

## CIVIL PROCEDURE II OUTLINE

### §1: JOINDER OF CLAIMS AND PARTIES

#### §1.1: INTERPLEADER

##### I. OVERVIEW

A. **Analytical Framework:** if confronted an interpleader problem, the procedure the courts goes through is:

1. Stage 1: a lawsuit is filed asking for interpleader.
  - a. The court determines if the requirements for interpleader are met;
    - i. If the judge decides interpleader is not appropriate, or that the requirements are not met, he will dismiss the action.
  - b. If the court determines the requirements are met, and it is appropriate, he directs the plaintiff to interplead; the plaintiff stakeholder then makes a deposit to the court of the stake.
    - i. If the stakeholder is disinterested, then he will be dismissed and is not required to be in the litigation anymore.
2. Stage 2: (a) determine the merits of the claimant's rights in the court if the judge enjoined the other proceeding pursuant to §2283; or (b) if the court did not stay the proceedings of other courts were the claimants have brought actions, then it will wait until after all judgments of interested parties are entered.
  - a. If it is a federal interpleader case, then the claimants have a right to a jury trial. If a jury trial is requested, the jury will determine the merits of the claims.
    - i. The Erie doctrine, and Klaxon Rule (choice of law of the forum state), are applicable.
3. Stage 3: after all of the judgments, and merits of the claims have been gathered by the court, the judge will divide up the funds between the claimants.

B. **G/R:** There are two forms of interpleader: (a) Rule Interpleader; and (b) Statutory Interpleader. The court goes through the same process in both instances, but applies different standards; however, the *function* and *policy* of interpleader is essentially the same.

C. **G/R:** Function of Interpleader: the function of interpleader is to rescue a debtor from undue harassment when there are several claims made against the same fund.

1. Rule Interpleader only permits interpleader if the claims are "such that the plaintiff is or *may be* exposed to double liability."
  - a. The requirement that the plaintiff "may be" exposed to multiple liability is not a strict one. The danger need not be immediate, any possibility of having to pay more than what is justly due is, no matter how improbable or remote will suffice.  
\*[*Pan American Fire & Cas Co. v. Revere*]
2. Interpleader allows the person holding the property (the stakeholder) to go to court and deposit the property. The stakeholder is a custodian who has the property, but does not own it or claim it. It allows the stakeholder to let the claimants litigate over the property, while he/it is dismissed from the action.
  - a. The stakeholder deposits the property in court, and then interpleads (gathers together all of the claimants) and then during the second stage of interpleader allows all of the claimants to litigate among themselves as to whose property it is because the stakeholder typically is dismissed after depositing the property.

b. There are situations in which the stakeholder is also the claimant, which is perfectly legitimate.

3. *Defensive Interpleader*: interpleader arises defensively when one of the claimants sues the stakeholder and then the stakeholder, defensively, deposits the property with the court and interpleads the other the claimants.

3. Interpleader can function to protect both the *stakeholder* and *claimant*.

a. Example: Stakeholder protection: Bill has a \$1 million life insurance policy, which he names “to his wife, Hillary, as beneficiary.” Bill then is divorced by Hillary, and remarries Monica. Bill dies with his life insurance policy to his wife. The concern for the life insurance company is that they will have to pay twice; if Hillary and Monica both sue in separate suits to collect the insurance proceeds. So the insurance company stakeholder would go to court, interplead (if all the requirements are met) Hillary and Monica, deposit the million dollars and be dismissed and only have to pay once.

b. Example: Claimant Protection: interpleader can also protect claimants. If an auto insurance company only has \$1 million dollar policy, and Bill and Monica are in a car accident, then they both won’t have to race to the court house to try and collect on the policy before the other.

D. **G/R: Policy for Interpleader**: the function of interpleader gives effect to several policy reasons for the rules:

1. *Benefit to the Stakeholder*: (a) avoids having to decide a peril which plaintiff has better claims; (b) the stakeholder does not have to be involved in multiple suits in different states; (c) it protects the stakeholder from multiple liability and vexatious litigation; (d) allows the stakeholder to be dismissed from the action after depositing the stake.

2. *Benefits to the Claimant*: (a) the claimants do not have to race to the courthouse to try and obtain a judgment on the limited fund first; (b) results in an equitable distribution of a limited fund; (c) the money/fund/stake the claimants are trying to obtain are already in court.

3. Promotes judicial economy.

4. *Disadvantages of Interpleader*: (a) adversely affects the claimants ability to choose which court/forum it wants to defend in; (b) sometimes it is not allowed; (c) requires the claimant to become entangled in more complex, hence costly, litigation because each claimant has to prove that not only is the plaintiff liable but all the other claimants competing for the fund are less deserving.

E. **G/R**: in statutory or rule interpleader the stakeholder, if in federal court, can recover both costs and attorney’s fees even though there is not a rule for fee shifting; which is in contravention of the *American Rule* that holds that each party is entitled to pay his own attorney’s fees and costs.

## II. RULE INTERPLEADER

A. **Rule 22: Interpleader**: (1) Persons having claims against the *plaintiff* may be joined as defendants and required to interplead when their claims are such that the plaintiff is or *may be* exposed to double liability.

B. **Rule Interpleader**: [Rule 22] there are five main requirements for Rule interpleader:

1. Subject Matter Jurisdiction:

a. *Diversity of Citizenship*: requires **complete diversity** between the stakeholder and claimants [28 USC § 1332].

b. *Amount in Controversy*: requires that the stake exceed \$75,000 (i.e. at least \$75,000.01) [28 U.S.C. §1332].

2. Personal Jurisdiction: requires traditional personal jurisdiction over all the claimants: service within a state, territorial, or long arm. Minimum contracts, *International Shoe*, etc...
3. Venue: is under § 1391(a) there can be defendant residential venue (where the defendant lives), substantial part of the claim venue (where a substantial part of the claim arose), or the default provision (it can be brought where there is personal jurisdiction over the claimant).
4. Bonds: the court may set a bond pursuant to Rule 67; however, if rule interpleader is properly invoked there is no requirement that the stake be deposited with the court.
5. Injunctions: the court may grant an injunction to stay the proceedings in another action in “aid of its jurisdiction” pursuant to 28 USC §2283.

**\*\*In an interpleader suit:** (a) the stakeholder is seeking equitable relief to deposit the stake and be dismissed from the action (unless he/it is also a claimant); (b) the plaintiff is the person/company seeking interpleader (i.e. the stakeholder) and the defendants are the claimants; (c) the defendants then usually cross claim against each other, and may counterclaim against the plaintiff.

B(1). **G/R:** Venue and Service of Process: there are two procedural limitations under Rule 22, which become important whenever the claimants are not all within the territorial jurisdiction of the district court:

1. the only proper venue for the suit when the defendants do not reside in the same state is the residence of the plaintiff; and
2. process cannot run beyond the boundaries of the state in which the court sits.

**\*\*These restrictions are waivable.**

B(2). **G/R:** Enjoining other Proceedings: usually interpleader will not be effective unless all of the claimants are brought before the same court in one proceeding and restricted to that single forum in the assertion of their claims.

1. **§2283**: prohibits federal courts from interfering with a pending state court action except in three situations:
  - a. where such a course is expressly authorized by an act of Congress;
    - i. This exception is applicable to a suit brought under the Interpleader Act [§1335] because that statute expressly empowers the court to enjoin claimants from instituting or prosecuting any proceeding in any State or federal court affecting property, instrument or obligation involved in interpleader action.
    - ii. This exception *does not* apply to Rule 22.
  - b. where the issuance of an injunction by the federal court is necessary in aid of its jurisdiction;
    - i. This exception is *applicable* to Rule 22.
  - c. where the court’s action required to protect or effectuate its judgments.
    - i. This exception is possible applicable to Rule 22.

C. **G/R:** interpleader is available when there are several claimants who have obtained judgments which aggregate too more than the amount of the policy.

1. In such a case, it makes no difference whether the claims originated in tort or contract.
2. It is settled that interpleader is available to an insurer whose policy is insufficient to satisfy the contractual claims, even if they have not been reduced to judgment.

D. **G/R: Utility of Rule Interpleader:** the only time a party will need to use Ruler interpleader, as opposed to statutory interpleader is when a stakeholder has complete diversity under §1332, but not minimal diversity.

1. *Example:* Plaintiff (Wyo.) v. Defendant #1 (Colo.); Defendant #2 (Colo.); Defendant #3 (Colo.).
  - a. This action could also be brought in State court.
2. Statutory interpleader is usually used instead of rule interpleader because it has less stringent jurisdictional requirements.

### III. STATUTORY INTERPLEADER

A. **28 U.S.C. § 1335: Interpleader:** (a) The district courts shall have original jurisdiction of any civil action of interpleader...if filed by any person or corporation...having in its custody or possession money or property of the value \$500 or more...if:

- (1) two or more adverse claimants, of *diverse citizenship* as defined in §1332...are claiming or may claim to be entitled to such money or property; and
- (2) the plaintiff has deposited such money or property...due under such obligation....to the court, there to abide the judgment of the court.

B. **Statutory Interpleader:** [28 USC §1335]: there are five requirements for statutory interpleader:

1. Subject Matter Jurisdiction:
  - a. *Diversity of Citizenship:* statutory interpleader only requires **minimal diversity**; that is, diversity between two or more claimants without regard to the circumstances that other rival co-claimants may be co-citizens; and the stakeholder does *not* matter. In other words, **ONLY** two defendants need to be diverse. [*State Farm v. Tashire*].
    - i. Ex: Plaintiff (Wyo.) v. Defendant #1 (Wyo.); Defendant #2, (Wyo.); Defendant #3 (Colo.) would satisfy the minimal diversity requirement.
  - b. *Amount in Controversy:* statutory interpleader only requires that the claim be more than \$500 [§1335(a)].
2. Personal Jurisdiction: the reach of service of process is nationwide [§2361; Rule 4(k)(1)(C)].
3. Venue: the action may be brought in the residence of one or more of the claimants [§1397].
4. Bond: the court is required to take a bond, or deposit, of \$500 or more; that is, in order to invoke statutory interpleader the plaintiff must deposit the entire amount of his possession that is claimed by the claimants and may not hold back the amount he claims. [§1335].
5. Injunctions: the court shall hear and determine the case, may discharge the plaintiff from further liability, and make the *injunction* permanent [§2361].
  - a. §2283 expressly authorizes the court to enjoin other proceedings when “authorized by an act of Congress.” §2361, expressly authorizes a court to enjoin other proceedings and make its determination final.

\*Thus, statutory interpleader creates its own rules for venue and jurisdiction and is governed by Rule 4(k)(1)(C) [federal statutory interpleader exception]; §1335 [interpleader statute]; and §1397 [interpleader venue statute].

C. **G/R: Choice of Law:** in a statutory interpleader suit based on diversity jurisdiction (minimal) a federal court is bound by the *Erie* doctrine to apply the conflict of law rules of the state in which it sits [Klaxon Rule].

## §1.2: INTERVENTION

## I. INTERVENTION OF RIGHT AND PERMISSIVE INTERVENTION: RULE 24

A. Generally: intervention allows a third party, who was not a party to the original action, to join the action upon filing a motion and meeting the requirements of Rule 24(a) or (b) mainly to protect their rights.

1. Intervention is a procedural device designed for protecting private rights and promoting judicial economy; however this may also complicate the action and make it longer.
2. The court when granting permissive intervention, and to a limited extent intervention of right, will balance two countervailing interests:
  - a. the plaintiff's right to control his own action, i.e. allowing him to choose a defendant, without prejudicing existing parties by complicating the issue and causing delay; and
  - b. avoiding multiplicity of litigation and inconsistent verdicts.

B. **G/R: Timeliness**: Rule 24(a) and (b) both require that intervention be "upon timely application," which means intervention is discretionary by the court and the intervener:

1. The court will not allow intervention, even if it is intervention of right, the intervener seeks to intervene shortly before trial, or during trial; however, if it is only a short time after the suit has been instituted then the court will probably determine that it was timely. It is largely in the discretion of the trial court to determine timeliness.
  - a. *Factors*: the court may take into consideration (a) when the intervener became aware of the lawsuit, (b) when they knew that their interests were being affected; (c) how long the parties are along in discovery; (d) the extent of distribution, delay, and prejudice to the parties already in the lawsuit.
  - b. Remember, it is the discretion of the trial court, and the court may allow intervention during the trial, or only for appeal [*Smuck v. Hobson*] if it deems it appropriate.

B. **Rule 24(a): Intervention of Right**: intervention is granted as a matter of right:

1. *Unconditional Statutory Right*: when a federal statute confers an unconditional right to intervene; *or*
  - a. ex: 28 USC §2403 (US government can intervene in any action to defend the constitutionality of an act of congress).
2. *Protect Intervener's Interest*: when the applicant claims an *interest* relating to the property or transaction of the action:
  - a. the disposition of the action must as a practical matter *impair* or *impede* [i.e. prejudice] the intervener's ability to protect that interest; and
    - i. the nature of the interest must be a significant protectable interest to support intervention; that is, the right or interest which will authorize a third person to intervene must be of such a direct and immediate character that the intervener will either lose or gain by the direct legal operation of judgment [*Brune v. McDonald*] and
    - ii. the intervener must show that the resolution of the litigation would impair her interest (this does not just mean *res judicata*) but as a practical matter.
    - iii. This interest can be raised on appeal if it raises a *substantial unsettled* question of law [*Smuck*].
  - b. the intervener's interest is *not* adequately represented by existing parties.
    - i. This means that if the intervener has demonstrated that his interest will be practically impaired, then the only way intervention should be denied is if the parties in the action are adequately representing that interest.
    - ii. Typical grounds for the inadequacy of representation are:

- a. the intervener's interests are not represented at all;
- b. the applicant and the attorney who is representing the interest have different views; and
- c. there is collusion between the representative and adverse party.

B(1). Stare Decisis Effect: it has been argued that the stare decisis effect of litigation alone is sufficient to grant intervention right when a unique issue of law is involved and there is little likelihood that it will be reconsidered after it is decided in the current litigation [*Atlantis Development Corp. v. US*].

C. **Rule 24(b): Permissive Intervention**: the court has discretion to permit a nonparty to intervene if:

1. *Conditional Statutory Right*: when a statute of the US confers a conditional statutory right to intervene;
2. *Common Question of Law or Fact*: when an intervener's claim or defense and the main action have a common question of law or fact.
3. The trial court has broad discretion in granting intervention of right and must weight countervailing interests:
  - a. delay or prejudice to the original parties; the original parties interest; against
  - b. the intervener's interest, and the public interest in judicial economy and efficiency.

D. **G/R: Conditions Imposed by the Court**: in both intervention of right, and permissive intervention, the court in its discretion may impose conditions on the intervener, such as:

1. restricting the scope of discovery;
2. limiting the issues the intervener can raise at the trial; and
3. not allowing duplicative interrogatories, among other things of the like nature.

E. **G/R: Supplemental Jurisdiction**: if the action is in federal court and based on diversity jurisdiction there is no supplement jurisdiction under §1367(b).

F. **G/R: Appeals**: if the court grants the motion to intervene, the other party cannot take an interlocutory appeal and the case must be tried and it is unlikely it will be reversed for granting the intervention motion because it is highly discretionary.

1. If the motion to intervene is denied, the applicant can intervene right away because, in effect, the case is over for him.

G. **G/R: Other Notes**: most inteverner's file their motions under both Rule 24(a) and (b); arguing an interest in the litigation; and in the alternative a common question of law or fact.

1. The applicant must file a motion for leave to intervene, and the proper pleadings. Until the court grants the motion the case is not docketed; however, the statute of limitations ceases to run while the court is considering the motion.

## §2: CLASS ACTIONS

### §2.1: OPERATION OF THE CLASS ACTION DEVICE

#### I. INITIATION OF THE CLASS ACTION

**A. Analytical Framework:** there are several requirements, and 5-steps to go through in order to bring a class action, and get it resolved:

1. Determine if the class can be certified:
  - a. There are 7 prerequisites for bringing a class action:
    - i. There must be a class;
    - ii. there must be class representative;
    - iii. numerosity: more than 40 will usually suffice;
    - iv. commonality: must be common question of law and fact;
    - v. typicality: the class representative's claim must be typical of all other claims;
    - v. adequacy: due process requirement, the class, class representative, and class representative's lawyer must all be adequate;
    - vi. Then determine if it is a Rule 23(b)(1); (b)(2); or (b)(3) class action.
  - b. Rule 23(b)(1): *anti-prejudice class action*: if not certifying the class will prejudice:
    - i. the party opposing the class action because of inconsistent or multiple litigation, the class can be certified; or
    - ii. to the class because it will impair or impede their ability to protect their interests.
  - c. Rule 23(b)(2): *injunctive or declaratory class action*: for an action to fall within Rule 23(b)(2) the defendant's conduct need only be generally applicable to the class, there is no requirement that the conduct be damaging, or offensive to every class member.
  - d. Rule 23(b)(3): *damage class action*: there are two additional prerequisites for a 23(b)(3) class action:
    - i. *predominance*: the common questions must predominate, that is, there must be several common issues of law and fact;
    - ii. *superiority*: the class action must be more superior than individual adjudication, which is essentially a manageability question.
2. Determine what notice the class is required to give if it is certified:
  - a. Rule 23(b)(1) and (b)(2) notice requirements are governed by Rule 23(d)(2), which allows the court in its discretion to determine the manner in which notice is given.
  - b. Rule 23(b)(3) notice requirements are governed by Rule 23(c)(2). Each member of the class:
    - i. must be given individual notice, super-*Mullane*; and
    - ii. be given the option to opt-out of the class.
3. If the class certification is denied, or granted, someone will want to appeal that decision:
  - a. Rule 23(f) gives the appellate court *discretion* to hear an appeal based on the grant or denial of certification:
    - i. §1291 does not work for an interlocutory appeal because the grant or denial of certification is not a "final judgment."
    - ii. A party could also try and seek an appeal under §1293, but that usually does not work.
  - b. However, the party seeking appeal must do it within 10-days after the order.
4. Determine if the court has jurisdiction: the court must have either federal or diversity jurisdiction to hear the case:
  - a. Federal Question Jurisdiction: traditional rules apply, the action must be brought under a federal statute, and based on a federal cause of action (i.e. discrimination, securities, etc...).
  - b. Diversity Jurisdiction:
    - i. *Diversity of Citizenship*: there must be complete diversity. Diversity is determined by looking SOLELY at the citizenship of the representative (not the entire class).

ii. *Amount in Controversy*: each plaintiff must have a claim that satisfies the jurisdictional minimum, \$75,000 and the absent class members cannot aggregate their claims. Only the persons not meeting the jurisdictional minimum are dismissed from the action.

(A). *counterargument*: under Abbott Labs, and the 5th circuit, the absent class members can be aggregated because §1367 the plain language of the statute allows for pendant party jurisdiction, or supplemental parties.

c. Personal Jurisdiction: a.

i. *defendant*: the defendant must have minimum contacts with the forum, traditional *International Shoe, Denkla, Volkswagen Rules*.

ii. *Absent class members*:

(A). the absent class members in a 23(b)(1) or 23(b)(2) class action are entitled to, at least, adequate representation.

(B). In a rule 23(b)(3) class action (and could argue that this applies to all class actions) the absent class members are entitled to:

(I) adequate representation;

(II) notice reasonable practicable under the circumstances to reach the parties; and

(III) the right to “opt-out” of the action and pursue their own claims or drop out completely.

4. Apply general rules to get the case to trial:

a. *Choice of Law*: the due process clause and full faith and credit clause require the state to have a significant contact with the action, creating state interests, such that their choice of law is not fundamentally unfair.

b. *Venue*: only the residence of the CLASS representative is important for venue purposes.

i. Remember, there is defendant residential venue, substantial part of the claim venue, or the default personal jurisdiction venue requirements.

b. *Pretrial Orders*: the court can grant several different kinds of pretrial orders under Rule 23(d).

c. *Settlements*: for the parties to settle, (a) notice must given to the absent class members; and (b) the court must approve. This is because the court is acting as a fiduciary for absent class members.

d. *Trial*: the court must conduct a trial, absent settlement and determine (a) liability; (b) damages; and (c) distribution. These are three distinct phases, and courts often have bifurcated trials.

