, you have, in effect, played the entire cause of action and you are forever barred from trying it again.

2. *There are Only Two Questions involved in Res Judicata:*

a. What is a cause of action; and

b. what is on the merits?

3. Cause of Action: (a) In the old days, a cause of action was equivalent to a writ, if you got a writ in trespass or replivin, that was your cause of action. You could never seek the reuse of that writ again. Well, obviously, that kind of thinking went out with the common law, but is does help our thinking of what a cause of action is. (b) Many States, as they passed from the common law into the code period, redefined what a cause of action is for purposes of res judicata.

a. Some courts said, a cause of action is a right. Every right is a cause of action, if you try and litigate a right, you've litigated your cause of action.

b. Other courts, ironically, said the reverse. A cause of action is a wrong, if you try and vindicate or punish a wrong, you cannot attempt to re-litigate any other aspect of that wrong.

c. Both of these tests, although they were very popular, were also very metaphysical. Overtime some courts began to use a more pragmatic test, they used to say: look if the evidence in the two cases that have been brought are more or less the same, you can't re-litigate.

d. Modern Rules: in modern times, that standard is *transaction and occurrence.* We use it for some many things, it is not surprising that we use it for defining res judicata as well.

e. **G/R:** if you attempt to litigate some aspect of a transaction or occurrence, the system now, in most states, would say that is it, you cannot attempt to re-litigate any other aspect of that transaction.

f. *Example:* Jack buys a toaster, it blows up in his face. Under the old thinking—you've got an action in negligence, warranty, strict liability, and breach of contract. Four different legal theories to cure the allegedly wrong, ironically, at common law, people might say those are four different writs. Today, someone might say how many wrongs were there? And the answer could be 4; or someone might say how many rights were violated? That is tougher, because rights of property and rights of people, so there may only be two rights. Under transaction and occurrence, most courts would say there was ONE transaction and occurrence, namely, the purchase of the toaster and its failure. So you see, a great deal can turn on how you define cause of action.

i. It is not surprising that in modern procedure were there is wide open pleading, and you can plead alternatively, and inconsistently, and you've got crammed dockets, most courts are leaning towards the transaction and occurrence standard.

ii. So if you believe that your civil rights have been violated, the fact that you've got one cause of action under a federal statute, and one cause of action under a state statute, and a third cause of action under a common law tort theory—many courts would say look, the

discriminatory act, is the same, it is the same transaction or occurrence and therefore for res judicata purposes you have one cause of action.

iii. So it is ABSOLUTELY CRITICAL ON A LAW SCHOOL EXAM that you indicate to the Prof that you understand what a cause of action is, because it really the heart of ever res judicata claim.

4. On the Merits: obviously, if a case is decided at trial, on a post trial motion, that is on the merits. Similarly, a case that is adjudicated by summary judgment is on the merits. After all, there has been adjudication that there is no genuine issue of material fact and the judge is entering judgment as a matter of law.

a. But what about a motion to dismiss on the pleadings? That one will fuck you. What has been adjudicated, has anything been adjudicated on the merits? Most people would say "no" because they would that say that all that has been adjudicated on a motion to dismiss it that the complaint, the document, did not state a claim for relief, that is not an adjudication on the merits of the claim. Well, take a look at Rule 41(b).

b. Rule 41(b): there is an indication in the last sentence of the provision that would indicate that a motion to dismiss for failure to state a claim is an adjudication on the merits because as the rule indicates unless the dismissal is for one of the stated basis of 41(b) and none of them included the motion to dismiss for failure to state a claim, then the adjudication is on the merits. The truth is that no one is really positive that a motion to dismiss under Rule 12(b)(6), is truly on the merits for the purposes of res judicata.

i. Here is the argument that says it is: you put in your complaint, and the judge said you have not stated a claim, under normative practice you are given leave to re-plead, and you re-plead, and the judge says you again have not stated a claim with your complaint, that process continues until some point at which the judge says look I've given you X number of chances to plead a claim for relief, you haven't done it, I now conclude that you do not have one and I am entering judgment, no more leave to re-plead. If that is the scenario, it is not irrational for the court to say that is on the merits, what has been adjudicated is that the particular transaction or occurrence does not give rise to a legally cognizable wrong. You don't have a cause of action based on that transaction or occurrence and therefore that has been adjudicated on the merits, that is res judicata, and you are hereby precluded from ever showing up and trying to re-litigate any aspect of that transaction or occurrence. That is to say, any aspect of that transaction or occurrence that you did plead or call into question, or any aspect of that transaction or occurrence that you could have pleaded but failed to plead. Understand, this is a tough doctrine, Res Judicata is like a meat axe, it simply cuts the cause of action off at the neck. It kills it forever.

c. The doctrine is made even more powerful and threatening by the fact that a transaction and occurrence test is more embracive than any of the historical tests. Any careful litigator will now plead each and every legal theory can be dreamt up that arises out of a transaction or occurrence out of a morbid fear that if he fails to do so, res judicata will catch him in the neck. In a curious way, the power of res judicata today, is that it really acts as an impetus, a pressure, for compulsory joinder of claims within the ambit of a transaction or occurrence that is roughly comparable to the compulsory counterclaim which obliges a defended to counterclaim on each and every claim that he may have arising out of the transaction or occurrence invoked by the plaintiff.