5. A judgment in a class action is binding on class members in subsequent litigation. The principles of res judicata and collateral estoppel apply.

B. **G/R: Class Actions**: permit a representative party to bring suit on their own behalf, and in addition to, other people similarly situated. Although Rule 23 expressly gives courts the power to issue certification of a class action on their own motion, they normally are issued in response to a motion made by the litigant who ultimately will be named as the class representative.

1. Class actions are procedural devices with substantive effects and implications. The power of the class is in their numbers.

C. **G/R: Basic Structure**: the individual who wants to initiate a class action need not get the permission of potential class members before moving to certification, and consent of the class members is generally not a prerequisite for a court’s certifying a suit as a class action.

1. The plaintiff, a named representative, represents absent members of the class. The responsibility for the litigation rest solely with the class representatives. The representatives should communicate with the class, however, the authority to make decisions rests solely with the representatives.
2. *Mootness*: if the representative's claim against the defendant becomes moot, and the class has been certified, then the action is its own entity, and the action can continue if a new representative is named. However, if the class *is not* certified then if the representative's case becomes moot, the action is over.

D. **G/R: Policy**: there are several pros and cons of the class action device:

1. *Pros*: (a) the class action is a powerful device, which allows "little" people to vindicate their rights against larger corporations; (b) it is very protection; (c) it would be difficult to enforce several laws without the class action device (e.g. civil rights laws, securities laws, etc...); and (d) allowing people to enforce those rules and rights through the class action is beneficial.
2. *Cons*: (a) representatives have the power to bind and affect the legal rights of absent class members; so, protections are needed to make sure that the absent class member's rights and right to due process have not been violated; (b) it has the potential to not protect the absent class members in "settlement cases" and mass tort cases.

## II. CERTIFYING THE CLASS

A. **Certification Decision: Prerequisites for Certification**: the district court judge must make seven (7) affirmative findings before a suit can be certified and the plaintiff has the *burden* of establishing all seven prerequisites. Two of the rules are judicial and the other four are enumerate in Rule 23(a), and the seventh determination is that the district court judge must find that the case falls within one the three categories of class actions described in Rule 23(b).

A(1). **The Class**: [judicial rule] the first requirement is that there must be a class; that is, the plaintiff must describe an *ascertainable* group that claims to be injured.

1. This is common sense, the class cannot be for "all poor people" or something of the like, it has to be class of people that were injured; for example, all the people who bought a certain stock and were subjected to fraud, or all the people who were hurt in an antitrust violation or discrimination by an employer, etc...

A(2). **The Representative**: [judicial rule] the plaintiff, the class representative, must be a *member of the class*. This is essentially a standing rule.

1. There can be sub-class representative also in large class actions; for example, past and present employees in a discrimination case.

A(3). **Numerosity: [Rule 23(a)(1)]**: requires that that the class be so numerous that joinder of all members is "impracticable."

1. If a class has more than 40 (or more than 60 which is which Selig said) members numerosity is usually satisfied;
2. If the class number is less than 25 members numerosity is usually lacking;
3. When the class is between 25-40 members factors such as the geographic dispersion of class members and the size of their individual claims become important.

4. In other words, the class must be large; otherwise, the litigants and the court do not get the cost benefit of the class action; that is, the efficiency of aggregated adjudication, which justifies the use of the representative action.

- a. Because American's prize their day in court, and that is lost with a class action, the class has to be large enough to justify a "representative day in court."

A(4). Commonality: [Rule 23(a)(2)]: mandates that the action raise common questions of law or fact common to the class. One significant common question is enough. Thus, it must common question of law or fact must be one that would have to be determined for all the members of the class whether or not they filed their own suit.

1. The common question of law or fact that ties the class together is usually obvious; for example, a mass disaster like a airplane crash there is a common question of fault; in contract claim its breach; in the civil rights case it is discrimination, etc...

A(5). Typicality: [Rule 23(a)(3)]: requires that claims of the representative party are typical of those by the class. This basically merges commonality and adequacy of representation and this is meaningful element.

1. A class representative must be part of the class and posses the same interest and suffer the same injury as class members; that is, the representatives claim and the class claims are so interrelated that the interest of the absent class members will be fairly and adequately protect.
2. The class representative's claim must be typical of the claims of all the members of the class, which means to satisfy this requirement the representative should be out of the central casting and looks like every other member of the class.
  - a. The representative's claim should be relatively the same as the absent class members and *not* a special claim or someone who has a special defense.

\*[*General Telephone Co. v. Falcon*].

A(6). Adequacy: [Rule 23(a)(4)]: the representative parties will fairly and adequately protect the interests of the class.

1. *Due Process Requirement*: adequacy is a due process requirement, and therefore a constitutional requirement, and probably the most important of the prerequisites for certifying the class [*Hansberry v. Lee*].

- a. In *Hansberry* the court said adequacy is a due process requirement that ensures that the members of the class, although they will not have their day in court, will have their figurative day in court.
- b. On a practical level, a defect in the adequacy of representation might leave the judgment vulnerable to collateral attack.

2. The fair and adequate representation requirement goes to the quality of the representative's *attorney*; that is, the plaintiff representative herself is not solely determinative of the question of adequacy.

1. *Adequacy of the Lawyer*: the court knows that class actions are very often lawyer driven, and therefore requires that lawyers are honorable litigators experienced in class actions.
  - a. The courts are very rigorous in ensuring that there is adequacy because, in effect, the court is acting as a fiduciary for the absent class members in assuring that the representative is adequate.
  - b. In addition, the it is not enough that the representative lawyer be adequate only at the time of certification, he must be *adequate throughout the case* or the court must take action. The court can give the lawyer a pep talk, require additional attorneys, and can de-

certify the class if the court feels that the lawyer is inadequately representing the absent class members to ensure that they are not prejudiced by inept lawyers.

2. There are three elements required to satisfy the adequacy requirement under Rule 23(a)(4):

a. the representative parties themselves must be adequate;

i. the court should ascertain whether the named plaintiffs have a substantial stake in the litigation, or if there is any reason to believe that they are motivated by factors unrelated to the case itself such as greed, vindictiveness, or pursuit of competitive advantage.

b. the representative's lawyer should be adequate; as with the party, much of this inquiry will focus on the lawyer's bona fides, but technical competence is also important;

c. the court also has an affirmative responsibility to examine the class itself to see if it is beset by internal antagonism.

i. **g/r:** a conflict within the class that goes to the matter of litigation will defeat the party's claim of representative status; that is if there is a manifest conflict of interest in the class the action will not be certified.

(A) When members of a class have conflicting interests, they cannot be said to be members of the same class and with regard to due process some parties with conflicting interests cannot stand in for judgment at all.

ii. **g/r:** in the appropriate cases the judgment render in a class suit is res judicata as to members of the class who are not formal parties to it.

(A) There is only a failure of due process in cases where the procedure adopted does not fairly ensure the protection of the interest of absent parties who are bound by it.

(B) Parties to a class action may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation.

\* [*Hansberry v. Lee*].

3. In other words, the representative, the representative's lawyer, and the class must all be adequate in order to satisfy the due process requirements.

A(7). Legitimacy of the Class: [**Rule 23(b)**]: after the court has determined that suit has satisfied the six prerequisites, she must decide if the *action falls within a category that is recognized as a legitimate class action*; that is, the class must fall within one of the three categories of class actions specifically enumerated in Rule 23(b).

1. *Anti-Prejudice Class Actions:* [**Rule 23(b)(1)**]: this rule contains two clauses, both asking whether individual actions might cause prejudice that can be avoided by the class action device.

a. Rule 23(b)(1)(A): *Prejudice to the Party Opposing the Class:* looks for prejudice to non-class members and deals with the risk of having individual actions that would create "incompatible standards of conduct" for the party opposing the class action, in other words, inconsistent or varying adjudications.

i. The rule applies when different results in individual actions would place the party opposing the class in a position of total uncertainty, not knowing how to treat the class as a whole.

b. Rule 23(b)(1)(B): *Prejudice to Class Members:* looks for prejudice to members of the class and requires that individual actions substantially IMPAIR or IMPEDE the ability of the class members to protect their interests.

i. Ex: when there is a limited fund, such as an insurance policy, and as a practical matter if the class was not certified then it would impair or substantially impede the other class members ability to recover.

\*Thus, if there is a threat of inconsistent results from individual litigation that produce prejudice to either (a) the class members; or (b) the party opposing the class, then the class action is legitimate.

\*\*A party cannot opt out of a Rule 23(b)(1) class action.

2. *Injunctive and Declaratory Class Actions*: [**Rule 23(b)(2)**]: includes suits for injunctive or declaratory relief and its primary application is to injunction suits.

a. For an action to fall within Rule 23(b)(2) the defendant's conduct need only be generally applicable to the class, there is no requirement that the conduct be damaging, or offensive to every class member.

b. **g/r**: Rule 23(b)(2) only authorizes certification of a class of plaintiffs, and actions against a defendant class may not be certified under the provision.

c. In other words, these are the class actions in which all of the class members want the same thing.

i. Rule 23(b)(2) class actions are used in discrimination, environmental, or prisoner cases because everybody wants the same thing.

(A) 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.

(B) This class action seeks to achieve therapeutic social remedies.

d. An absent class member cannot opt-out of the Rule 23(b)(2) class action.

3. *Damage Class Actions* [**Rule 23(b)(3)**]: the 23(b)(3) class action is not a natural class and simply embraces a group of people who have been injured by a common practice and all want damages from the defendant; that is, the only tie between the class is that they claim to have been injured in the same way by the defendant. The class has been thrust together solely because they have been injured by the same thing (mass/toxic tort, tobacco, Agent Orange, breast implants, etc...). There are TWO PREREQUISITES that do not apply to other class actions which make the Rule 23(b)(3) class action more difficult to have certified than the other class actions:

a. Predominance: questions of law and fact must *predominate* over any questions affecting only individual class members; that is, for the action to be certified the court must find that the common issue *predominate*; commonality is not enough. In other words, there is a real insistence for efficiency and economy of group adjudication through the predominance requirement.

i. **Test for Predominance**: if the liability issues are common (things like fault or causation) and ONLY the damages issues are individual (and damage issues are always individual) then there is predominance. This may mean there has to be a substantial number of common questions.

ii. The key to resolving predominance lies in ascertaining whether the efficiency and economy of common adjudication outweigh the interest each class member may have in individual adjudication.

b. Superiority: Rule 23(b)(3) also requires that the court must find that a class action is superior to other available methods for the fair and efficient adjudication of the controversy; that is the

class action must be the superior method as opposed to individual actions. The court considers four factors, with the fourth being the most important, to determine if the class action is superior:

- i. Rule 23(b)(3)(A): the interests of the members of the class in individually controlling the prosecution or defense of separate actions;
  - ii. Rule 23(b)(3)(B): the extent and nature of any litigation concerning the controversy already commenced;
  - iii. Rule 23(b)(3)(C): the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
  - iv. the *difficulties* like to be encountered in the *management* of the class action.
    - (A) is the class so large and diverse that it is unmanageable?
    - (B) would the notice requirement be too onerous or burdensome?
    - (C) how many people will intervene?
    - (D) will there have to multiple sub-classes, or are there conflicting interests?
- c. In addition, if predominance and superiority are satisfied Rule 23(c) requires to additional requirements for a Rule 23(b)(3) class action:
- i. Notice requirement, and
  - ii. An opt-out options.

**B. Final Certification Decision:** [Rule 23(c)(1)]: after considering the certification prerequisites, Rule 23(c) gives the judge the power to certify the class as proposed, deny the certification, or certify and modify the class conditionally.

1. In issuing a certification order, the judge defines the terms on which the class action will proceed:
  - a. the order approves a particular description of the class; that is, it defines who is included in it;
  - b. the certification defines the substantive issue the suit will consider; and
  - c. the certification order appoints the class representative, in plaintiff class actions the parties seeking certification will normally nominate themselves as class representatives, however, this does not necessarily mean they will be appointed.
2. Certification is probably the most critical stage in a class action because if the class is certified it gives the plaintiff's a lot of bargaining power for settlements, and if it is denied the case is over.

**C. Appealability of the Certification Decision:** [Rule 23(f)]: a court of appeals, may in its discretion:

1. Permit an appeal from an order granting or denying certification;
  - a. *Denial:* if the court does not certify the class the plaintiff does not have a right to appeal automatically under §1291 because the certification decision is not a "final judgment", the appellate court can discretionarily hear the appeal though.
    - i. The plaintiff could try and bring an action under §1293, however those usually do not succeed.
  - b. *Certification:* if the court certifies the class, the defendant will want an immediate appeal because it does not want to go to all the time and energy of trying the case if the district court is overturned on its certification after a long, expense drawn out trial.
    1. The plaintiff may want certification appealed also, because if the action is overturned as error on certification, all the plaintiffs will have to bring their actions individually.

**D. Notice Requirements for Class Actions:** if the class is certified, then the court will order, or determine, what notice to the class members needs to be given, and the type of notice will vary depending on whether the class is certified as a Rule 23(b)(1) or (b)(2) class action, or a Rule 23(b)(3) class action.

D(1). *Anti-Prejudice, and Injunctive Class Actions*: [**Rule 23(d)(2)**]: Notice Requirement for Rule 23(b)(1) and (b)(2) Class Actions: the court may make appropriate orders, in its discretion, requiring for the protection of of the members of the class for the friar conduct of the action, that *notice* be given in such a manner as the court may direct.

1. The trial judge, in his discretion, can determine what is adequate notice for Rule 23(b)(1) and (b)(2) class actions. He can require anything from publication, to no notice is required, or to individual notice of each absent class member.

D(2). *Damage Class Actions*: [**Rule 23(c)(2)**]: Notice Requirement for Rule 23(b)(3) Class Action: in any 23(b)(3) class action, the court shall direct to the members of the class the best notice reasonable under the circumstances, INCLUDING, *individual notice to all members who can be identified through reasonable effort* [*Mullane* Requirement]. The notice shall advise each member:

1. *Opt-Out Option*: the court will exclude the member from the class if the member so requests by a specified date;
  - a. this means that, after receiving notice the absent class member does not have utilize the class representative if she does not want to; the absent class members can hire their own lawyers, bring an individual claim after they opt-out, or intervene and become a party to the class action, or do nothing (just opt-out of the case).
2. the judgment, whether favorable or not, will include members who do not request exclusion; and
3. any member who does not request exclusion, may enter an appearance through counsel if they desire.
  - a. This is a very demanding notice requirement, it is **super-Mullane**: this rule not only includes what is reasonable under the circumstances, but says *including* individual notice to all class members who can be identified with reasonable effort. This means if you have a large class, it means that can be very expensive, and cumbersome; but it is required by due process because of the special delicacy of adjudicating absent class members rights to damages.
    - i. In other words, individual notice to each class member is always required [*Eisen v. Carlise and Jacqueline*].
  - b. *Preparation*: most courts direct the class representative to draft a notice and permit the opposing party to make objections; the court usually mediates between the parties to insure adequate notice is provided. The class representative, plaintiff, bears the cost of providing notice.
  - c. *Contents*: the contents, in addition to the three things in Rule 23(c) must include:
    - i. a description of the class claim;
    - ii. a description of any counterclaims filed against the class; and
    - iii. sometimes a disclaimer stating that notice of the pending class action does not indicate that the court believes it will prevail on the merits.
  - d. *Costs*: the costs of providing notice must be borne by the party seeking class treatment. If the class suit is successful, the costs of sending notice may be subtracted from the class recovery, thus making each class member share the costs on a pro-rata basis.
    - i. The plaintiff cannot shift the burden to the defendant through discovery process.  
\* [*Oppenhiemer Fund v. Sanders*].

### III. JURISDICTION AND CLASS ACTIONS

**A. Federal Question Jurisdiction:** a class action based upon a federal question does not raise any special problems of subject-matter jurisdiction; just have to meet the normal requirements.

1. If the class action is based on a federal question, like a securities class action, or a civil rights class action, or antitrust class action, the *normal rule* about subject matter jurisdiction continues.
2. In other words, there is no amount in controversy, or diversity requirement, just have to a federal right to bring the action.

**B. Diversity Jurisdiction:** if the action is based on diversity, then there are several requirements that have to be met:

1. Diversity of Citizenship: the determinations of diversity of citizenship in a class action are based on the citizenship of the *NAMED PARTIES ONLY* [*Supreme Tribe of Ben-Hur v. Cauble*].
  - a. In other words, *ONLY* the residence of the *representative* is considered for purposes of establishing federal diversity jurisdiction.
  - b. That means you can have a huge class of millions coming from every state, and all the lawyer has to do is pick a representative whose citizenship is diverse from the citizenship of the defendants; and that is usually what happens, and the issue becomes irrelevant.
  - c. Remember, in cases involving a federal statute, i.e. federal question jurisdiction, there does not have to be diversity or amount in controversy.
2. Amount in Controversy: in federal courts *ALL CLASS MEMBERS* must have claims in excess of the jurisdictional minimum (\$75,000).
  1. *ALL members of the class must meet the jurisdictional amount:* separate and distinct claims cannot be aggregated [*Synder v. Harris; Zahn v. International Paper*]. In other words you cannot aggregate the claims of the class members. *EACH* and *EVERY* class member must have a claim in excess of \$75,000.
  2. Aggregation of claims is only permitted when:
    - a. in cases in which a single plaintiff (i.e. not a class action) seeks to aggregate two or more claims against a single defendant;
    - b. in cases where two or more plaintiffs unite to enforce a single title or right in which they have a common or undivided interest.
  3. **g/r:** each of the several plaintiffs asserting separate and distinct claims must satisfy the jurisdictional amount requirement if his claim is to survive a motion to dismiss; in other words, there is no aggregation of claims.
    1. *Caveat:* only the plaintiffs' whose claims do not satisfy the jurisdictional amount requirement are dismissed and the class can be maintained with the others (if there is numerosity still) who allege sufficient claims [*Synder v. Harris*].
  4. **g/r:** in a Rule 23(b)(3) class action every plaintiff must satisfy the jurisdictional amount requirement [*Zahn v. International Paper*].
3. Amount in Controversy and Supplemental Jurisdiction: as the plain language of 1367 reads: that there can be pendent party jurisdiction, there can be supplemental jurisdiction by having one class member with a claim for more than \$75,000 and treating all of the other class members who might have claims for less than \$75,000 as supplemental parties. *The plain language of the statute leads to that conclusion.*
  1. *Zahn v. Intern'l Paper:* held that just because one class member meets the jurisdictional amount does not mean the other parties can be supplemental parties, every class member has to meet the jurisdictional amount.
    - a. The legislative history of §1367 indicates that Congress made it clear that they did not intend to over the *Zahn* decision against aggregation and against pendency.

2. *Abbott Labs*: [5th Cir. and S. Ct. summarily affirmed]: the 5th circuit said that they are governed by the plain language of §1367 and held that absent class members who do not meet the jurisdictional requirement can aggregate in a class action as supplemental parties.
3. You CAN argue that you can aggregate the claims in a class action under *Abbott Labs*.

**C. Personal Jurisdiction:** due process is satisfied and the judgment is binding on all class members when the interests of the class are represented *adequately* during a suit [*Hansberry v. Lee*]. In an action involving a nationwide class, the state court can assert person jurisdiction over absent class members of the plaintiff class if they are afforded an opportunity to opt out of the class, and choose not be in the action, which satisfies the requirements of due process [*Shutts Petroleum*].

1. There must be minimum contacts over the defendant, but the real issue will be the court's personal jurisdiction over the absent class members.
2. Under classic notions of due process, the rights and property of absent class members is in jeopardy in a class action because a representative is 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 assert their own claims; in other words, their property rights are at stake and they should be afforded adequate due process protection.
3. Applies to all class actions.

C(1). Minimum Contacts: [Non-class action rule, but applies to the defendant] the due process clause does not permit a State to make a binding judgment against a person with whom the state has no contacts, ties, or relations—minimum contacts.

- a. The due process clause does not permit a state to make a binding judgment against a person with whom the state has no contacts with the state, so that it is reasonable and just, according to fair play and substantial justice, for the state to exercise personal jurisdiction. The state can force the defendant to stand and defend in the forum, and upon default, can bind the defendant to judgment.

\*[*World Wide Volkswagen, International Shoe, Denkla*].

C(2). Adequate Representation: in a class action, the plaintiff is in a different position than a normal defendant. A class action suit is an exception to the rule that one could not be bound by judgment in personam unless one was made fully a party in the traditional sense. The absent parties are bound by the decree so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common the interest [*Hansberry v. Lee*].

1. Applies to all class actions.

C(3). **Due Process Requirements for Personal Jurisdiction in a Rule 23(b)(3) Class Action:** if three requirements are met, then the absent class is afforded the due process rights required by the constitution and the court can assert personal jurisdiction over them:

1. The plaintiff *MUST* receive notice *PLUS* an opportunity to be heard and participate in the litigation, whether through counsel or in person.
2. Notice must be the best practicable method, reasonably calculated under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections [*Mullane*].
3. The notice should describe the action and plaintiffs' rights in the action.

4. **G/R: Opt-Out:** due process, at a minimum, requires that an absent plaintiff be provided with an opportunity to remove himself from the class by executing an opt-out or request for exclusion from the court.
  - a. The named plaintiff (the representative), must at *ALL* times, adequately represent the interests of the absent class members.
  - b. The due process clause does not require that the plaintiffs are given an opt-in option (that would be too cumbersome and onerous).
5. The court in *Shutts* said those are constitutional rights, but limited its decision to **Rule 23(b)(3)** class actions, damage class actions, and said that they were not deciding the due process requirements for an injunction or declaratory class action.
6. *Policy:* the absent class members are entitled to due process, *but* since absent class members do not really have to appear, and are not vulnerable to cost assessments, and are not subject to discovery, they can get along with the *Shutts* due process requirements.  
\**[Phillips Petro v. Shutts]*.

#### IV. APPLY OTHER RULES TO GET THE CASE TO TRIAL

- A. **G/R: Choice of Law:** the due process clause and full faith and credit clause require that a state substantive law be selected in a constitutionally permissible manner, which requires the application of three elements:
  1. The state must have a significant contract, or a significant aggregation of contacts;
  2. Creating state interests, such that the choice of its law;
  3. Is neither arbitrary nor fundamentally unfair.\* *[Phillips Petro v. Shutts]*.
- B. **G/R: Venue:** In determining the proper venue for a class action suit the courts look to the residence of the class representatives alone. Only the residence of the class *representative* is important venue; the residences of the absent class members and interveners are irrelevant.
  1. Remember there are three kinds of venue: (a) defendant residential; (b) substantial part of the claim; and (c) default personal jurisdiction venue [§1391].
- C. **G/R: Orders Regulating the Conduct of Pretrial and Trial Proceedings: [Rule 23(d)]:** under Rule 23(d) the court may implement various orders, such as, creating a timetable for discover, scheduling pretrial hearings, imposing conditions on the parties, requiring amended pleadings, etc...
  1. Typically, on the representative named as plaintiff are required to submit to discovery requests, however courts have permitted discover of unnamed parties.
  2. Courts treat counterclaims filed against the class in various manners with some allowing them and some not.
- D. **G/R: Settlements: [Rule 23(e)]** Rule 23(e) provides that a class action cannot be dismissed or compromised *without* court approval and that the notice of any proposed dismissal or compromise (compromise = settlement) **MUST** be given to all the class members.
  1. Thus, if the parties reach a settlement which would bind the entire class; Rule 23(e) requires that notice be given to all the class members about the settlement, and that the court approve, before the settlement can be given effect.
    - a. Rule 23(b)(1): in a rule 23(b)(1) the parties must be given notice of the settlement.

b. Rule 23(b)(2): This is true, even if the class action is a Rule 23(b)(2), which does not require notice of the class action when it was commenced.

i. In 23(b)(2) class actions, the absent plaintiff's can be given the option to opt out of the settlement and most have a requirement saying that if the absent class member takes the settlement they are bound by it.

c. Rule 23(b)(3): the absent class members have already been given a chance to opt-out, so they probably will not be given a second chance.

2. This is different than most cases, in which the court does not have to approve the settlement.

However, because the judge in a class action is acting as a fiduciary for the absent class members whose property interests and rights are at stake. In many instances there is a legitimate question of whether the settlement is fair, reasonable, and adequate for the absent class members and due process requires that their interests be protected.

a. Very often settlement hearings require extensive hearings, expert proof, and sometimes the court will appoint counsel for the absent class members to ensure that the settlement was fair.

b. The decision to allow a settlement is appealable, and can be overturned.

**E. G/R: Proving the Class Claims and Administering Class Relief:** the fundamental characteristic of the class action device is that the class representative serves as a proxy for the absent class members, thus making it possible to adjudicate the claims of the entire class by evaluation the claims of the class representative.

1. In suits for injunctive or declaratory relief, the suit closely resembles a normal suit with the court determining liability, if any, and then administering relief.

2. In suits for monetary relief the court faces problems not invoked in ordinary litigation and must complete 3-analytically distinct tasks:

a. it must determine if the defendant is liable;

b. it must calculate the amount of damages to the plaintiff class; and

c. it must distribute the proper share of the award to individual class members.

\*Sometimes a court holds a bifurcated, or trifurcated, trial determining liability at one, damages and distribution at another, or damages then distribution.

## VI. EFFECT OF DECISION: RES JUDICATA AND COLLATERAL ESTOPPEL

**A. G/R: Binding Effect of a Class Action Decision:** a class action is binding on all of the members of the class who did not opt out and that means there is a res judicata and collateral estoppel effect to class actions.

1. A judgment in a properly entertained class action is binding on class members in subsequent litigation.

2. The principles of res judicata and collateral estoppel apply.

a. A judgment in favor of the plaintiff class extinguishes their claims, which merge into the judgment granting relief;

b. A judgment in favor of the defendant extinguishes the claim, barring as subsequent action on that claim;

c. A judgment in favor of either side is conclusive in a subsequent action between them on any issue *actually litigated and necessarily decided*.

3. *Preclusive Effect:* the rejection of a claim of class wide discrimination does not warrant the conclusion that no member of the class could have an individualized claim and the member of the class is not precluded from bringing a subsequent action.

\*[*Cooper v. Federal Reserve Bank*].

## VII. THE PROBLEM OF THE MASS TORT CASE

A. Generally: mass tort cases are brought under Rule 23(b)(3), which the advisory committee on the rules said was not the desirable effect. However, because the actions are brought, all the requirements for Rule 23(b)(3) have to met and satisfied, however several issues arise more often:

1. In mass tort cases, whether in the fields of products liability, mass disasters or toxic torts, the court is usually confronted with a national class which means that they have to apply the *Erie Doctrine*; that is, the substantive law of each and every state.
  - a. In effect, this means the court has to form 50-different sub-classes of class members.
2. The problems of general causation and individual causation always arise in the mass tort cases:
  - a. *General Causation*: is the product complained of (the agent orange, asbestos, etc...) capable of causing the harm alleged.
  - b. *Individual Causation*: even if general causation is established, did the substances cause the individual injuries claimed by each member of the class.

\*These are usually difficult proof problems which require scientific experts and it becomes even more difficult applying them to individuals.

\*\*So when there is a mass tort action, involving something other than a mass disaster, the court is usually conservative about granting certification.
3. *Mass Disasters*: when there is a single event (like an airplane crash, and to a lesser extent a toxic tort) were the causation is absolutely common, and there are not individual defenses to liability, that is a mass tort case the courts will be more liberal in granting certification for because it can achieve efficiency of adjudication through representation for a situation that involves hundreds or thousands of plaintiffs.

B. G/R: Variations in State Law: Rule 23(c)(1) requires that the class should be certified as soon as practicable and allows a court to certify conditional classes, however, the requirements for certification are not lessened when the class is conditional.

1. The purpose of a conditional certification is to preserve the court's power to revoke certification in those cases where the magnitude and complexity of the litigation may eventually reveal problems not apparent before certification.
2. In a multi-state class action in tort, the variations in state law may swamp any common issues and defeat predominance.
  - a. It is the district court's duty to determine whether the plaintiff has borne its burden on class certification and the court must consider variations in State law, under the *Erie Doctrine*, when class actions involves multiple jurisdictions.

\*[*Castano v. American Tobacco Co.*].

C. Rule 23(b)(3): Predominance Requirement: the predominance requirement requires the court to determine whether a question of law or fact common to the members of the class predominate over any questions affecting only individual class members.

1. A district court may go beyond the pleadings to determine whether the requirements of Rule 23 have been met. Going beyond the pleadings (and looking at the merits) is necessary to determine the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination on the certification issues.

\*[*American Tobacco*].

D. **Rule 23(b)(3): Superiority Requirement:** the superiority requirement requires the court to determine whether the class action is superior to other available methods for the fair and efficient adjudication of the controversy.

1. In the context of a mass tort class action, certification dramatically affects the stakes for the defendants because:

- a. it puts insurmountable pressure on the defendants to settle because of the risk facing an all or nothing verdict presents too high of risk, even when the probability of an adverse judgment is low; and
- b. certification of a mass tort litigation class has historically been disfavored because it affects the rights of the defendants dramatically.

\*[*American Tobacco*].

E. 5. A judgment in a class action is binding on class members in subsequent litigation. The principles of res judicata and collateral estoppel apply.

E. **G/R: Factors in Determining if the Predominance and Superiority Requirements of Rule 23(b)(3) Have Been Met in the Mass Tort Case:** there are four factors the court weighs in deciding if the requirements have been satisfied:

1. the interests of the members of the class in individually controlling the prosecution or defense of separate actions;
2. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
3. the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
4. the difficulties likely to be encountered in the management of the class action.

\*[*American Tobacco*].

F. **G/R:** settlements in mass tort cases also raise problems for the court because there are usually a lot of conflicting interests in the mass tort case.

### §3: **PRE-TRIAL DEVICES FOR OBTAINING INFORMATION: DISCOVERY AND DEPOSITIONS**

#### §3.1: **THE GENERAL SCOPE OF AND DISCRETIONARY LIMITS ON DISCOVERY**

##### I. INTRODUCTION

###### A. **Federal Discovery Rules are Rules 26-37.**

B. **Generally:** the basic philosophy of discovery is that it is for the benefit of all parties and that the parties should find out the truth before trial and not be subjected to surprise at trial.

1. *Pleading Requirements:* the federal rules do not require fact pleadings, and the federal rules do not seek to formulate issues in the pleadings, therefore discovery:
  - a. is liberal and wide-angle to develop the facts, and legal issues before trial. Since the pleadings do not reveal the facts or formulate the issues the federal rules of discovery have to bear that burden.
  - b. The discovery rules desire to give everybody access to the court system, give everybody their full day in court, and try to effectuate deciding the cases on the merits.

2. Since the objective of the discovery rules is to get at the truth, the Rules must give every litigant equal access to all *relevant data*. That is the principle of the federal discovery rules.
3. Discovery creates certain amounts of problems because some parties have begun to manipulate the liberal discovery rules to wear down the other parties financially and physically through extensive discovery; nonetheless, liberal discovery is the system.

C. Court's Function: the courts under the FRCP have always had the authority to limit the scope of discovery; however, they are usually reluctant to intervene in the discovery process and let counsel work the discovery process out among themselves:

1. There are several reasons judges do not interject themselves into the discovery process:
  - a. it is not exciting;
  - b. takes too much of the judges time;
  - c. judges feel that they are not as familiar with the facts and the case and are reluctant to second-guess an attorney working on the case.
2. **Rule 26(f)**: gives judges the power, and allows them broad managerial authority over discovery, such as setting up deadlines and timetables for discovery.

D. Basic Structure: even without discovery rules, attorneys are free to get together, share information, barter, trade and discuss information with each other without serving formal interrogatories or taking depositions. The formal discovery provisions, however, are:

1. compulsory devices to compel the other side to provide information;
2. interrogatories are written questions, which the parties have a duty to answer, and if they object to the question and do not answer the question, then the other party must obtain a court order to compel the party to answer.

E. Three Purposes of Discovery: there are three main purposes to the discovery rules:

1. The preservation of relevant information that might not be available at trial;
  - a. This purpose is basically to preserve testimony and relevant information that might not be available due to age, illness, or the fact that a party may be out of the jurisdiction at the time of trial
  - b. Rules 27, 32(a) deal with this purpose.
2. To ascertain and isolate those issues that actually are in controversy between the parties [Rule 36]; and
3. to find out what testimony and other evidence is available on each of the disputed factual issues.

## II. THE SCOPE OF DISCOVERY

A. **Rule 27**: Pre-Action Discovery: this is the only rule dealing with pre-action discovery, which provides that a person, with court approval, can depose himself or any other person for the purpose of perpetuating testimony for a contemplated action that cannot be presently brought.

B. **Rule 26(a)(1)**: the initial stage in the discovery process is mandatory disclosure certain information set forth in Rule 26(a), see below.

B. **Rule 26(b)(1)**: Discovery Scope: parties may obtain discovery regarding *any matter*, NOT PRIVILEGED, which is relevant to the subject matter involved in the pending action...the information sought need not be

admissible at trial if the information sought appears *reasonably calculated to lead to the discovery of admissible evidence*.

1. *Any Matter*: This is a very broad and embracive standard. There is no burden of persuasion standard, there are no formulated in the pleadings requirement, or any admissibility limitations.
2. *Not Privileged*: means that certain things are protected by legal privilege such as: attorney/client, work product, doctor/patient, priest/pennant.
3. *Reasonably Calculated to Lead to Discovery of Admissible Evidence*: the information sought to be discovered, is discoverable if it is reasonably calculated to lead to the discovery of admissible evidence. In other words, admissibility is not required, but a party cannot go on a fishing expedition either, the information just must be reasonably calculated to lead to the discovery of admissible evidence.
4. Rule 26(b)(1) enables parties to obtain information relevant to the subject matter involved in the suit which they believe will be helpful in preparation and trial of the case.
  - a. Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or settlement, of litigated disputes. Because of the liberality of Discovery under Rule 26(b)(1) it is necessary for the trial court to have authority to limit the scope of authority.

\*[*Seattle Times Co.*].

## II. DISCRETIONARY LIMITS ON THE SCOPE OF DISCOVERY:

A. **Rule 26(c): Protective Orders**: upon motion by a party upon whom discovery is sought, accompanied with a certificate that the movant in good faith has attempted to confer with the opposing party in an effort to resolve the dispute without court action, and for *good cause shown* the court:

1. may make any order which justice requires to protect a party from:
  - a. annoyance;
  - b. embarrassment;
  - c. oppression,
  - d. undue burden or expense;
2. may order:
  - a. that the disclosure or discovery cannot be taken;
  - b. that discovery will only be available under certain conditions;
  - c. that discovery is only available in a form other than the one requested,
  - d. that the scope of discovery be limited to specific facts or issues; or
  - e. that the discovery be conducted with no present except person designated by the court.

A(1). Good Cause Shown Requirement: under the *good cause shown requirement* of Rule 26(c) to issue protective orders the courts have required the moving party to show that disclosure will work a clearly defined and very serious injury.

1. The movant must make a showing by a particular and specific demonstrated fact.
2. If the movant sustains the burden the court then considers the interests of the non-moving party, of non-parties, and of the public in not restricting disclosures.

B. **Rule 26(c): Balancing Test**: a motion under Rule 26(c) to limit discovery requires the district judge to compare the hardship to the party against whom discovery is sought, if discovery is allowed, with the hardship to the party seeking discovery is denied.

1. The judge must consider the nature of the hardship as well as its magnitude and thus give more weight to the interests that have distinctively social values than purely private interests; and he must consider the possibility of reconciling the competing interest through carefully crafted protective orders.
2. The judge also has other devices, beside the protective order, that he can use to reconcile the parties competing needs:
  - a. he can view the discovery material *in camera*, which is a relatively costless and worthwhile method to insure that the balance between the petitioners claim of irrelevance/privilege and the plaintiff's asserted need for the documents;
  - b. he can order the documents redacted (removing all names and material that may be damaging to the party opposing discovery and the view originals *in camera* to ensure the accuracy of the redactions; and
  - c. Rule 26(d) allows the district judge to control the timing and sequence of discovery which can be used to schedule sensitive discovery last.

\*[*Marrese v. AAOS*].

C. **G/R: Protective Orders:** Rule 26(c) confers broad discretion on the trial court to decide when to issue a protective order and the degree of protection needed because the trial judge is in the best position to weigh fairly the competing needs and interests of the affected parties [*Seattle Times Co.*].

### §3.2: THE MECHANICS OF DISCOVERY

#### I. MANDATORY DISCLOSURE: RULE 26(a):

A. **Rule 26(a): Automatic Pre-discovery Disclosure:** “except to the extent otherwise stipulated or directed by order or local rule”\* a party without awaiting a discovery request provide to the other parties:

1. *Personal Info:* the name, and if known the address, telephone number of each individual likely to have discoverable information relevant to the disputed facts *alleged with particularity in the pleadings*;
  - a. This may have the effect of creating pleading with more particularized facts so parties can take advantage of the automatic disclosure provisions.
  - b. The 2000 Amendments to the FRCP eliminated that provision, so it doesn't really have that effect anymore.
2. *Documents:* a copy of, or a description by category and location of all documents, data compilations, and tangible things in the possession or control of the party that are *relevant* to the disputed facts; and
3. *Damage Estimate:* A computation of any damages claimed by the disclosing party.
4. *Insurance Policies:* insurance policies for inspection and copying pursuant to Rule 34.
  - a. There is automatic discovery of insurance policies because it promotes judicial economy in that a plaintiff will not want to go all the way through trial and find out at the end that the defendant has no money, or insurance.
  - b. However, a party usually can't discover tax information, income, etc....

\*This means the court, and/or the particular parties in a case can “opt-out” of the mandatory provisions if they desire.

- a. “Except as provided by the parties, or directed by the Court” are not to controversial because it is a matter of discretion and agreement of the parties.
- b. “Directed by *local rule*” is more controversial because several districts have enacted local rules to opt out of the initial disclosure rules. Causes less uniformity because now you have to research whether the court has a local rule that does not require automatic disclosure.

**B. G/R: Initial Disclosures:** initial disclosures pursuant to Rule 26(a)(1) may be made by describing or categorizing potentially relevant materials so that the opposing party may make an informed decision regarding which documents might need to be examined.

1. The rule does not require that either party produce documents at this initial stage. If only a description or categorization is provided, the other party is expected to obtain documents desired by proceeding under Rule 34 [production of documents] or through informal requests.
2. Rule 26(a)(1) allows initial disclosures to be made by producing copies of relevant documents.
  - a. Parties may therefore agree to produce all relevant documents without discovery requests.
  - b. Production at this stage speeds up the discovery process.
3. Documents which are relevant at the initial disclosure stage are all documents relevant to the disputed facts alleged with particularity in the pleadings.  
\*[*Combs v. United Telephone*].

## II. DEPOSITIONS: **RULES: 26(d), 30, 31**

A. Generally: the deposition is the most powerful discovery device because it allows a party to probe deeply into a witness and ask follow up questions. There are three main purposes to for taking depositions:

1. find out information through an investigatory device of the witness;
2. preserve evidence to impeach witnesses at trial; you can use depositions at trial if comply with the federal rules of evidence.

**B. Rule 26(d)**: a party may not seek discovery from any source before the parties have met and conferred as required by Rule 26(f). Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, depositions or otherwise, shall not operate to delay another party's discovery.