III. Issue Preclusion; Collateral Estoppel

A. Metaphor: Miller described res judicata as a meat axe because it lops off the entire cause of action; collateral estoppel is much more like a scalpel, because what it tries to do is simply identify issues that have litigated in the first action, that need not be litigated in the second action. So the scalpel takes the issue out of the case in the second trial. It is a much more discrete, and in some ways powerful, doctrine.

1. Keep in mind that in res judicata, the causes of action by definition are the same—the context is that same. In collateral estoppel what we are doing is looking at the question of whether an issue that was litigated in one context, in action 1, should or should not be re-litigated in a different context because it is a different cause of action, in action 2. Thus, because of that contextual shift, the law is very careful before it allows collateral estoppel to take hold. It has serious prerequisites.

B. Prerequisites for Collateral Estoppel: there are three prerequisites before collateral estoppel can be invoked:

1. You must make sure that the issue in action 1, is the same as the issue is in action 2. It HAS TO BE THE SAME ISSUE.
2. You've got to make sure that the issue actually was litigated in the first case. There are many issues in a case that are alleged, maybe even discovered on, but when you get to trial they are not actually litigated on because they turn out to be alternative matters, or matters that end up not meaning much. Collateral estoppel will not be applied unless the issues was *ACTUALLY LITIGATED* in the first action.
3. Not only must the issue have been litigated on in the first action, but the issue must have been *NECESSARILY DECIDED* in the first action. Miller did not just say decided, he said necessarily decided. There are many issues in cases that are decided, there is a ruling on them, but it turns out on close inspection, that the ruling, that decision, was not necessary to achieve the result that was achieved in the first case.
    a. It is this third element that many people have difficulties with and it is this third element that occasionally shows up in a nasty collateral estoppel question on the exam.

b. *Examples:* this is fucking hard, draw it out and visualize it because if you don't you won't get it, you're dumb and your teacher is not. Two cars collide, driver 1 sues driver 2, and driver 1 wins. There is no compulsory counterclaim rule, so driver 2 never asserted a compulsory counterclaim. Driver 2, after the rendition of judgment in action 1, brings an action, a second action, this time suing driver 1, claiming that I got hurt and my car got damaged and I am now suing to recover my damages. The question now is what if, if any, collateral estoppel effect runs from action 1, which ended up in a decision for driver 1, over to action 2, in which driver 2 is seeking to impose liability on driver 1.

i. There is something you have to realize before we take another step: we are talking now about collateral estoppel, we are not talking about res judicata (don't be thinking that since we have one transaction and occurrence that everything is precluded). Res judicata does not apply because when it says you cannot re-litigate a cause of action has a point of view to it. My cause of action is not the same as your cause of action, even if both causes of action arose from the same transaction or occurrence. That is what exists in the hypo, yes it is true that when those cars collided, we have one transaction and occurrence, but that one transaction creates a *cause of action* in driver 1 and a cause of action in driver 2. So that when driver 1 advances his causes of action, in action 1, that has NO res judicata effect on drivers 2 cause of action. That is completely different. That is why we are forced to a collateral estoppel analysis and not res judicata.

Back to the issue: what is the collateral estoppel effect of driver 1's victory in the first action. What is it that driver 1 had to establish to prevail in the first action; namely, driver's 2 fault. That had to be litigated in the first action and that was necessarily decided in the first action. Driver 1 could not get a judgment against driver 2 unless driver 1 litigated, proved, and the court determined that driver 2 was negligent. So the issue of driver 2's negligence was (a) *actually litigated*, and (b) *necessarily determined* in the first action. This issue of driver's 2 negligence in the context of action 1, becomes driver's 2 contributory negligence when driver 2 turns around and brings a tort action against driver 1 in action 2. Forget about comparative negligence, lets just look at collateral estoppel. In other words, if the second driver was found negligent in action 1, that negligence *bars* driver 2 in the second action when he seeks to recover against driver 1 because it now establishes driver 2's contributory negligence which in the hypo situation is a bar to driver's 2 prevailing in action 2.