1. In other words, both sides can conduct discovery at the same time, upon the court's predetermined schedule unless the court orders otherwise.

**C. Rule 26(f)**: the parties shall as soon as practicable shall meet to discuss the nature and basis of their claims and defenses and to develop a discovery plan. The plan shall indicate the parties views and proposals concerning timing, the subjects of discovery, the limitations of discovery, and any other scheduling orders pursuant to Rule 16.

### D. **Rule 30**: Depositions Upon Oral Examination:

D(1). **Rule 30(a)**: When Depositions May Be Taken; When Leave Required:

- (1) A party may take a deposition of *any person*, including a party, by oral examination without leave of the court (subject to the limitations in (2)).
  - a. This means you can take a deposition of anyone; in that respect, depositions are different from interrogatories or requests for physical examination because a party can only get those from a party to the suit.
- (2) A party must obtain leave of the court to:
  - (A) take more than 10-depositions—total. The 10-limit rule is calculated cumulatively for plaintiffs, defendants, and third party defendants.
  - (B) take a deposition of a person more than once.

D(2). **Rule 30(b): Notice of Examination**: a party wishing to depose a witness must give written notice to every other *party*, identifying the deponent and the time and place of the deposition.

1. In federal proceedings notice must be given a reasonable length of time in advance of the scheduled date for the deposition.

D(3). **Rule 30(c): Examination**: examination and cross-examination of witnesses may proceed as permitted at trial under the Federal Rules of evidence. The deposition must be stenographically recorded.

1. Any party may object to a question, then under Rule 30(c) the objection is noted by the reporter and the deponent answers the question, it may not be admissible at trial but it may lead to other information; notwithstanding the objection the deponent must answer the question. A party does not waive objections at trial by not objecting during the deposition.

a. There are curables, like objections to the form of the question, leading, etc..., which must be fixed at the deposition because the other party can fix the problem.

2. If a deponent refuses to answer a question, at the instruction of counsel, then the adverse party must go to court and get a court order to compel testimony. Rule 30(d)(1) describes when an attorney can instruct a witness not to answer, such as privilege or upon a motion.

3. Any speaking objection must be made in a short, non-argumentative manner [Rule 30(d)(1)].

E. **Rule 45: Subpoenas**: at the request of a party, the court clerk will issue a subpoena commanding the named witness to appear and give testimony at the designated time and place. An attorney admitted to practice before the court may also issue a subpoena [Rule 45(a)].

1. There is nationwide service of process for deposition subpoenas [Rule 45(b)(2)].

2. A witness, if served with a subpoena, may be required to appear at a deposition at any place within 100-miles of the place where he resides, is employed, or transacts business [Rule 45(c)(3)(A)(ii)].

3. *Parties*: it is not necessary to serve a subpoena on an *adverse party* to the lawsuit [Rule 37(d)].

However, you do have to give the adverse party notice, then if the adverse party objects to the deposition, he has to obtain a court order not to attend.

i. An adverse party may be required to travel further than a non-party to the lawsuit, however, he cannot be required to travel if it is an undue burden.

4. *Non-Parties*: if the deponent is not in the judicial district, or the 100-mile bulge, the party seeking the deposition has to go to the deponent; that is, the party can depose anyone in the nation but if they are outside the judicial district the attorney has to go them.

5. *Trial Subpoenas*: you can only compel a person to be a witness at trial if they are within the judicial district or the 100-mile bulge; however, if they do not show up, their deposition can be entered at trial under Rule 32.

E(1). **Rule 30(b)(5): Subpoena Duces Tecum**: a party can issue a subpoena duces tecum which allows a party to subpoena someone and require them to bring documents to the deposition if the request is made in compliance with Rule 34 [production of documents] and the procedure for Rule 34 shall apply to the request. This applies with equal force to defendants, plaintiffs, non-parties.

F. **Rule 30(d): Sanctions**: a non-party cannot be sanctioned for not showing up at a deposition unless he has been served with a subpoena. Moreover, if the party calls a deposition, and the other attorney's attend, and the witness did not show up the party can be sanctioned.

**G. Rule 31: Depositions Upon Written Questions:** Rule 31 authorizes the taking of depositions upon written questions governed by essentially the same rules under Rule 30.

1. This is a different procedure than interrogatories, however, it serves essentially the same purpose but is not as effective as oral depositions because you can't ask follow up question.
2. Even though the questions are written, the deponent answers the questions orally.
3. You can also take depositions by telephone.

**H. G/R: Subpoena and Deposing a Corporation: [Rule 30(b)(6)]** a party can subpoena and depose a corporation, organization, or governmental body. Where a corporation is to be deposed, the party taking the deposition need not identify the individual who is compelled to give the information.

1. The party only needs to state the *matters* on which he proposes to examine the corporation, and the corporation must then designate the appropriate witness.
2. The adverse party need not guess which employee is in possession of the required information; and the corporation IS BOUND by the deponent's answers.
3. Under the FRCP discovery rules, the deposition of a corporate party may be taken from a director named in the notice given to the corporation.
  - a. The director need not be personally subpoenaed, and the corporation must produce him or risk the impositions of sanctions under Rule 37(d).
  - b. The Rules do not suggest that a different principle applies to discovery from a party corporation than applies to discovery of a non-corporation party.
4. It is the general rule that the deposition of a corporate official/corporation should be taken at its principle place of business.
5. These rules apply equally whether the corporation is a party, or non-party to the action.

\*[*Less v. Taber Instrument Corp.*].

### III. INTERROGATORIES: **RULE 33.**

**A. Rule 26(d):** interrogatories like other formal discovery may be served only after the Rule 26(f) scheduling conference on a discovery plan.

**B. Rule 33(a): Interrogatories:** are written questions from one party to another party requiring written responses under oath to be answered within a specific time (30-days). Not court order is required and the entire exchange can occur through the mail.

1. Interrogatories can be addressed to *only a party to the action* (unlike depositions which may be taken from non-parties). Non-party witnesses are not subject to interrogatories.
  - a. Co-parties generally are obliged to respond to interrogatories.
  - b. Interrogatories may be served on a corporation, and they may be answered by any officer or agent designated.
2. Interrogatories require the party to answer not only of her own knowledge, *but also* on the basis of information which is reasonably accessible (unlike depositions which only require the deponent to answer to matters of which he has personal knowledge).
3. No *party* may serve MORE THAN 25 interrogatories, including sub-parts. This limitation applies to each party so co-parties (such as co-plaintiffs) may *each* use 25 interrogatories even though represented by the same lawyer.
  1. The limitation may be varied by stipulation or court order.

C. **Rule 33(b): Answers and Objections:** a party must answer, or object to interrogatories within 30-days after their service date.

1. *Duty to Investigate:* a party to whom interrogatories are given must give all information responsive to the questions that is under her control. This generally includes all information that might be discovered in her own files or by further questioning of the client, agents, or employees.

1. This duty requires the person answering the interrogatories to disclose information that is *available to them*.

a. The duty to respond to interrogatories is not only on the basis of his own knowledge but also with regard to the knowledge of other person that reasonably can be obtained through investigation.

2. The interrogatory must be answered even if it asks for more than facts. The interrogatory is not objectionable merely because an answer to an interrogatory involves an opinion, contention that relates to fact, or *the application of law to fact* [Rule 33(c)].

3. *Option to Produce Business Records:* if an answer can be supplied only by extensive search of the answering party's records and the burden of finding the information is substantially the same for the inquiring and responding parties, it is sufficient to specify the pertinent records and allow the inquiring party to examine and copy them [Rule 33(d)].

a. In other words, the responding party cannot just say the information is in our document warehouse, they would have to specify where, or what box, the information could be obtained in.

4. *Objections:* if a question is thought to be improper the responding party may object rather than answering the question, then the burden is on the interrogating party to seek a court order to compel the answer if he desires.

5. Interrogatories are not in evidence right when they are taken; they have to be offered and admitted at trial.

#### IV. DISCOVERY AND THE PRODUCTION OF PROPERTY: **RULE 34.**

A. **Rule 34(a)(1): Requests for Production:** any party may serve on *any other party* a request:

1. to produce and permit the party making the request to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations);  
or

2. to inspect and copy, test or sample, any tangible things which constitute or contain matters within the scope of discovery (Rule 26(d)...reasonably calculated to lead to the discovery of admissible evidence);  
AND

3. which are in the *possession, custody, or control* of the party upon whom the request is served.

A(1). **G/R: Possession, Custody, and Control Requirement:** an order for the production of documents under Rule 34 may only be directed against a party having possession, custody, or control of the records.

1. A *prima facie* case of control is all that is needed to be established to justify the issuance of an order under Rule 34.

2. Because the FRCP are construed liberally, Rule 34's "control" requirement should not be given hyper-technical construction that will undermine the policy favoring liberal pretrial discovery.

3. Rule 34 is sufficiently flexible to be adapted to the exigencies of particular litigation. The propriety of the use to which it is put depends upon the circumstances of a given case.

4. In *Wolf*, the influence a corporation official had over the corporation of which he was no longer employed was sufficient to satisfy the control requirement.

\*[*Hart v. Wolf*].

**B. Rule 34(a)(2): Entry onto Property:** any party may serve on any other party a request:

1. to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purposes of inspection, measuring, surveying, photographing, testing, or sampling the property or any designated object or operation, within the scope of Rule 26(b).

**C. Rule 34(b): Procedure:** the request shall set forth the items to be inspected and describe them with reasonable particularity, along with the time, manner, and performance of making the inspection. This is a flexible approach that varies with the circumstances; most courts allow discovery of general categories of items if the description is easily understood.

1. The responding party has the option to seek a protective order when discovery is inappropriate.

**D. Rule 34(c): Non-Parties:** if the request for production of documents or inspection of the premises is addressed to a non-party, the litigant must serve a subpoena pursuant to Rule 45.

1. Rule 45 provides that an attorney may issue a subpoena commanding any person to give testimony, to permit and produce inspection and copy of designated records or other tangible objects, or to permit inspection of premises.

**E. G/R: Confidentiality Orders:** parties can agree to not disclose any information discovered or obtained in discovery after the trial is over.

#### V. PHYSICAL AND MENTAL EXAMINATIONS: **RULE 35.**

**A. Rule 35(a): Order for Examination:** in order to compel someone who is a party to the litigation (a court cannot require a non-party, or plain witness to submit to an examination) three prerequisites have to be satisfied (a) notice, (b) a motion, and (c) a court order. This is different than most discovery devices which basically operate on notice. After notice to the party, and motion to the court, the court will only grant the order if:

1. *Good Cause*: for the examination is shown. This basically means the party seeking the examination has to show that the information is needed, and that they do not have the information or it cannot be obtained in a less intrusive manner. In addition, the party has to show the adversaries medical condition is in controversy.

a. Good Cause Test: the examination must be shown to be reasonably likely to produce information about the condition at issue.

2. *Controversy*: the party cannot just request a medical examination, they have to show that it is in controversy, which is easily done in personal injury cases; in other words, the extent and scope of the injuries of the party are debatable.

3. *Parties*: the medical exam is limited to parties in the action. A witness, no matter how important in the case, cannot be examined if they are not a party.

a. *Caveat*: a party in privity to the action, such as an infant, incompetent, or infirm person may be subject to a medical examination.

4. *Policy*: a medical examination is an intrusive procedure, and the right to privacy is valued in this society, therefore there is a stringent standard to be satisfied before a party, and no one else, can be subjected to a medical examination.

B. **G/R: Requirements:** Rule 35, on its face, applies to *all parties* which under a normal reading would include the defendant; however, the general rule is that Rule 35 applies to both plaintiffs and defendants.

1. Rule 35 requires discriminating application by the trial judge who must decide, as an initial matter in every case, whether the party requesting a mental or physical examination has adequately demonstrated the existence of the Rule's requirements of "in controversy" and "good cause" which are necessarily related.

2. The good cause and in controversy requirements of Rule 35 are not met by mere conclusory allegations in the pleadings, nor by the mere relevance to the case, but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each examination.

3. A plaintiff in a negligence action who asserts mental or physical injury places that mental or physical injury clearly in controversy and provides for the good cause for an examination to determine the existence and extent of such asserted injury.

a. This applies equally to a defendant who asserts his mental or physical condition as a defense to a claim, such as where insanity is claimed as a defense to a divorce claim.

\*\*Medical examinations, which are usually stipulated to by the parties, are fairly routine in cases involving paternity, negligence personal injuries, incompetence, and undue influence.

## VI. REQUESTS TO ADMIT: RULE 36.

A. **Rule 36: Requests to Admit:** authorizes a party to serve on another party written requests to admit the truth of certain matters of fact or of the application of fact to law, or the genuineness of a document or other evidence that may be used at trial.

1. *Purpose:* requests for admissions are used to shape information already know into statements that expedite the trial by limiting issues in dispute and by obviating some of the formalities that control the introduction of evidence at trial.

2. Rule 36 requests constitute conclusive evidence, unless withdrawn, and cannot be contradicted at trial.

3. A request for admission may be served without the necessity of a court order at any time after the parties have met and conferred in accordance with rule 26(d) [timing and sequence of discovery], although not later than 30-days before a fixed trial date.

a. Each matter of admission must be set forth separately.

b. The party who receives a request to admit **MUST respond under oath** with 30-days, or the matter is **DEEMED ADMITTED**. The party receiving the request can either:

i. *Admit:* then the admission is binding as conclusive evidence at trial.

ii. *Deny:* if the party denies to admit, and it is later proven in court, then the party may be subject to sanctions under Rule 37(c)(2).

iii. *Object:* to the form and nature of the question.

4. Rule 36, unlike other rules, is self executing, and there is **NO LIMIT** on the requests for admission.

A party is also free to admit some things and deny others.

## VII. DUTY TO SUPPLEMENT RESPONSES: RULE 26(e).

A. **Rule 26(e): Supplementation of Disclosures and Responses:** requires that disclosures and responses to interrogatories, requests for production, and requests for admissions be supplemented if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the updated information has not otherwise been made known or available.

1. *Sanctions*: the sanction for the breach of the duty supplement answers is that most courts have prohibited the admission of the undisclosed evidence or prohibited the undisclosed witness from giving testimony.
  - a. Rule 37(c)(1) specifically proves that a party may not use any witness or information not disclosed to the other party or not supplemented as required by Rule 26(e)(1).
  - b. As alternative to imposing sanctions upon the offending party a court may grant a continuance or recess so that the other side may complete discovery and prepare to meet any new testimony.

#### VIII. USE OF DISCOVERY AT TRIAL: RULES 32, 36(b).

A. Generally: attorneys can use the discovery devices at trial as admissions to refresh witness's recollection, or to provide a basis for cross-examination or impeachment.

1. Sometimes a response to discovery can be used instead of, or in addition to, live testimony.
2. The sue of discovery at trial is governed by the F. R. Evidence and the FRCP.

B. **Rule 32: Use of Depositions in Court Proceedings**: a deposition may be used at trial, if admissible under the Federal Rules Evidence, against any party who was present at the deposition:

1. for the purposes of impeaching or contradicting the witness's testimony;
2. for any purpose if used by an adverse party to a corporation;
3. may be used by any party for any purpose if the court finds:
  - a. the witness is dead;
  - b. the witness is greater than 100-miles away from the trial or hearing;
  - c. the witness unable to testify because of age, illness, infirmity, or imprisonment; or
  - d. when exceptional circumstances exist.
4. This rule applies equally to defendant's and plaintiffs.

\*[*Richmond v. Brooks*].

C. **Rule 36(b)**: requests for admissions, if admitted, under rule 36(b) are conclusive evidence for the purpose of the pending trial unless the trial court allows the admission to be amended or withdrawn.

### §3.3: SPECIAL PROBLEMS REGARDING THE SCOPE OF DISCOVERY

#### I. WORK PRODUCT DOCTRINE: MATERIALS PREPARED IN ANTICIPATION OF TRIAL.

A. **Rule 26(b)(3): Trial Preparation Materials**: a party may *not* obtain discovery of documents or other tangible things prepared in anticipation of litigation or for trial by (or for) another party or by (or for) that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) *UNLESS* the party seeking discovery:

1. *Substantial Need*: has a substantial need of the materials in the preparation of the party's case; AND
  - a. Substantial Need Test: the party must show that the material sought is of substantial importance to its case, courts usually won't treat minimal relevance as sufficient.
2. *Undue Hardship*: the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.
3. In ordering discovery of such materials when the required showing has been made, the court SHALL protect against disclosure of the *mental impressions, conclusions, opinions, or legal theories* of an attorney or other representative of the party concerning litigation.

\*\*This is the work product rule.

B. **G/R: Hickman Rule:** materials prepared and information developed by or under the direction of a party or her attorney in anticipation of litigation are subject to discovery *ONLY IF* the discovering party can show substantial need and an inability to obtain equivalent material by other means [*Hickman v. Taylor*].

1. *Qualified Immunity:* Thus, any materials prepared in *anticipation* of litigation are *qualifiedly immune* from discovery.

a. That does not include normal business records, it means interviews, memos, or other documents or reports that are generated with an eye towards litigation.

b. *Hint:* if the cause of action has accrued, and there is an investigator, or someone preparing an accident report, or memorandum or interview, it is produced in *anticipation of litigation* and is qualifiedly immune.

2. *Not a Privilege:* work product is not a privilege, privilege means attorney/client, doctor/patient, priest/penitent, executive privilege, spousal privilege, the broad societal judgment that certain communications are absolutely immune.

3. *Policy:* the work product doctrine is an exception to the liberal discovery rules that allow almost any material to be discoverable because the courts want each side to do their own work, don't want to chill use of the discovery procedures by feeling that your work will get ripped off by your opponent. In other words, the work product doctrine is designed to maintain the adversary process.

C. **G/R: Matters Protected:** the focus of the work product doctrine is on the process of preparing for litigation. Thus it is very broad; the Federal Rules covers materials *prepared in anticipation of litigation*.

1. *Mental Impressions:* the closest thing to an absolute privilege is the mental impressions and legal theories of the attorney because the federal rule says the court SHALL protect against disclosure of such information.

a. If the party seeking discovery makes the showing of (a) substantial hardship and (b) undue hardship the court can still protect the legal impressions and theories of the attorney by redacting (covering or blanking out) the parts that should not be read.

2. *Caveat:* If there was no foreseeable possibility of litigation at the time the materials are prepared, then the protection does not apply.

D. **G/R: Substantial Need and Undue Hardship:** if a party makes a showing of substantial need and undue hardship, the basic principle of discovery, equally access to all relevant data, trumps the work product doctrine because the information is simply unavailable. Situations like this arise when:

1. if the witness has died;
2. the witness is out of the jurisdiction;
3. the witness is old or infirm and has forgotten; and
4. the witness is hostile and won't answer questions.

\*\*Those are situations in which the discovering party does not have access to information and the work product doctrine qualified immunity becomes irrelevant because the basic principle of equal access to all relevant information and data must be honored.

## II. PRIVILEGED MATTER

A. **Rule 26(b)(1): Scope of Discovery:** parties may obtain discovery of any information, *not privileged*, which is relevant to the subject matter of the action..

B. **G/R: Privilege:** a rule of privilege gives a person a right to refuse to disclose information that he otherwise would be required to provide. It also may give a person the right to prevent someone else from disclosing information or it may give its possessor a right to refuse to become a witness. The courts cannot compel the testimony of some who is protected by privilege.

1. In other words, privileged material is universally excluded from obligatory disclosure through discovery.

C. **G/R: Attorney Client Privilege:** there are four elements that must be satisfied for attorney-client privilege:

1. the asserted holder of the privilege sought to be, or is, a client;
2. the person to whom the communications were made is:
  - a. a member of the bar of the court, or his subordinate,
  - b. in connection with the communications he was acting as a lawyer.
3. the communication relates to a fact of which the attorney was informed:
  - a. by his client;
  - b. without the presence of strangers;
  - c. for the purpose of securing primarily either:
    - i. an opinion of law;
    - ii. legal services; or
    - iii. assistance in some legal proceeding; and
    - iv. NOT for the purpose of committing a crime or tort.
4. the privilege has not been claimed and not waived by the client.

\*\*The attorney client privilege is the *client's privilege* but the modern view is increasingly that communications by the lawyer to the client are also protect [*Upjohn v. US*].

D. **G/R: Corporations and Attorney-Client Privilege:** the Supreme Court has held that the attorney client privilege can be applied to corporate clients, the problem is with defining the client:

D(1). **Control Group Test:** many courts limited the privilege to communications between the lawyer and those persons who could not be considered the “control group” of the corporation, i.e. the persons who controlled the corporation and who could on the lawyer’s advice.

D(2). **Upjohn Test:** rejected the control group test as a matter of federal common law. The court extended the privilege to *any* employee. The test is not clear, but the court takes into account the following factors:

1. *Matters within the Scope of Employment:* the protection only extends to communications about matters within the scope of the employee’s job with the corporation.
2. *Information not available from higher management:* the protection is justified for “non-control group” employees when higher management cannot itself supply the information.
3. *Other Requirements:* all other elements of the attorney client privilege must be satisfied, thus, the employee must know that the communication is designed to obtain legal advice for the corporation and that it is to be held in confidence.
4. **g/r:** if the asserted privilege is over communications made by corporate counsel *with employees* the attorney client privilege exists to the extent the communications do not reveal the attorney’s mental process in evaluating the communications, such work product cannot be disclosed simply on a showing of substantial need and the inability to obtain the equivalent without undue hardship.

E. **G/R: Other Privileges:** other privileges protect other communications from disclosure:

1. Spousal communications;
2. Doctor/patient;
3. Priest/penitent;
4. Executive privilege;
5. Privilege against self incrimination, etc...

### III. EXPERT INFORMATION

A. **Rule 26(a)(2)(A):** a party without a formal discovery request shall disclose to other parties the identity of any person who *may be used at trial* to present expert evidence.

B. **G/R: Testifying Experts:** [Rule 26(b)(4)(A)] without formal discovery each party must identify each person that party will call to offer expert testimony at trial [Rule 26(a)(2)(A)].

1. In the absence of other directions from the court, this disclosure must be made at least 90-days before trial. The court usually staggers the disclosure requirements so that the party with the burden of proof will be required to disclose first.

2. *Reports:* in addition to identifying its expert witnesses, a party must ordinarily provide a detailed report from the expert, which includes a *complete statement* of all opinions the expert will express in testimony, along with his basis therefor and the *data and other information* on which they are based.

1. The report will also include all exhibits the expert will use in connection with his testimony and all of her qualifications, including publications authored and cases testified in.

3. **Rule 26(b)(4)(A):** any person has a right to take the deposition of a testifying expert, but where a report is required the this deposition shall not take place until after the report is provided.

1. The party taking the deposition is required to pay compensation to expert for his time spent at the deposition.

\*[*Perry v. WS Darely*].

C. **G/R: Non-Testifying Experts:** [Rule 26(b)(4)(B)]: facts known to and opinions held by non-testifying experts are discoverable only in exceptional circumstances, e.g., like when one party has monopolized the qualified experts and there is no one for the other party to hire.

1. *Policy:* allowing discovery would give the other party a free ride when he could hire his own experts.

2. Where discovery is ordered, the court is to require the discovering party who retained the expert for a fair portion of the fees and expenses paid for the facts and opinions developed by the expert [Rule 26(b)(4)(C)].

3. If the expert is not testifying, and special circumstances are not shown, the identity of the expert can be discovered in some jurisdictions, but not others.

\*[*Perry v. WS Darley*].

## §3.4: SANCTIONS AND JUDICIAL SUPERVISION OF DISCOVERY

### I. SANCTIONS

A. **Rule 26(g)(3): Sanctions:** if without substantial justification a certification is made in violation of the Rule 26 the court may impose an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation.

**B. Rule 37: Sanctions for Failure to Make or Cooperate in Discovery:** before sanctions can be imposed by the court the party seeking discovery must usually obtain an order compelling discovery from the court [Rule 37(a)].

1. *Reasons for Sanctions:*

- a. When a motion to compel discovery is made, an evasive or incomplete answer is treated as a failure to answer, this means that the responding party can be ordered to provide a proper answer [Rule 37(a)(3)].
- b. Where a party completely fails to file a response to a discovery request or attend his properly noticed deposition, discovery sanctions can be sought immediately, without the need for a prior order compelling discovery [Rule 37(d)].
- c. If a party fails to make disclosures required by Rule 26(a) or to supplement them as required by Rule 26(e)(1) the court should usually exclude undisclosed information/material for evidence and may impose Rule 37(b) sanctions.

2. *Actual Sanctions:* where sanctions are appropriate the court, in its discretion, can apply a variety of sanctions. Many courts hold that the least severe sanction that will undo the harm of the violation should be used; however, the Supreme Court has held that sanctions can be imposed as a general deterrence method. Here are the sanctions from least severe to most severe:

- a. the court may order that matters pertinent to the discovery be taken as established in favor of the party seeking discovery [Rule 37(b)(2)(A)];
- b. the court may deny the offending party the right to present claims or defenses raised by the pleadings or exclude matters from evidence [*Cine 42nd St. Theater v. Allied Artists*];
- c. the court may impose contempt sanctions on the offending party; or
- d. the court dismiss or default the offending party rendering judgment in favor of the party seeking discovery.

**C. G/R: Purpose of Sanctions:** Rule 37 provides a spectrum of sanctions that can be applied for failure to comply with discovery, which serve three purposes:

1. preclusionary orders ensure that a party will not be able to profit from its own failure to comply;
2. serve to deter non-compliance with discovery requests and seek compliance with the particular order at hand; and
3. can be used as a general deterrent effect when the non-complying party is at *fault* (gross negligence).  
\* [*Cine 42nd St. Theater v. Allied Artists*].

**D. G/R: Exceptions to Rule 37:** when a party makes a good faith effort to comply and is thwarted by circumstances beyond his control (like foreign law) an order dismissing the complaint would deprive the party of a property interest without due process of law [*Cine 42nd St. Theater v. Allied Artists*].

**E. G/R: Degree of Culpability:** where gross professional negligence has been found; that is, where counsel clearly should have understood his duty to the court, the full range of sanctions under Rule 37 may be used.

1. *Caveat:* considerations of fair play can require the judge to use discretion and not impose the harshest sanctions (such as dismissal) when the non-compliance of an order is oversight and merely amounts to mere negligence by counsel.
2. *Policy:* this view advances the purpose of Rule 37 and has the general deterrent effect of requiring strict adherence to the responsibilities counsel owe to the Court and their opponents. Also, if parties were allowed to flout their obligations choosing to wait to make a response until a trial court has lost patience with them, the effect will be to require trial judges to supervise all discovery phases.

3. *Gross Negligence*: means fault under the Supreme Court's interpretation of Rule 37 and therefore the court can impose sanctions of the severest kind (dismissal) when a party abrogates his duties under the discovery rules.

\*[ *Cine 42nd St. Theater v. Allied Artists*].

## **§4: PRETRIAL MANAGEMENT AND THE PRETRIAL CONFERENCE**

### **§4.1: CASE MANAGEMENT**

#### **I. PRETRIAL MANAGEMENT**

A. Generally: discovery operates in modern litigation, particularly complex litigation, under schedules, plans, and sequences ordered by judges in a series of pretrial conferences under Rule 16.

1. The design is to make sure there is little or no game playing, to make sure everything is put on schedule and that everything is done fairly. The modern litigation judge is really a manager as much as she is an adjudicator.

#### **B. Rule 16: Pretrial Management, Scheduling, Management:**

B(1). Mandatory Scheduling Order: [Rule 16(b)]: except in categories of cases exempted by local rule, federal courts are *required* to enter a *scheduling order* within 90-days after a defendant's appearance and within 120-days after service of the complaint. This order is to set time limits for joining parties, amending pleadings, completing discovery, and filing motions.

1. The scheduling order is to be preceded by consultation with the parties by telephone, mail or other suitable means.

2. Beyond the mandatory scheduling limitations the court may impose much more specific scheduling requirements regarding a variety of matters as part of its pretrial management of the case.

B(2). Discovery Control: the federal rules affirmatively direct judges to limit discovery if it is cumulative, if the party seeking discovery has had ample opportunity already, or when discovery is unduly burdensome [Rule 26(b)(2)].

B(3). Pretrial Order: based on the parties Rule 26(f) submission (after a conference where claims, defenses, and a discovery plan was discussed), the court is to enter an order that should limit the time to complete discovery [Rule 16(b)(3)].

B(4). Final Pretrial Conference: the final pretrial conference is intended to simplify and streamline the trial and resolve as much as possible before trial. In addition, it serves to give both sides advance notice of subjects covered at trial so they can be prepared.

1. The final pretrial conference will ordinarily follow the pretrial disclosures. At least 30-days before trial each party is to make further disclosures regarding *evidence the party may present* [Rule 26(a)(3)].

The evidence to be disclosed included names of witnesses, deposition testimony, and exhibits.

B(5). Final Pretrial Order: following the final pretrial conference, the court will usually enter a final pretrial order with regard to matters covered at the conference. This order is to control the trial and can be *modified to prevent manifest injustice* [Rule 16(e)].

B(6). Rule 16 is very explicit and lists all of the things that can be considered, allows for settlement negotiations and encourages the court to recommend settlements and allows for sanctions to be imposed for other non-compliance with the courts orders.

C. **G/R: Pretrial Scheduling and Management:** Rule 16(a) gives the district court broad discretion, and various procedures, *in any action*, for managing a case before trial, including:

1. expediting the disposition of the action;
2. establishing early and continuing control;
3. discouraging wasteful pretrial activity;
4. improving the quality of trial through preparation;
5. facilitating settlement of the case;
6. Rule 16(b) requires that the court *shall* issue an order scheduling pretrial activities which is usually done at a pretrial conference with the parties;
7. Rule 16(c) lists all the subjects that can be considered in a pretrial conference.

\*[*Heileman Brewing Co. v. Joe Oat Corp.*].

D. **G/R: Purpose of Rule 16:** the spirit, intent and purpose of Rule 16 is broadly remedial allowing courts to manage actively the preparation of cases for trial.

1. Rule 16 is not designed as a device to restrict or limit the authority of the district judge in the conduct of pretrial conferences.
2. The spirit and purpose of the amendments of Rule 16 have been within the inherent power of the court to manage their affairs as an independent constitutional branch of government.
3. Rule 16 was designed to urge judges to make wider use of their powers and to manage actively their dockets at an early stage.
4. Rule 16 addressed the sue of pretrial conferences to formulate and narrow issues for trial as well as to discuss means for dispensing with the need for costly and unnecessary litigation.
5. Pretrial procedure has become an integrated part of the judicial process on the trial level. Courts must be free to use it and to control and enforce its operation. Otherwise orderly administration of justice will be removed from control of the trial court and placed in the hands of counsel, which the law does not contemplate.

\*[*Heileman Brewing Co. v. Joe Oat Corp.*].

E. **G/R: Inherent Authority of Trial Courts:** the Supreme Court has acknowledged that the provisions of the FRCP are not intended to be the exclusive authority for actions taken by the district court [*Link v. Wabash*].

1. In *Link*, the Supreme Court noted that the district court's ability to take action in a procedural context may be grounded in inherent power governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve orderly and expeditious disposition of the cases.
2. This authority forms the basis for continued development of procedural techniques designed to make the operation of the court more efficient, to preserve integrity of the judicial process, and control the court's docket.

F. **G/R:** the district court judge has a broad inherent power—derived from the nature of his office—over the field of which the FRCP is applied.

1. Inherent authority remains the means by which district judges deal with circumstances not proscribed or specifically addressed by rule or statute, but which must be addressed to promote the just, speedy, and inexpensive determination of every action.
2. *Caveat*: because inherent powers in the judiciary are shielded from the democratic process controls they must be exercised with restraint and discretion.

**G. Rule 1:** states the FRCP shall be construed to secure the just, speedy, and expensive determination of every action.

**H. Civil Justice Reform Act:** [28 USC §§ 471-479]: codified may pretrial procedures that district courts can engage in and even *extended* Rule 16.

**I. G/R: Sanctions:** pretrial orders under Rule 16, particularly rules scheduling trial and witnesses must be obeyed and evidence can be omitted if they are not complied with because it has long been the law that attorneys at the pretrial stage owe a duty to the court and opposing counsel to make full and fair disclosure of their views as to what the real issues at the trial will be.

1. *Policy*: avoid surprise at trial.
2. Rule 16 does not make parties admit anything unwillingly but rather is a way of advancing the trial to be had by setting forth points on which the parties are agreed after conference directed by judge.  
\*[*Payne v. SS Nabob*].

## **§5: ADJUDICATION WITHOUT TRIAL OR BY SPECIAL PROCEEDING**

### **§5.1: SUMMARY JUDGMENT**

#### **I. THE BURDEN OF ESTABLISHING THAT NO FACTUAL DISPUTE EXISTS**

**A. Generally:** summary judgment is a procedure to dismiss cases which do not deserve to go to trial because there is no issue of material fact for the fact finder to adjudicate. Summary judgment is a fairly modern procedure, and it is used much more often than Rule 12(b)(6), failure to state a claim upon which relief can be granted because it is very difficult not to state a claim based on the pleadings.

1. Rule 12(b)(6) is based solely on the pleadings, while summary judgment is based on evidence submitted by affidavits and testimony.
2. Summary judgment is used to allow a plaintiff or defendant to get out of a case in which no genuine issues exist and is used more frequently by defendants.
3. If the motion is granted, judgment is entered, and the case is over. The losing party does not get his day in court, does not get to go in front of the jury. Therefore the system tries to be extremely sensitive in granting summary judgment and resolve all disputes in favor of the non-moving party.
4. When you have a motion for summary judgment, and a response, it is not a question of the quantum of the evidence presented; but rather, a question of the nature of the evidence and what the applicable law is.

**B. G/R: Burden of Persuasion:** the moving party has a heavy burden of persuasion in the summary judgment motion. The judge will draw all *inferences* in favor of the non-moving party.

1. The judge will resolve all issues that may arise about the credibility of witnesses, stated in the affidavits and depositions, in favor of the non-moving party.

2. This is designed to ensure that you don't have a premature entry of summary judgment.

C. **G/R: Factual Issues:** the judge does NOT resolve any factual issues at the summary judgment stage because the object the judge is seeking to find is the whether a genuine issue of material fact exists.

## II. SUMMARY JUDGMENT STANDARDS

A. **Rule 56(c): Summary Judgment Motion:** a motion for summary judgment will be granted if there is *no genuine issue as to any material fact* and that the moving party is entitled to judgment as a matter of law

A(1). **Material Fact:** a material fact is one which will affect the outcome of the case;

1. the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.
2. Factual disputes that are irrelevant or unnecessary will not be counted.

\*[*Anderson v. Liberty Lobby*].

A(2). **Genuine Issue:** a material fact raises a genuine issue if a reasonable jury could reach different conclusions concerning that fact.

1. An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party.
2. If the issue is NOT genuine summary judgment should NOT be granted.

\*[*Anderson v. Liberty Lobby*].

A(3). **Test for Material Fact/Genuine Issue:** the judge will conceptualize himself being at trial then if the evidence adduced is so insufficient that he would grant a *directed verdict*, then summary judgment should be granted.

1. The judge will only look at admissible evidence at trial on a summary judgment motion in the light most favorable to the non-moving party, and if the judge would grant a directed verdict at trial, then there is no material issue of genuine fact, and the court should grant summary judgment.

\*[*Anderson v. Liberty Lobby*].

A(4). **G/R:** the trial judge should consider a motion for summary judgment under the same standard as he does for directed verdict under Rule 50(a); that is, the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.

1. If reasonable minds could differ as to the import of the evidence however, a verdict should be directed.
2. Summary judgment should be granted where the evidence is such that it would require a directed verdict for the moving party.
3. *Genuine Issue:* the genuine issue summary judgment standard is very close to the reasonable jury directed verdict standard; the primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted.

\*[*Anderson v. Liberty Lobby*].

A(5). **Test For Summary Judgment:** (and directed verdict): whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

1. The judge must ask himself, whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.
2. The mere existence of a scintilla of evidence in support of the moving party's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.
3. The judge's inquiry therefore unavoidably asks whether reasonable jurors could find by a *preponderance of the evidence* that the plaintiff is entitled to a verdict; that is, whether there is evidence upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

\*[*Anderson v. Liberty Lobby*].

A(6). **Evidentiary Burden in Summary Judgment:** in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden.

1. Thus, the question is whether a jury could find reasonably *either*:
  - a. that the plaintiff proved his case by the quality and quantity of the evidence required by the governing law; *or*
  - b. that he did not.

B. **Rule 56(d):** provides that when a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial.

C. **Rule 56(f): When Affidavits are Unavailable:** premature motions for summary judgment are dealt with under this rule which allows a summary judgment to be denied if the nonmoving party has not had an opportunity to make full discovery.

1. The Rule says that the parties have to have adequate time for discovery before a party can move for summary judgment because the moving party cannot not rush the non-moving party and the court to decide the case prematurely.

D. **Rule 56(e): Form of Affidavit:** supporting and opposing affidavits *shall* be made on personal knowledge, *shall* set forth such facts that would be admissible in evidence, and *shall* show affirmatively that the affiant is competent to testify to matters stated therein.

1. An adverse party must do more than reiterate the pleadings when opposing summary judgment, he must file evidence of facts relating to whether a genuine issue of material fact exists, largely because affidavits are a lot more detailed than the pleadings.

E. **G/R: Burden of Persuasion:** [Rule 56] the moving party has the initial burden of presenting information that clearly establishes that there is no factual dispute regarding the matter upon which summary judgment is sought.

1. This is so even if the adverse party would bear the burden of persuasion at trial.
2. To meet this burden the moving party normally submits outside evidence such as affidavits of witnesses setting forth facts to which they could testify at trial.
3. If the information presented, taken as true, fails to establish that no factual dispute exists, summary judgment will be denied, even if the opposing party has presented to counter-arguments or evidence.

4. If, but only if, the moving party produces information that appears to establish that no factual issue exists, then the responding party normally must come forward with information to show that there is no genuine issue of material fact or summary judgment will be granted.

5. If the responding party does produce information contradicting that of the moving party or otherwise showing that a factual dispute does exist, summary judgment will be denied and the case will go to trial on the merits.

\*[*Lundeen v. Cordner*].

6. A party seeking summary judgment always bears the initial burden of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact [*Celotex Corp v. Catrett*].

**F. G/R: Support of Affidavits:** affidavits from only persons in a position to be aware of a factual situation can serve as the basis for a summary judgment. There are three factors that support an affidavit of a witness, *if he is the only witness*, for a summary judgment motion:

1. if he is an unbiased witness;
2. if he is competent with regard to his mental capacity and his being in a position to directly observe the facts related to the affidavits; and
3. the affidavits are internally consistent, unequivocal, and in full accord with documentary evidence.

\*[*Lundeen v. Cordner*].

**H. G/R: Denial of Cross-Examination:** the non-moving party cannot force a trial merely in order to cross examine a witness, such as an affiant, on the mere supposition that something might turn up at trial [*Lundeen v. Cordner*].

1. *Caveat:* the right to use depositions for discovery does not mean that they are to supplant the right to call and examine the adverse party before the jury.

- a. It is of great importance to have a witness examined and cross-examined [*Cross v. US*].