ii. As you can see, if you preclude re-litigation of certain critical issues, in effect, you are determining action 2 from top to bottom. The little hypo indicates that collateral estoppel can have as much power as res judicata.

c. *Example #2* (a touch more complicated): lets suppose that in our 2 car collision this time when driver 1 sues driver 2 for negligence, the jury comes back in and in a special verdict says we find that driver 1 was negligent and we also find that driver 2 was negligent, they both were negligent and as a result that leads a verdict and judgment for the defendant, namely driver 2, in action 1. Now, driver 2, says I'm going to give this a shot, that jackass motherfucker driver 1 injured me, my Honda accord was damaged, I'm going to bring my action, the turn around action and sue driver 1. The same question we looked at before: what issue or issues from the first action are collaterally estopped in the second action. Intuitively you might say something quite logical—the jury in action 1 found driver 1 negligent, and driver 2 negligent that means both issues should get collateral estoppel effect and that prohibits driver 2 from prevailing in action 2 because the jury in the first case found driver 2 negligent. You would says the issues are the same, the first requirement of collateral estoppel, the issues were actually litigated and the issues were decided. Okay, but Miller emphasized before that it is not enough that an issue was decided, but the issue must have been necessarily decided. So the question is when that jury came back in action 1 and said they're both negligent, did the jury necessarily decide that driver 1 was negligent and driver 2 was negligent. Think about that. Was it necessary *to reach the result the jury reached* for the jury to find that driver 2 was negligent. The truth is, to reach the result it did in action 1, all the jury had to decide was that driver 1 was negligent—that produces verdict and judgment for driver 2. In fact, the decision by the jury that driver 2 was negligent was not necessary to the result, and in real sense it was inconsistent, with a verdict and judgment in favor of driver 2. The only thing that was necessary in action 1 was for the jury to decide that the original plaintiff, driver 1, was contributory negligent, and therefore could not prevail in the action. Miller knows that we are sitting here saying but they decided that driver 2 was negligent also. How do you know that they took it seriously, how do you it was decided seriously. Also, driver 2, since driver 2 won, cannot appeal because he won, he does not get appellate review on the question of his negligence and the propriety of the jury's decision that he was negligent. When you look at in that fashion, you can see why we have the requirement that not only must issue be litigated and decided it must be necessary to the result. Otherwise you never know if it was seriously decided, and the party that prevailed on that issue, or got hurt by that issue can take an appeal.

IV. <u>Whose Impacted by Former Adjudication Principles</u>

A. <u>Hypothetical:</u> lets suppose that a taxicab driving the porno star Chasey Lane, and a bus loaded with Swedish Bikini models, collide. The taxicab sues the bus company in negligence. The taxicab company wins and the bus company loses.

1. As between them you have normal res judicata and collateral estoppel principles. But that is not what we are talking about. Here we are talking about someone who is an absolute stranger to the first action being sued, or suing, in the second action. Who would that be in out hypo? Obviously it would be a passenger, doesn't matter if it is a Swedish bikini model on the bus, or Chasey Lane who was in the taxicab. Lets say it was a bus passenger.
2. In the second action, the passenger sues the taxicab and the bus company. The taxicab company starts bitching and says the obvious—look I've already litigated it with the bus company as to who caused that accident. In action 1 it was decided that accident was caused by the bus company, not me, not me in and my taxicab. Therefore, passenger go away. What's the answer?
3. You realize instantly, if you have your thinking cap on, that the passenger has never had a day in court. Constitutionally we cannot bind the passenger to the result in the litigation between the cab company and the bus company. The fact that as between those two, the cab was exonerated does not prevent the passenger in action 2 from suing the taxicab company. The passenger, and her beautiful ass, has never had her day in court. For all we know the bus company had a lousy lawyer, or the bus company and the taxicab company colluded in the first action, or the taxicab company had a special defense against the bus company. But what we do know is the general rule:
    a. **G/R:** you are not bound by a result that you were not a party to, or a privy to a party to.
        i. That rule has always been the law, and is still the law. Do not, DO NOT FORGET THAT!
        ii. Do not get trapped by an examination question that tries to get you to apply collateral estoppel against someone who was not a party to the first action, IT CANNOT BE DONE.
4. What have just decided is that the passenger is free to sue the taxicab. But what about the bus? The passenger says the bus was found negligent, I want to run collateral estoppel against the bus.
    a. Mutuality of Estoppel: The historic rule, called *mutuality of estoppel*, said that the bus passenger cannot do it. Even though the bus company has had its day in court on the question of who caused that accident, even though it has been adjudicated that the bus company was a fault, a stranger to the litigation, the passenger, cannot benefit from that adjudication. We don't know the true roots of the doctrine of the mutuality of estoppel, all that we know is that until the 1940s, it was the universal law of the land.
    G/R: Historical rule: Someone who was stranger to the first action could: (a) not be bound by that action; and (b) could not benefit from that action. Maybe it had to do with symmetry, or moralistic notion that the passenger did not risk or anything, and therefore could not claim benefits from the first action.
        i. Well the law has gone through a revolution. Starting in the 1940s, with the Supreme Court of California in *Burnhart v. Polygraph Corp. of America* the entire mutuality structure begun, and eventually collapsed. In a case that is the casebook, *ParkLane*

Hosiery the United States Supreme Court abandoned mutuality entirely for the federal courts.

B. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

1. **Facts:** in *Parklane* the SEC brought a proceeding against the company claiming there had been a violation of the securities laws. In that case it was adjudicated that there had been a violation of the securities law by the company. Action 2 was brought by Shore, a shareholder, a stranger to action 1. Shore says, look because you violated the securities law I was damaged and I want damages. Moreover, since the company has already been adjudicated, guilty of violating the securities law, there is no reason to re-litigate that. The issue of the company's violation of the securities laws should be given collateral estoppel effect from action 1, and I should benefit from it in action 2.

2. **Holding:** Supreme Court of the US said okay. Even though you were a stranger to the first action Mr. Shore, we are going to allow you to benefit. And notice, we going to allow you to benefit in an *offensive* way, to impose liability on *Parklane.*

1. We call this *offensive non-mutual collateral estoppel*. It is were the law is today. Almost all states that have considered mutuality of estoppel in the past two decades have said that mutuality is dead, and that offensive non-mutual collateral estoppel lives. But, the Supreme Court, in *Parklane* and State courts have laid down prerequisites to this use of offensive non-mutual collateral estoppel.

3. *Prerequisites for Offensive Non-Mutual Collateral Estoppel:*

1. If the stranger could have joined in the first action easily, and did not, that stranger cannot take advantage of the doctrine.

a. You can't sit on the sidelines, and then claim the fruits of the victory of the game. You have to get into the game, if you can.

2. To be fair to the party who loses on the issue in the first action, that party must have been given a full and fair opportunity to litigate in the first action. There cannot be any procedural inhibitions. The losing party must have had a fair and full opportunity to litigate *and* must have exploited that opportunity. The party against whom you're trying to run the collateral estoppel must have actively and fully litigated the issue.

3. That losing party must have foreseen the second action.

a. In *Parklane* that issue was easy, the company knew it had shareholders, it knew that when it violated the securities law that people would be damaged, it knew that when the SEC was prosecuting it that it would follow (like the night does day) that the shareholders would sue it the company.

**This case is the perfect example of the offensive non-mutual collateral estoppel doctrine. But on the exam you have got to be very careful, professors like to trick your dumb ass, and give you situations that seem to indicate that it is okay to apply this doctrine and unless you look at the

facts very carefully and use your common sense you may not see that one of the preconditions to the use of the doctrine is missing.

D. Hypothetical: here is a situation that Miller thinks the *Parklane* doctrine does not apply. Lets assume we have a photographer, who takes pictures of nude women for a dirty magazine. He has a gallery. One night the gallery burns down (no women were injured). It turns out this fire occurs after the gallery had been rewired. So the photographer sues the electrician saying you fucking asshole you're negligent rewiring caused the fire, burned down my studio, destroyed my photos, and ruined the best job a guy could have—I want damages. The case goes to trial, and it is determined, the jury finds on the special verdict that the fire was not caused by the electricians negligent rewiring. The fire was caused because the photographer had left a hot plate on, unattended, and it heated up some papers, causing the fire, destroying the studio. In other words, the photographer loses the first action because fault does not lie with the electrician. The owner of the building hears this, and says look, that studio fire has destroyed half my building. I am going to sue the photographer claiming that the damage to the building was caused by his negligence. And he does, sues the photographer and says I am entitled to collateral estoppel on the photographer's negligence.

1. Now look at that situation, the issue of the photographers negligence has been adjudicated, but was that second action foreseeable at the time of the first action? Is it fair to hang this enormous consequence of the fire, and the tremendous liability to the building owner, on the photographer's neck by way of collateral estoppel? This is one of those cases in which although the photographer has had his day in court, maybe we should give him a second day in court, and have a second jury make a determination as between the landlord and the photographer.
2. This hypothetical is a pretty good indication that although offensive non-mutual collateral estoppel has swept the country, it has its limits, and a rational court would not impose the consequences of the first adjudication as to the cause of the fire on photographer in the second case.

THAT'S IT, GOOD FUCKING LUCK ON THE EXAM, Arthur Miller