**I. G/R: When Summary Judgment is Inappropriate:** summary judgment is only permitted where there is no genuine issue of material fact; therefore, summary judgment is inappropriate:

1. where the inferences which the parties seek to have drawn deal with questions of motive, intent, and subjective feelings and reactions.
  - a. judge may not draw inferences of fact on a summary judgment motion;
  - b. ordinarily the bare allegations of the pleading, unsupported by any evidentiary data, will not alone defeat a motion for summary judgment, however, this principle does not justify summary judgment where the disputed questions of fact turn exclusively on the credibility of the movant's witness.

\*[*Cross v. US*].

**J. G/R: Inferences by the Judge:** on summary judgment the inferences to be drawn from the underlying facts contained in the moving parties materials must viewed in the light most favorable to the party opposing the motion.

1. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.
2. In other words, the defendant does not need to make an evidentiary showing to avoid summary judgment.

\*[*Adicks v. S.H. Kress*].

K. **G/R: Lack of Affidavits:** there is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim.

1. Rule 56 refers to "affidavits, if any" which suggests the absence of such a requirement.
2. Rule 56(a) and (b) also support this notion because they state the parties may move for summary judgment "with or without" supporting affidavits.
3. **g/r:** regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56 is satisfied.

\*[*Celotex Corp. v. Catrett*].

L. **G/R: Judge's Function:** the judges function at the summary judgment stage, is *not* to weigh the evidence himself, or determine the truth of the matter himself, but rather, to determine whether a genuine issue of material fact exists.

1. There is no genuine issue of material fact for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party.
2. If the evidence is merely colorable or not significantly probative, summary judgment will be granted.

\*[*Anderson v. Liberty Lobby*].

### III. APPLICATION OF SUMMARY JUDGMENT STANDARDS

A. **Generally:** the Supreme Court has breathed life into the summary judgment motion in *Lundeen, Cross, Celotex, and Liberty Lobby* because the standard has been raised from a mere scintilla of an issue, to whether a reasonable jury could find for the moving party.

B. **Contexts in which Summary Judgment May be Granted:** there are three contexts in which a motion for summary judgment is going to be granted:

1. Summary judgment is appropriate when you look at all the material presented on the motion, the court realizes that the plaintiff's case has no legal basis, it is not a legalized wrong.
  - a. Ex: some sues for giving a dirty look, there is not tort for dirty looks, case should be dismissed.
2. Summary judgment is appropriate when all the material on the motion is consistent.
  - a. All the witnesses deposed the same way, all the documents are consistent, and in that situation there is nothing triable. No reasonable jury could disagree with what everybody says, and what all documents say. There is no genuine issue of material fact, summary judgment should be granted.
3. Summary judgment is appropriate when all the summary judgment material may look favorable to the plaintiff; however the summary judgment material also presents an ironclad defense, like the statute of limitations or *res judicata*.
4. If the entire case is based on documentary evidence, like a contract or property case, it will be easier to obtain summary judgment than in a personal injury tort case which relies on witnesses the proving of damages.
5. Summary judgment is also appropriate when the parties stipulate to the facts, and all the judge has to do is apply the law to the facts which are stipulated.

C. Contexts when Summary Judgment is Not Appropriate: summary judgment is discretionary; and several situations arise in which the court, in its discretion, will not grant summary judgment because the evidence does not all fit together perfectly, some of the more common situations are:

1. If all of the deponents in favor of the moving (who has strong evidence) are blood relatives, or employees, or someone who has been convicted of perjury, is that situation the court may deny the motion in his discretion;
2. Courts exercise this negative discretion very often when there are issues of credibility in a jury trialable case and the judge wants the trier of fact to look at the evidence. That is why summary judgment is more likely to be denied in a tort case, then a property or contract case.
  1. *Hint*: the more the case depends on documentary evidence the more likely it is to be subject to summary judgment; whereas, the more a case depends on eye witness type testimony the more likelihood there is a credibility type issue that should be left for the jury.
3. The court may exercise discretion and deny summary judgment when there is a gap in the material presented on the motion (i.e. 3 depositions taken, only two presented before the judge, and the judge may want to see what that third person says).

## §5.2: DISMISSAL OF ACTIONS

### I. VOLUNTARY DISMISSAL

- A. **Rule 41(a): Voluntary Dismissal**: an action may be dismissed by the plaintiff without order of court by:
1. filing a notice of dismissal before service by the adverse party of an answer or motion for summary judgment (whichever occurs first); or
  2. by filing a stipulation of dismissal signed by all parties who have appeared in the action;
  3. the dismissal is *without prejudice* unless:
    - a. the plaintiff previously dismissed the same action, then it is a dismissal with prejudice [Rule 41(a)(1)].

B. **G/R**: voluntary dismissal allows the moving party to extricate himself from the lawsuit without affecting his legal rights before significant judicial resources are spent.

1. Generally, a voluntary dismissal places the parties in the positions they occupied before the lawsuit began; it does not, in general, have the effect of an adjudication on the merits.
2. Generally, the right to dismiss voluntarily is governed by the a rule or statute that typically permits a dismissal before trial or commencement of trial.

### II. DISMISSAL FOR FAILURE TO PROSECUTE

A. Generally: courts have long been regarding the inherent discretionary power to dismiss an action if the plaintiff does not proceed to trial with “due diligence.”

B. **G/R: Failure to Prosecute**: the authority of a federal trial court to dismiss a plaintiff’s action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this action is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the district court dockets [Link v. Wabash R. Co.].

1. **Rule 41(b)** expressly authorizes the power of the district court to dismiss for failure to prosecute.

2. Fines are also appropriate under Rule 41(b) because districts courts have been directed to avoid the harsh result of a dismissal in cases where the delays or disobedience have been the fault of counsel rather than clients. In those cases, the courts may draw on their inherent power to control the course of litigation to impose on the counsel the less severe sanction of a fined [Clemshaw v. City of Norwich].

### III. DEFAULT JUDGMENT

A. **Rule 55(a):** when a party against whom a judgment for affirmative relief is sought has failed *to plead* or *otherwise defend* as provided by the Rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

1. Rule 55(a) authorizes the clerk to enter a default when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as proved by these rules.

a. This does not require that to escape default the defendant must not only file a sufficient answer to the merits, but must also have a lawyer or be present in court when the case is called for trial.

b. The words "otherwise defend" refers to attacks on the service, or motions to dismiss, or for better particulars, and the like, which may prevent default without presently pleading to the merits.

c. Absence of a defendant when a case is called for trial after it is at issue does not warrant a judgment against him by default, but a trial or hearing on the issues is necessary and the judgment which follows is based on the proof adduced.

d. Under the provisions of Rule 55, no judgment by default may be entered against a defendant who has appeared—as by timely filing an answer—unless he is given notice of the application for judgment.

B. **G/R: Default Judgments:** if the defendant does plead or otherwise, it is a default. However, if the defendant pleads, does some discovery, but does not show up at trial, it is not a default because with the default judgment the plaintiff does not have to make any evidentiary showing and if the defendant fails to trial, the plaintiff would still have to present some evidence before judgment could be entered.

1. A default judgment can be entered when a defendant fails to plead or otherwise defend. Merely failing to show up at trial, and if the trial proceeds without the defendant present, is a judgment on the merits, and not a default judgment.

C. **G/R: Notice: [Rule 55(b)(2)]** requires a 3-day notice before a default judgment can be entered against the party who has failed to defend.

D. **G/R: Due Process:** if an answer has been filed, a defendant cannot be in default under Rule 55 and the entry of a judgment without a trial by jury (if demanded) is a violation of the Due Process Clause [Bass v. Hoagland].

E. **G/R: Recovery: [Rule 54(c)]:** provides that the plaintiff, upon default by the defendant, may recover all the relief to which he is entitled except that plaintiff is limited to the amount prayed for in the demand for judgment.

## §6: TRIAL

### §6.1: TRIAL BY JURY

### A. Analytical Framework:

1. First determine whether there is a right to a jury trial at all?
  - a. Are you in State or Federal Court?
    - i. If in State court apply, both center of gravity and *Beacon Theaters* analyses saying if on the one hand, they don't follow *Beacon*...if on the other hand they do....
    - ii. If in federal court, to *Beacon Analysis*.
  - b. Determine what statute is involved?
    - i. Does it create a brand new statutory right that did no exist in 1791? If so:
      - Look at the Statue, if Congress did/did not give a jury trial that governs, if Congress was silent or ambiguous, then
      - Apply *Historical Test*: (a) analogous cause of action available before 1791? (b) nature of the remedy sought, legal or equitable? If money damages = jury trial.
    - ii. If it is something like the Civil Rights Act, or Securities Laws, or other federal statutes apply *Beacon* analysis to the claim (i.e. legal issues = jury trial; common = jury trial; equitable = judge); have decide legal and common questions before.
2. Assuming you have a right to a jury trial, what procedural safeguards are you entitled at trial?

## I. THE INSTITUTION OF TRIAL BY JURY

### A. Constitutional Architecture:

1. 6th Amendment provides a right to a jury trial in all criminal cases, except for petty offenses. The 6th Amendment applies to the States through the 14th Amendment.
2. **7th Amendment:** provides "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of the trail by jury shall be preserved. The 7th Amendment has not been incorporated through the 14th Amend to apply to the States.
  - a. However, many States have constitutional provisions, or statutory protections, preserving the right to a jury trial in civil cases.

B. Historical Context: at common law, before the adoption of the 7th Amendment, there was a right to a jury in *actions at law* (legal claims); and there was no right to a jury trial for in *equitable claims*. The main distinction between "law" and "equity" claims was the remedy sought:

1. *Legal Claims*: usually afforded monetary damages, or other remedies (such as ejectment or replevin) that could be enforced by the court with or without the cooperation of the parties.
2. *Equity Claims*: generally afforded remedies such as injunctions, specific performance of a contract, accountings, declarations, and other remedies that imposed duties directly on the parties, subjecting them to contempt citations if they disobeyed.

C. **Historical Test**: with a traditional type claim (i.e. one that existed before 1791) the federal court will consider whether the claim is *legal* or *equitable* as such terms were understood in 1791 and if it was legal then the jury trial right should be preserved, and if it was an equitable claim, then the right to a jury did not exist and there is no right to a jury trail.

D. **G/R: Clean Up Doctrine**: at common law, a doctrine was developed whereby in equity courts, legal issues *incidental* to the primary equitable claim could be disposed of without a fully jury trial. The legal issues were "cleaned up" as incidental to an essentially equitable action.

1. The clean up doctrine was retained after law and equity were merged: in the early years of the FRCP (and still in some states) legal disputes appearing in a essentially equitable claim could be disposed of by the court without a jury when the legal disputes were minor or incidental.
2. *Center of Gravity Test*: if the center of gravity of the claim was legal then the right to a jury trial attached, if the center of gravity of the claim was equitable, even if the court cleaned up the case and awarded damages, no right to a jury trial attached.
2. The clean up doctrine basically meant that if the center of gravity of the claim was equitable, a party did not have a right to a jury trial on the damages (legal) part of the claim because the equity court would end the litigation by cleaning it up and awarding damages.
3. This doctrine was *overruled* in the federal courts by *Dairy Queen v. Wood*, but if you're put in a State court on the exam, you may have to use it.

## II. MODERN STANDARDS FOR THE RIGHT TO A JURY TRIAL

A. **G/R: Purely Legal Claims**: modern actions that are counterparts to actions at law, such as personal injury claims, or claims for damages, are triable to a jury [*Beacon Theaters*].

B. **G/R: Purely Equitable Claims**: there is no right to a jury in modern actions that are counterparts to actions in equity, such as specific enforcement, injunctions, or actions to foreclose mortgages [*Beacon Theaters*].

C. **G/R: Newly Created Statutory Rights**: Congress may provide for nonjury trials when the right to be enforced is one that was *not known* at common law and the practical considerations justify withholding the right to a jury in order to assure efficient disposition, especially if the initial disposition is assigned to an administrative agency.

1. *Caveat*: when the action on a new statutory right can be INITIATED in federal court, the approach to such cases requires examining both the nature of the issues involved and the remedy sought.

- a. There is to be a comparison of the statutory action to 18th century pre-merger English actions and an examination of whether the remedy sought is legal or equitable in nature.

\*[*Teamsters Local 391 v. Terry*].

D. **G/R: Choice of Law**: FEDERAL LAW governs the right to jury trial in federal court, even in diversity actions in which the court is applying state law.

## III. MODERN STANDARDS INVOLVING COMMON QUESTIONS OF LEGAL AND EQUITABLE CLAIMS

A. **G/R: Common Legal and Equitable Claims**: in the merged law/equity system (modern) the court should try and make sure that any ISSUE that historically would have been tried to a jury, continues to be tried to a jury. This involves a three-prong analysis:

1. *Purely Legal Issues*: purely legal issues, such as computing damages (which have always been a purely legal issue) are afforded the right to a jury trial.
2. *Purely Equitable Issues*: purely equitable issues, such as the exercise of discretion in deciding whether or not to make a certain equitable remedy (like specific performance or injunction) available should be left to the judge.
3. *Common Legal/Equitable Issues*: if there are issues which are common to both the legal and equitable side of the case then the PRESUMPTION in favor of the constitutional right to a jury trial comes into play:

- a. If there is an amalgamation of legal and equitable issues, that will NOT cause a person to lose their right to a jury trial simply because there is a mix of legal and equitable claims. The issue should go to the jury, and **THE JURY'S RESOLUTION IS BINDING ON THE JUDGE**.
- b. The major element of this analysis is that you determine jury trial rights in terms of *issues* and not at the wholesale level in terms of characterizing the entire case and asking what the center of gravity is.

A(1). **G/R:** On the exam, then the analysis will be to characterize the issues, and apply the following rules:

1. Purely legal questions = go to the jury.
2. Common legal/equitable questions = go to the jury.
3. Purely Equitable questions = the judge decides on the basis of what the jury ascertained.

\*\*This is *Beacon Theaters* Analysis.

B. **G/R: Equitable Claims Predominate:** even if the equitable claims predominate, that is, it is a case for accounting or specific performance, with only incidental legal claims, the *Beacon Analysis* applies and the right to a jury trial attaches for the legal claims, and then the judge decides the equitable claims on the basis of the jury's determination of the legal claims [*Dairy Queen v. Wood*].

1. Thus, the priority of the issues at trial becomes significant. In federal courts, under *Beacon*, ALL *issues* affecting the legal claim for relief **MUST BE TRIED FIRST**.
  - a. In other words, the trial court, no matter how incidental the legal claim is, must grant a jury trial if there is ANY legal claim, no matter how incidental, when there is an opportunity to do so.
2. This had the effect of overruling the old clean up doctrine, in federal courts.
3. Examples:
  - a. In action in which the plaintiff seeks redress for a single wrong, but asks for both legal and equitable relief: a copyright infringement action in which damages for past infringement (legal) and injunctive relief against future infringement (equitable) are sought.
    - i. Jury right attaches.
  - b. If the P is entitled to both equitable and legal remedies, but not both, such as in action for specific performance of a contract, and damages in the alternative, is he entitled to a jury trial.
    - i. The plaintiff must elect which damages he seeks: if it is specific performance, no jury trial attaches, if it is damages, then a jury trial attaches.

C. **G/R: Equitable Proceedings Seeking Legal Relief:** one historical role of equity was to provide procedural mechanisms/vehicles for the resolution of complex disputes. Derivative suits, interpleader, and class actions were created by equity courts. The general rule today, in determining if the right of jury trial attaches, federal courts focus on *the nature of the underlying claim*; rather than the procedural vehicle by which the claim is to be adjudicated.

1. It does not matter that the dispute comes into court in an equity procedural vehicle, like the class action or derivative suit, the court will use equity principles to determine if the procedural vehicles was properly invoked, and if so, then the legal claims for damages can go before the jury.
2. The equity vehicle does not destroy the jury trial for the underlying issues for the legal or common claims.

\*[*Ross v. Bernhard*].

C(1). Class Actions: in the class action context, this means that the judge, sitting without a jury, decides certification issues; that is, all the prerequisites for bringing the action such as numerosity, commonality, typicality, what type of class action it will be, and if it is a Rule 23(b)(3) class action, whether the predominance and superiority have been satisfied.

1. Once the court certifies the class action, and says the equitable vehicle is appropriate, the court will look at the *nature of the underlying claim* and then apply the *Beacon Theaters* analysis to determine if the right to a jury trial attaches.

C(2). Shareholder Actions: in a shareholder derivative action there is a right to jury trial on issues that would have been tried by the jury if the claim had been brought by the corporation itself [*Ross v. Bernhard*].

C(3). Interpleader: an interpleader action would be triable to a jury when the underlying claims against the stakeholder would have been actions at law if brought by the interpleader claimants.

#### IV. NEWLY CREATED STATUTORY RIGHTS AND CONGRESSIONAL ACQUIESCENCE OF THE JURY TRIAL

A. **Analytical Framework**: for claims involving a statutory right that did not exist at common, or a common law right which existed but was expanded on through federal law, there is a three step analysis for determining whether the jury trial right attaches:

1. **Statutory Construction**: does the statute, or legislative history, indicate that Congress intended a jury right to attach, if so, the right attaches. If Congress was clear that the statute did not create a statutory right to a jury trial, then that applies and no right attaches.

2. If Congress was silent, or ambiguous, apply the *Historical Test*:

1. To determine whether a particular action will resolve legal rights, the court must examine both the *nature of the issues involved* and the *remedy sought*:

a. First the court compares the statutory right action to 18th-century actions brought in the courts of England prior to the merger of courts of law and equity;

b. Second, the court examines the remedy sought to determine whether it is legal or equitable in nature.

\*\*The second inquiry is more important in the courts analysis.

\*[*Teamsters Local 391 v. Terry*].

3. If the remedy sought is monetary damages, a jury trial will usually attach (unless it upsets a statutory scheme like in bankruptcy); if not the right to a jury for damages will not attach. If the action is analogous to a legal right (jury trialable) that existed before 1971 then the right to the jury trial attaches.

*Note*: then after going through this analysis, you can try and analogize whatever fact scenario is given, to one of the following general rules....

#### B. **Cases in which the Right to a Jury Trial Does NOT Attach:**

B(1). Bankruptcy Proceedings: a bankruptcy proceeding, and a bankruptcy court, have traditionally been viewed as courts of equity, and jury trials would disrupt the statutory scheme of the Bankruptcy Act; therefore no jury trial right attaches in bankruptcy proceedings, even though, in a sense, they involve monetary damages and remedies [*Katchen v. Landy*].

1. **Exception**: if the proceeding in bankruptcy is to recovery for a fraudulent conveyance, then the right to a jury trial does exist because it is, in effect, a private contract right [*Granfinanciera v. Nordberg*].

B(2). Administrative Agencies: the 7th Amend is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the agency's role in the statutory scheme [*NRLB v. Jones & Laughlin*; *Atlas Roofing v. OSHA*].

1. **g/r**: when public rights (where the government is involved in its sovereign capacity under a valid statute creating enforceable public rights) are being litigated the 7th amend does not prohibit Congress from assigning fact finding functions to an administrative agency [*Atlas Roofing*].

B(3). Admiralty Law: case tried in courts of equity or admiralty do not require a jury trial [*Tull v. US*].

### C. Cases in which the Right to a Jury Trial Does Attach:

C(1). Civil Rights Act: [Fair Housing Act]: if certain conditions are met, statutory rights carry the constitutional jury trial right even though they are post-1791; the three conditions are:

1. the right created by Congress must be vindicated in an Article III court;
2. the remedy provided by the substantive right must be one traditionally granted to juries in courts of law (DAMAGE remedieies); and
3. the right created by the statute must be analogous to a right that existed in 1791:
  - a. In *Curtis*, the housing accommodations were analogous to innkeepers liability.
  - b. The court was basically saying, if you look hard enough, you can find an analogous jury trialable action that existed traditionally. This is not a very tough restriction.
  - c. *Hint*: if you're in a pinch, you can always say the new substantive right created by Congress is analogous to the common law notion of trespass on the case.

**G/R**: if the relief sought is ACTUAL OR PUNATIVE DAMAGES it is a traditional form of relief offered in the courts of law and the right to a jury trial attaches.

C(2). Clean Water Act: the right to a jury trial exists on liability, but not damages (congressional intent was clearly precluded a jury trial on damages) [*Tull v. US*].

C(3). National Labor Relations Act: the remedy of backpay (although historically equitable) is legal in nature and therefore the right to a jury trial attaches [*Teamsters Local 391 v. Terry*].

### V. STATE COURTS AND THE RIGHT TO A JURY TRIAL

A. **Analytical Framework**: if placed in a State court on the exam, they are not bound by the 7th Amend, *Beacon* and its progeny; therefore, some States follow the analysis exactly, and others do not and still use the center of gravity/clean up doctrine analysis. So on the exam go through this process:

1. Unless you are placed in Indiana (which we know does not follow *Beacon*; see *Hiatt v. Yergin*) if faced with a jury trial problem in State court:
  - a. In State X, if the court follows federal line of cases and the federal 7th Amend....then do *Beacon Analysis* and apply all rules just like you are in federal court; then say
  - b. If on the other hand the states do not follow *Beacon Theaters* they probably use the dissenter's historical approach, and apply the center of gravity/clean up doctrine analysis.

### §6.2: THE JUDGE AND JURY AT TRIAL

## I. SIZE OF THE JURY AND VERDICTS

A. **Rule 48:** Number of Jurors: the court shall seat NOT LESS than 6 jurors, nor MORE than 12 jurors. Unless the parties stipulate otherwise:

1. The verdict *must be* UNANIMIOUS; and
2. no verdict shall be taken from a jury of fewer than 6-persons.
3. In jury of six persons satisfies the 7th Amendment's guarantee of trial by jury in the in civil cases [*Colgrove v. Battin*].
4. Non-unanimous decisions are covered by Rule 48 (i.e. prohibited) in federal court, but States are free to choose their own rules and laws for dealing with non-unanimous verdicts.

## II. PROVINCE OF THE JUDGE AND JURY

A. **G/R:** Duty of Court and Jurors: in a trail by jury both the court and jury are essential factors. The court's duty is committed to the power of direction and supervision and the jury's duty is to determine the facts [*Slocum v. NY Life Ins. Co.*].

1. *Jury's Function:* interpretation is a question of fact and therefore must be submitted to the jury unless there is no evidence, which, if believed, would authorize the jury's conclusions.
2. *Court's Function:* the statement that the jurors are the judges of the facts and the weight of the evidence must be qualified by a recognition of the admitted powers of the court:
  - a. to find in certain cases the existence or non-existence of facts as a necessary basis for the determination of the competency of the proffered witness or written evidence;
  - b. under certain circumstances to direct a verdict at the close of the plaintiff's or defendant's cases;
  - c. to charge or instruct the jury on the facts in the federal courts and some state courts; and
  - d. to set aside the verdict of the jury for error of law, or if contrary to the manifest weight of the evidence and
    - i. grant a new trial;
    - ii. condition the overruling of a new trial upon the entry of remittitur; or
    - iii. to enter judgment contrary and notwithstanding the verdict.

\*[*Dobson v. Masonite Corp.*].

## III. DEMAND AND WAIVER OF TRIAL BY JURY

A. **Rule 38(b):** Demand: in federal actions, when the right to a jury trial applies, a party must demand a jury trial within 10-days of the service of the last pleading directed to that issue.

B. **Rule 38(d):** Waiver: the failure of a party to serve and file a demand as required by Rule 38 constitutes a waiver by the party of the trial by jury.

B(1). **G/R:** the right of the jury trial is fundamental and court should indulge the reasonable presumption against waiver, nonetheless, the waiver presumption is constitutional [*Aetna Ins. Co. v. Kennedy*].

C. **Rule 39(b):** issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court...the court in its discretion may order a trial by jury of any or all issues.

1. Test for When Jury Should be Granted Under Rule 39(b): the determining factor in such cases should be whether, despite the failure to comply with Rule 38, the nature of the case is such that one or the other of the parties is likely to be prejudiced by the failure to have a jury trial. Where the issues are more factual than legal, there is more reason for the liberal exercise of discretion to grant a jury trial. \*[*Segal v. American Cas. Co.*].

D. **Rule 81(c): Removed Actions**: Rule 81(c) provides *inter alia* that a party who, prior to removal, has made an express demand in order to claim trial by jury, need not make demands after removal unless the court directs that they do so within a specified time.

E. **G/R: Demand After Removal**: the necessity for a demand after removal is obviated only where the case automatically would have been set for jury trial in the court from which it is removed, without the necessity of for any action on the part of the party desiring a jury trial [*Segal v. American Cas. Co.*].

#### IV. JURY SELECTION

A. **Generally**: trial juries are selected from a pool of citizens, commonly known as the venire. The court summons prospective jurors. Jury selection is a two stage process:

1. A list of potential jurors is compiled and they are assembled. A number of them, equal to the number who will serve, usually twelve or six, are then selected at random to sit as a tentative jury.
2. The tentative jurors are questioned by the judge and/or by the attorneys to determine if they can fairly and appropriately decide the case. This process is called *voire dire*.
  - i. If one of the jurors is dismissed, his place is taken another member of venire, selected at random, who in turn is subjected to questioning.
  - ii. This process continues until the final panel is in place.
3. There are three interests involved in jury selection:
  - a. the public at large;
  - b. the defendants/plaintiffs; and
  - c. the jurors.
4. 28 USC §§1861-1867 govern federal jury selection procedures.

B. **28 USC §1863: Plan for Random Jury Selection**: jury selection methods in the federal courts now conform to plans promulgated by local district courts in conformity with national standards.

1. Every district uses voter registration lists as the basic source of from which juries are summoned.

C. **§1861: Policy**: the national policy requires juries to be selected from a *fair cross-section* of the community.

D. **§1867(c)**: if the venire has not been selected in strict compliance with the statutes and local plan, either party may challenge the entire pool of jurors and require a new venire be summoned [*Theil v. S. Pacific Co.*].

E. **G/R: Qualifications of Jurors**: every has the right to be a jury, except certain classes of people exempted such as, minors, illiterates, aliens, infirmity, and felons [§1865].

F. **G/R: Exclusion of Jurors**: the American trial by jury, considered in connection with either civil or criminal proceedings, necessarily contemplates an impartial jury drawn from a fair cross section of the community. This does not mean that every jury must contain representatives of all the economic, social, religious, political and

geographic groups of the community because that would be impossible but it does mean that *certain groups cannot be systematically and intentionally excluded.*

1. The choice of the means by which unlawful distinctions and discriminations are to be avoided rests largely with discretion of the trial courts and their officers.
2. The exclusion of certain groups cannot be justified on either state or federal law.
3. *Competence*: a juror to be competent need only be a citizen of the US over eighteen years old, a resident of the state and county for one year preceding selection, possessed of his natural faculties and of ordinary intelligence and speaks English.
4. Jury service is a duty that cannot be avoided because of inconvenience or loss of earning power.
  - a. *Exception*: when the financial embarrassment is such as to impose a real burden and hardship on the party does a valid excuse of for avoiding jury duty arise.

G. **G/R: Challenges for Cause**: permit a prospective juror to be rejected when partiality can be shown.

1. **§1870**: all challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.
  - a. An unlimited number of challenges for cause are permitted for each party. The trial judge determines these challenges.
2. The basis for a dismissal for cause arises when any person has bias or prejudice in favor or against either of the parties, or the subject matter of the litigation [*Flowers v. Flowers*].
  - a. *Bias*: in its usual meaning, is an inclination toward one side of an issue rather than to the other, but to disqualify it must appear that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality.
  - b. *Prejudice*: means pre-judgment, and consequently embraces bias, the converse is not true.

H. **G/R: Peremptory Challenges**: permit rejection of jurors without any statement of reason and usually are based on an assumed partiality that may not be susceptible to proof.

1. **Rule 47/ §1870**: the court shall allow three peremptory challenges.
2. Rule 47(c) allows the court to excuse a juror from service during deliberation for good cause.

## V. DISCRIMINATION AND JURY SELECTION

A. **G/R: Racial Discrimination**: the equal protection clause of the 5th amendment precludes a private party in federal civil litigation from using *peremptory challenges* to excuse potential jurors on grounds of their race. This applies to state courts through the 14 Amendment [*Edmonson v. Leesville Concrete Co.*].

1. *Batson Test*: if it appears that a pattern of peremptory strikes are against members of a particular race, the opposing party can request the district court to require the party making the strikes to articulate a race neutral explanation for striking the jurors.
2. The equal protection clause applies, although it is being applied to private litigants, because peremptory challenges are done under the supervision of the State, and in effect are a delegation from the State, therefore the equal protection clause applies.

B. **G/R: Gender Discrimination**: the equal protection clause of the 5th amendment precludes a private party in federal civil litigation from using *peremptory challenges* to excuse potential jurors on grounds of their gender. This applies to state courts through the 14th Amendment [*JEB v. Alabama*].

C. **28 USC § 1862:** no person shall be excluded from service as a juror in a federal court on account of race, color, religion, sex, national origin, or economic status.

### **§6.3: TAKING THE CASE FROM THE JURY: POST-TRIAL MOTIONS**

A. Overview: at the close of the proof at trial, motions can be made to determine whether a party has carried his burden of producing evidence. 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 try the case again.
2. Motion for a directed verdict (judgment as a matter of law); and
3. Motion for a judgment notwithstanding the verdict (jnov) (renewed judgment as a matter of law).
4. Generally some things to remember are:
  - a. All the motions are governed by Rule 50; the movant usually files a motion for directed verdict, and for a new trial in the alternative. The motion for the directed verdict must be filed to file a motion for a jnov.
  - b. Directed verdicts are the same as summary judgment, if the court grants them, the case is over; the only difference is that they come at the end of trial. Motions for new trials, if granted, start the trial over, unless it is a partial new trial motion in which only damages or liability can be tried at the second trial.
  - c. Directed verdict = judgment as a matter of law; jnov = renewed judgment as a matter of law.
  - d. Directed verdicts come before the jury has rendered a decision, JNOV's come after the jury has rendered a decision.

B. **Analysis:** these three motions are very testable and the classic testing mechanism is an exam question with two possibly all three of the motions and you have tell the professor that you know what the motions are in terms of:

1. their function;
  2. the standards for granting and denying them (tear and compare);
  3. knowing when to apply one, or more than one, even when it may be awkward to do so.
- \*\*The most important thing is to ANALYZE EACH MOTION SEPERATELY, NO MATTER WHAT.**  
Apply the rule to the facts, then conclude if it requirements have been satisfied, and then move to the next one, and ignore your last answer. **DO NOT** mix your analysis up.

#### I. STANDARDS FOR DIRECTED VERDICT: JUDGMENT AS A MATTER OF LAW

A. **Rule 50(a): Judgment as a Matter of Law:** [directed verdicts] after a party has been fully heard on an issue, and there is no legally sufficient evidentiary basis *for a reasonable jury to find for that party on the issue* the court may determine the issue against that party and grant the motion.

1. Motions for judgment as a matter of law may be made any time before the submission of the case to the jury.
  - a. The motion can be made at the end of all the evidence, it can come at the end of the plaintiff's case, and can even be made at the beginning of the case.

B. **G/R: Directed Verdicts:** directed verdict practice is not unconstitutional under the 7th Amend right to a jury trial because the history of the 7th Amend does not preclude directed verdicts [*Galloway v. US*].

C. **G/R: General Standard:** the directed verdict will deprive the losing party access to the jury, therefore courts bend over backwards in favor of the non-moving party:

1. The court will look at the evidence in the light most favorable to the non-moving party; draw all inferences in favor of the non-moving party; and resolve all issues and questions of witness credibility in favor of the non-moving party.
2. **Test:** the court will grant a directed verdict motion *if no reasonable jury could find for the non-moving party*.
  - a. That will only be true if there is an ironclad defense, or if all the evidence points in exactly the same direction.
  - b. The directed verdict ends the case if granted.

D. **G/R: When Appropriate:** when one party presents no evidence at all, to an element of the cause of action, a judgment as a matter of law is appropriate [*Denman v. Spain; Hatwig v. Kanner*].

1. The burden is on the plaintiff demonstrate by a preponderance of evidence her cause of action; and if there is no evidence presented other mere possibilities of what might have happened, a directed verdict is appropriate because verdicts cannot be based on possibilities [*Denman v. Spain*].

E. **G/R: Standard of Review:** a motion for a directed verdict raises only a question of law; thus, the court's review is de novo.

1. In determining whether a directed verdict should be granted, the evidence is viewed in the *light most favorable to the non-moving party*.
2. A court should direct a verdict only if there is no credible evidence to sustain a verdict in favor of the party against whom the motion was made.  
\* [*Hartwig v. Kanner*].

F. **G/R: Jury Speculation/Inferences:** jury inferences are acceptable, if the parties have presented evidence of the issue and within limits the fact that the jury's decision will involve some speculation is not a ground for taking the a case from the jury. If the facts are in dispute or reasonable people may draw different inferences from the evidence, the jury may use speculation and conjecture to settle the dispute by choose what seems to be the most reasonable inference [*Gallow v. US; Lavender v. Kurn*].

1. *Caveat:* mere speculation cannot be allowed to contravene probative facts after making due allowance for all reasonable inferences in favor of the party who moved for the motion [*Galloway*].
2. *Caveat:* only when there is a complete absence of probative facts to support a conclusion reached does a reversible error appear [*Kurn*].

G. **G/R: Credibility:** credibility issues are normally a fact-finders responsibility and should be left to the jury [*Kircher v. Atchison et. al.*].

## II. STANDARDS FOR J.N.O.V.: RENEWED JUDGMENT AS A MATTER OF LAW

A. **G/R: Constitutional Issues:** the jnov, without more, violates the re-examination clause of the 7th Amendment because it impermissibly reexamines the jury's verdict; however, it is not impermissible if it is only a reconsideration by the judge of his directed verdict motion [*Baltimore RR v. Redman*].

1. This has been fixed, and the fixture is embedded in Rule 50, however it requires some prerequisites before the motion can be made.

**B. Rule 50(b): Renewing Motion for Judgment after Trial and Alternative Motion for new trial:** if the court does not grant a directed verdict at the end of trial, the court is considered to have submitted the action to the jury. The movant may renew his request for judgment as a matter of law no later than 10-days after entry of judgment; and may alternatively request a new trial under Rule 59. In ruling on the renewed motion the court may:

1. allow the judgment to stand;
2. order a new trial; or
3. direct judgment as a matter of law [notwithstanding the jury's verdict].

**C. G/R: Prerequisites for a JNOV:** the movant must do three things in order to file a motion for a JNOV:

1. make a directed verdict motion pursuant to Rule 50(b) before jury deliberates;
2. the motion for a directed verdict has to be made at the *close of all evidence* to preserve the jnov; and
3. make a motion for a jnov after the jury has returned, even after making the aforementioned motions.   
\*\*(the first motion does not necessarily have to be made, that only arises if the movant made a motion after the close of the plaintiff's evidence, then he would have to make another motion at the close of all the evidence).

**D. G/R: Standards:** the same standards apply for the jnov as the directed verdict: all inferences (all evidence looked at in the light most favorable to the non-moving party, credibility issues) will be drawn in favor of the non-moving party and the motion will only be granted if *no reasonable jury could have found for the nonmoving party*. (This may be an even higher standard because the jury did just find for the non-moving party). There are several reasons that a judge might grant a jnov:

1. Many times the judge could have granted the motion for the directed verdict but did not because if the jury renders a verdict for the non-moving party the judge is bailed out, but if the jury comes back with the wrong decision he will grant a jnov. Judges do this because:
  - a. the case will have less of a chance of being overturned on appeal;
  - b. the parties and public might be happier with the decision;
  - c. if the judge directs a verdict and is overturned on appeal, there has to be a new trial; if the judge is overturned on a jnov then the jury's verdict is reinstated—judicial economy.
2. Policy considerations on the other side are:
  - a. the judge may not want to risk having to overturn the jury;
  - b. it would save the jurors time and be more judicially efficient if the judge directs a verdict after the close of the plaintiff's case.

**E. G/R: Effect of the JNOV:** the effect of the jnov is that it ends the case. It takes the verdict away from the winner and gives it to the other party. It ends the case, and this is why it is a much more stringent standard than the new trial motion.

**F. Rule 50(c): New Trial Motion:** [also discussed later in outline]: if the motion for a jnov is granted the court shall also issue a ruling on the motion for a new trial, if any, by determining if it should be granted also. The court is saying that it will grant a new trial if it is reversed on the jnov.

### III. JURY INSTRUCTIONS

A. **Rule 51: Instructions to the Jury:** at the close of the evidence any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests before their arguments to the jury.

1. The court, at its election, may instruct the jury before or after argument, or both.
  - a. *Policy for giving instructions before:* the jury must know the law so they can apply it, and consider what is important in closing arguments.
  - b. *Policy for giving instructions after:* the court wants to have the last word, and don't want the jury deliberating during closing arguments.
2. No party may assign error to the giving of an instruction, or failure to give an instruction, unless that party objects to it before the jury retires to consider its verdict, stating distinctly the ground for objection.

\*The parties can request to have the jury instructions given in writing.

B. **G/R: Special Instructions:** a special instruction is one which relates the law to a the specific evidence in the case; however, a jury instruction which assumes a controverted fact is an invasion of the province of the jury and is erroneous [*Griffin v. City of Cincinnati*].

C. **G/R: Judges Commenting on the Evidence:** the right of district judge to comment on the evidence is firmly established in the federal system; however, if the judge gives an opinion on an ultimate fact question peculiarly for jury consideration and it amounts to an instructed verdict the appellate court will overturn as error [*Nunley v. Pettway Oil Co.*].

#### IV. JURY VERDICTS

A. **G/R: General Verdict:** the most common and traditional form of jury verdict is the general verdict, in which the jury simply makes a decision in favor of one party or the other. Such a verdict implies a finding in favor of the prevailing party on every material issue of fact submitted to the jury.

B. **G/R: Special Verdict: [Rule 49(a)]:** a special verdict consists of the jury's answers to specific factual questions that it is instructed to decide. The jury does not decide directly which party should prevail on the law. Instead, the special verdict should resolve all the material issues so the court can enter judgment on the jury's findings.

C. **G/R: General Verdict with Written Interrogatories: [Rule 49(b)]:** the trial judge may combine the two foregoing forms of verdict by instructing the jury to return a general decision as to which party shall prevail on the law, while simultaneously answering specific questions of fact posed by the evidence.

1. When the general verdict and the answers to the interrogatories are harmonious, the appropriate judgment on the verdict and answers shall be entered pursuant to Rule 58.
2. If the answers are inconsistent with the general verdict the trial judge may:
  - a. enter judgment pursuant to Rule 58 in accordance with the consistent answers, notwithstanding the general verdict;
  - b. return the jury for further consideration of its answers and verdict; or
  - c. may order a new trial.
3. When the answers are inconsistent with each other, and the general verdict:
  - a. judgment shall not be entered but the court *shall* return the jury for consideration of its answers and verdict; or

b. the court *shall* order a new trial.  
\*[*Nollenburger v. US*].

D. **G/R: Inconsistent Verdicts**: it is the duty of the court to harmonize answers to interrogatories with the general verdict, if it is possible under a fair reading of them.

1. The findings of fact of the jury in answer to special interrogatories control over the general verdict;
2. it is not within the power of the court under Rule 49(b) to submit additional interrogatories after the jury has returned its verdict answering special interrogatories and at the same time returned a general verdict.

\*[*Nollenburger v. US*].

#### IV. FINDINGS AND CONCLUSIONS IN NON-JURY CASES

A. **Rule 52(a): Findings by the Court**: in ALL actions tried upon facts *without a jury* the court *shall* find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58.

1. Findings of fact shall not be set aside *unless clearly erroneous* and due regard shall be given to the trial judge to judge the credibility of the witnesses.

B. **G/R: Purpose of Rule 52**: Rule 52(a) requires the judge to find the facts specially and to state his conclusions of law thereon with clarity. The findings and conclusions must be sufficient to indicate the basis of the trial judge's decision. The purposes of the Rule are:

1. to require the trial judge to formulate and articulate his findings of fact and conclusions of law in the course of his consideration and determination of the cases and as part of his decision making process, so that he himself may be satisfied that he has dealt fully and properly with all of the issues in the case before he decides it and so that the parties involved and the court of appeals may be fully informed as to the bases of his decision.
2. Findings of fact prepared *ex post facto* by counsel, even though signed by the judge do NOT serve adequately the function contemplated by the rule.
  - a. The purpose of Rule 52(a) is subverted when the judge adopts only the findings of the prevailing party.
3. The trial judge may invite counsel for both parties to submit to him proposed findings of fact and conclusions of law, accompanied by a brief if he desires them, to assist in formulating his own findings and conclusions and reaching his decision.
4. *Duty*: the duty of the trial judge pursuant to Rule 52(a) is to formulate findings of fact and conclusions of law in the course of and as part of his decision making process and to articulate them in full, and file them at the time of announcing the decision either in an opinion if filed, or in a *separate document*.

\*[*Roberts v. Ross*].

### **§6.4: CHALLENGING ERRORS: NEW TRIAL**

#### I. THE NATURE AND THE SCOPE OF THE POWER TO GRANT A NEW TRIAL

A. **Rule 59: New Trials**: a new trial may be granted to all or any of the parties and on all or part of the part of the issues:

1. in action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law; and
2. in an action tried without a jury for any reasons heretofore for which new trials have been granted in suits in equity.

**B. Analysis:** the key in analyzing a new trial motion question is looking for the ERROR. In a civil action anyone can make an error which might lead to a new trial motion:

1. the judge can admit evidence that he should have excluded, or excluded evidence he should have admitted and if the error on that point is grave enough a new trial can be granted;
  2. a judge can mischarge the jury, the judge can put the burden of persuasion on the wrong party and the new trial will allow this error to be remedied.
  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 have improper ex parte contacts with the jurors.
  4. The jury can render incoherent verdicts, or engage in compromise verdicts or quotient verdicts.
- \*\*All these types of things can lead to a new trial motion—and grant. LOOK FOR the ERROR.

**C. G/R: Error and Misconduct:** the source of error that is commonly tested on first year exams is error by the jury; the jury can do all sorts of thing wrong:

1. **Test:** juries must decide the case on *in court testimony under oath subject to cross-examination*. That is absolutely critical and if the jury deviates from that it can result in a new trial grant.
2. Common sources of jury error:
  - a. going to the scene of the accident without supervision;
  - b. bringing books or other extraneous material into the jury room;
  - c. relying heavily on one juror who purports to be an expert; and
  - d. the jury can make a lot of mistakes rendering the verdict:
    - i. quotient verdicts: where the jury without deliberation or thought all put down the amount of the award and then divide by 12. If someone puts down zero, that could be an indication they think the defendant is not liable, and with the quotient verdict that goes unnoticed;
    - ii. juries can apportion damages to the wrong party or when they are not supposed to and if the jury renders an *inconsistent verdict* when they were not supposed to, or apportioned damages to someone who was not to receive damages, it could lead to a new trial.

**D. G/R: Standard:** for the new trial motion to be granted the jury verdict must be against the *clear and overwhelming weight of the evidence* either on liability or damages. If the judge, who in theory has watched many trials, concludes the verdict is against the clear and convincing weight of the evidence a new trial motion can be granted.

1. This is a less stringent standard than the standard for judgment as a matter of law because the remedy sought is less severe.
2. On a Rule 59 motion it is the duty of the court to set aside the verdict and grant a new trial, if it is of the opinion that the verdict is against the clear weight of the evidence, is based upon evidence which is false, or would result in the miscarriage of justice, even though there may be substantial evidence which would prevent the direction of the verdict (i.e. directed verdict motion).

\*[*Aetna Casualty Co. v. Yeats*].

E. **Rule 61: Harmless Error:** no error by any of the parties is ground for granting a new trial *unless* the refusal to do to take such action appears to the court inconsistent with *substantial justice*. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does NOT affect the substantial rights of the parties.

F. **G/R: Discretion of Trial Judge:** the purpose of vesting the trial judge with the power and discretion to grant a new trial is to permit him, before losing jurisdiction of the case, to correct errors that he or the jury might have made during the course of trial. The decision to grant a new trial rests in the sole discretion of the trial judge [*Magnani v. Trogi*].

1. The granting or refusing of a new trial is a matter resting in the sound discretion of the trial judge and his action in granting or denying the motion is *not* reviewable upon appeal, except in the most exceptional circumstances.

a. The reason usually given for the denial of review is that the granting or refusing of a motion for a new trial is within the discretion of the trial court.

\*[*Aetna Causality v. Yeats*].

G. **G/R: Unresponsive Verdicts:** the jury verdict must be responsive to the issues and recommendations submitted to it by the court.

1. If a jury awards damages that are contrary to the issues presented, but the court can clearly, sufficiently, and convincingly ascertain the jury's intent, then the trial judge can make the informal verdict formal.

2. If the jury's intent cannot be ascertained, and the verdict is self-contradictory and ambiguous, the trial judge cannot substitute his judgment for that of the jury and the court must order a new trial.

\*[*Robb v. John Hickey*].

H. **G/R: Difference Between Directed Verdict and Motion for a New Trial:**

1. *Directed Verdict Motion:* where there is substantial evidence in support of the plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side because under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass on its credibility.

2. *Motion for a New Trial:* in a motion for a new trial the judge may set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence, or which is based on false evidence because even though the evidence may be sufficient to preclude a directed verdict, it is still his duty to exercise his power over the proceedings before him to prevent the miscarriage of justice.

\*[*Aetna Causality v. Yeats*].

I. **G/R: Appealability of New Trial Motion:** the denial of a motion to grant a new trial is not appealable. When the motion is granted for insufficiency of the evidence, it is only in rare cases showing *abuse of discretion* that an appellate court will interfere because the trial judge must weigh all the evidence and determine the just conclusion to be drawn from it. It cannot be held that a trial court has abused its discretion where there is conflict in the evidence or where there is any evidence which would support a judgment in favor of the moving party [*In Re Green's Estate*].

J. **G/R: Forms of New Trial Motions:** there are three basic types of new trial motions (plus one that cannot be used in federal courts):

J(1). Partial New Trial Motion: [Rule 59(a)] Rule 59(a) states that a new trial may be granted to all or any of the parties on all or part of the issues. The most common form of a partial retrial is when the verdict comes in and liability is established, but damages are excessive or inadequate, then the court can retry just the damages. It is way of salvaging part of the first trial.

1. Under FRCP, however, the judge can have a partial new trial on liability, and keep the damage award from the new trial but that is more rare, and more controversial.
2. The partial new trial is dangerous, especially for purists about jury trials. Thus, the utilization of it 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 cannot separate damages from liability.
3. But the partial new trial is constitutional and judges do it.  
\*[*Doutre v. Niec*].

J(2). Bifurcation: it is sort of like the partial new trial, is fairly common, and appears to be constitutional. In complex cases, particularly in federal courts, the court can bifurcate the issues at trial. It will try the liability first, and once that trial is over, if the jury finds liability it will have a trial on damages. If the jury finds no liability the case is over.

1. This promotes judicial economy because if the jury does not find liability then a lot of time is not wasted finding damages.

J(3). Conditional New Trial: also referred to as additur and remittitur. This occurs when damages seem disproportionately high or inappropriately low and the court wants to avoid a new trial just because the damages were calibrated wrong.

1. *Additur*: is used to describe an order denying the plaintiff's application for a new trial on the condition that the defendant consent to a specified *increase* in the jury's award. It basically works by the judge instructing the defendant that it will deny plaintiff's motion if he consents to a determined amount in the increase of the verdict.
  - a. In the federal courts additur is unconstitutional because it violates the 7th Amendment [*Dimick v. Schiedt*].
2. *Remittitur*: is used to describe an order denying the defendant's application for a new trial on the condition that the plaintiff consent to a specified reduction in the jury's award. The plaintiff has to consent to a reduction in the award or the court will grant the defendant's motion for a new trial.
  - a. Federal courts have upheld the application of remittitur because it was known at common law and therefore does not violate the 7th Amendment and under the reasoning that if a jury awarded a verdict of X amount of dollars it impliedly consented to amount less than that; whereas, with additur, the jury never contemplated going in excess of the awarded amount.
  - b. A party cannot accept a remittitur and then appeal it. The Supreme Court said that was impermissible and the party had to make the decision of whether to accept the remittitur, or have a new trial and that was it.

\*[*Fisch v. Manger*].

## **§6.5: The Power to Set Aside A Judgment on Grounds Discovered After it was Rendered**

### I. MISTAKE AND EXCUSABLE NEGLIGENCE—TIMELINESS OF REQUESTS FOR A NEW TRIAL

A. **Rule 50(b):** a party must move for judgment as a matter of law (j.n.o.v.) within 10-days after entry of a verdict.

B. **Rule 59(b):** a party must move for a new trial within 10-days after entry of a judgment.

C. **Rule 6(b):** a court may NOT extend the time for taking any action under Rules 50(b)[jnov], 50(c)(2)[new trial], 52(b)[amendments in findings of fact in non-jury trial], 59(b)[new trial], 59(d)[new trial], 59(e)[amendment to alter new trial motion], 60(b)[mistake, inadvertence, surprise] except to the extent and under the conditions stated in them.

D. **Rule 60(b): Mistake, Inadvertence, Excusable Neglect:** on motion and upon such terms as are just, the court may relieve a party from final judgment for the following reasons:

1. mistake, inadvertence, surprise, or excusable neglect;
2. newly discovered evidence, which in due diligence could not have discovered in enough time (10-days) to move for a new trial under Rule 59(b);
3. fraud;
4. the judgment is void;
5. the judgment has been satisfied, released, or discharged;
6. *any* other reason justifying relief from judgment.

The motion shall be made within a *reasonable time* and not more than a year for #1-3.

\*\*An independent action can be brought under Rule 60 (“this Rule does not limit the power of the court to entertain an independent action to relieve a party from judgment”).

E. **G/R: Untimely Motions:** if the motion for a new trial is untimely, the trial court has no choice but to deny the motion; and the tardy motion will not toll the time for taking an appeal. (a) Counsel cannot waive the strict requirements of the timeliness of motions.

1. Ignorance of the rules resulting in an agreement for an unauthorized extension of time cannot serve to furnish grounds for relief under 60(b).
2. Under appropriate circumstances the district court may entertain under Rule 60(b) a motion for a new trial which is untimely under Rule 59(b) only if a showing is made which complies with the requirements of that rule, clause (1) of which requires a showing of mistake, inadvertence, surprise, or excusable neglect *and* clause (6) a showing of any other reason justifying relief from the operation of the judgment.

\*[*Hulson v. Atchison*].

G. **Fed. R. Appellate Pro.:** [Rule 4(a)(4)]: the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion under Rule 50(b), 52(b), 54, 59, or 60.

H. **G/R: Excusable Neglect under Rule 60(b)(1):** excusable neglect, to be granted, has to be an exceptional circumstance and is usually more than a mistake of the all the parties, including the judge.

1. The reason for such a high standard is that Rule 6 specifically enumerates that the time cannot be extended;
2. once a judgment becomes final that is the end of the case because of the policy of finality, and the only next step is to appeal within 30-days unless a motion is pending before the court [see FRAP 4(a)(4)].

## II. NEWLY DISCOVERED EVIDENCE: Rule 60(b)(6)(2).

A. **G/R: Test for New Trial on Newly Found Evidence:** a motion for new trial on the grounds of newly discovered evidence must meet the following elements:

1. must be such as would probably change the result on a new trial;
2. must have been discovered since the trial (after 10-days before a year);
3. must be of such a nature that it could not have been discovered before trial by due diligence;
4. must be material;
5. must not be merely cumulative or impeaching; and
6. must relate to the facts which *were in existence at the time of the trial*.

\*[*Patrick v. Sedwick*].

## III. JURY MISCONDUCT

A. **G/R: Mansfield Rule:** the general rule is that juror's affidavits cannot be utilized to attack the jury's verdict. There are five reasons for the Mansfield Rule:

1. the need for stability of verdicts;
2. the need to protect jurors from fraud and harassment by disappointed litigants;
3. the desire to prevent prolonged litigation;
4. the need to prevent verdicts from being set aside because subsequent doubts or change of attitude by a juror; and
5. the concept of sanctity in the Jury Room.

B. **Fed. R. Evid. 606(b):** juror's affidavits are inadmissible subject to two exceptions:

1. jurors may testify if extraneous prejudicial evidence was shown to the jury; and
2. jurors may testify as to whether an outside influence was improperly brought to bear upon any juror.
3. The basic thrust of Rule 606 is that the federal courts did not want to get into the jury's mind and understand which arguments influenced their decision making process, there are several things that a *juror cannot* testify to:
  - a. instruction misunderstanding;
  - b. misused evidence;
  - c. prejudice;
  - d. that the jury held it against the defendant that he did not take the stand;
  - e. that the jury took into account taxes, insurance, and contingent fees,
  - f. jury compromises;
  - g. sleeping and inattentive jurors; and
  - h. juror's use of intoxicating liquor or drugs while in the jury room.

## §7: APPELLATE REVIEW

### §7.1: THE PRINCIPLE OF FINALITY

#### I. INTRODUCTION

A. **G/R:** appellate review is an issue of subject matter jurisdiction for the appellate courts. ALWAYS start with that premise.

B. Generally: there are several things to understand about appeals:

1. Reviewability refers to whether some action may be reviewed by the appellate court, and most everything is reviewable.
2. Appealability is a question of timing, which means subject matter jurisdiction.
3. Many, the majority of things, that are reviewable, are *not* appealable when they are done.
4. Appealability in the federal system is defined by 28 USC §1291.
5. Rule 54(b) defines what is appealable for particular parties in multiparty litigation.
6. Rule 23(f) governs certification decisions and appealability for class actions.

## II. APPLICATION OF THE BASIC CONCEPT

A. **28 USC § 1291: Final Decisions for District Courts:** the courts of appeals shall have *jurisdiction* of appeals from all *final decisions* of the district courts except where direct review may be had in the Supreme Court.

B. **G/R: Final Judgment Rule:** the basic maxim of appellate review is that only final judgments are reviewable for error [*Liberty Mutual v. Wetzel*]. Federal appellate jurisdiction generally depends on the existence of a decision by the district court that ends the litigation on the merits and leaves nothing for the court to do but execute judgment [*Coopers & Lybrand v. Livesay*]. An appeal gives the appellate court the power of review, not one of intervention, and so long as a matter remains open, unfinished, or inconclusive, there may be *no* intrusion by appeal [*Cohen v. Beneficial*].

1. *Policy:* for the final judgment rule:
  - a. avoid piecemeal appeals;
  - b. reduce the number of appeals;
  - c. judicial economy and efficiency; that is, if a party wins the case and would have appealed several orders and decisions of the trial court, those appeals do not have to be brought;
  - d. shortens the time for litigation;
  - e. appealing non-final orders undermines the trial court's control of the case; and
  - f. it is disruptive to the litigation, and a burden on jurors, if a party can appeal immediately every action of the trial court.
2. *Policy:* against the final judgment rule:
  - a. trial court proceedings may be a waste of time because the court should have dismissed the action;
  - b. makes sure the case is done correctly the first time.
3. The exceptions, and safeguards built into the final judgment rule make the policies for the rule outweigh the ones against it.

B(1). **Hint:** in determining if an order, or judgment is final, remember that if the trial goes on it is usually not final, for example:

1. if the court denies a motion to dismiss under Rule 12(b)(6), the case goes on so the decision is not final;
2. if the court denies a motion for summary judgment, the case goes on so the decision is not final;
3. if someone intervenes under Rule 24(a) the existing parties cannot appeal the grant of intervention because the trial goes on;

- a. if the trial court denies the intervener's motion to intervene, then they can appeal because the judgment the trial does *not* go on for them.
4. if the court denies a discovery order, the case goes on so the decision is not final;
5. orders granting or denying certification are governed by Rule 23(f).
6. Conversely, an order granting a directed verdict, or jnov, is a final judgment because the case is over, it does not go on.

B(2). Essential Elements of a Final Judgment: a judgment is final when it clearly evidences the judges intention that it shall be his final act in the case. If the opinion or decision letter clearly evidences the judges intention that it is the final action in the case and it constitutes his final judgment under **Rule 58** it must:

1. direct that a party recover of sum of money;
2. upon receipt by the clerk of the opinion, requires the clerk to enter judgment forthwith against the party found liable for the amount awarded, which is to be done by making a brief notation of the judgment in the civil docket showing the substance of the judgment of the court as provided in Rule 79(a).
3. When all of these elements clear appear final judgment has been both pronounced and entered, and the time to appeal starts to run.
4. And the later filing and entry of a more formal judgment cannot constitute a second final judgment in the case nor extend the time to appeal.

\*\*I think this all covered now by the requirement that the final order be placed in a separate document.

C. **Rule 54(b)**: Judgment Upon Multiple Claims or Involving Multiple Parties: when *more than one claim* for relief is presented in an action (counterclaims, crossclaims, third party claims) or when multiple parties are involved, the court may direct the entry of a *final judgment* as to one or more but fewer than all of the claims or parties only upon express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

C(1). **G/R**: Rule 54(b) does NOT apply to a single claim or single party action. It is limited expressly to multiple claim actions. This is not an exception to the final judgment rule because the appeal is on a final decision as to that claim, or that party.

1. A claim asserting only one legal right, even if it is seeking multiple remedies for an alleged violation of that right, states only a single claim for relief.
2. Rule 54(b) *does not* relax the finality required for each decision, as an individual claim, to render it appealable, but it does provide as a practical means of permitting an appeal to be taken from one or more final decisions on individual claims, in multiple claim actions, without waiting for final decisions to be rendered on *all* the claims in that case.
3. The certification under Rule 54(b) is discretionary, and is determined by the trial judge.

\*[*Liberty Mutual v. Wetzel*].

C(2). Function of Reviewing Court: there are two aspects to the proper function of a reviewing court in Rule 54(b) cases:

1. the court of appeals must scrutinize the district court's evaluation of such factors as the interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units; and

2. once such judicial concerns have been met, the discretionary judgment of the district court should be given substantial deference, for that court is the one most likely to be familiar with the case and any justifiable reasons for delay.

\*[*Liberty Mutual v. Wetzel*].

D. **G/R: Timing of Appeals:** the timing of an appeal, is when the courts subject matter jurisdiction begins.

1. **Rule 58:** a judgment is not final until it is entered by the court and *set forth on a separate document*.

a. When the separate document is with the final order is entered, that is the time for which the appeal begins to run.

2. **Fed. R. App. P. 4(a)(1)(A):** in a civil case the notice of appeal is required 30-days after judgment or order appealed from was entered.

3. The time for appeals may be extended only by the *district court*, and not the appellate court, upon a showing of excusable neglect under Rule 60(b).

4. If a premature notice of appeal is filed, the appeal will be treated as filed on the day the final judgment was entered.

E. **Exceptions to the Final Judgment Rule:** there are several exceptions to the final judgment Rule:

E(1). 28 USC §1292(a): is an exception to the final judgment rule (practically it is an exception, however, the Supreme Court's interpretation of the statute, and since it is a separate statute, it is not really an exception) which allows for immediate appeal whenever a district court:

1. grants an injunction, refuses to grant an injunction, or modifies an existing injunction.

2. This is a pragmatic exception to the final judgment rule because very often injunctions are critical to a case and very often a case is won or lost on the basis of whether the court issues or denies the injunction.

3. There are two elements the plaintiff must satisfy in order to obtain a preliminary injunction:

a. the plaintiff must show there is no adequate remedy at law/irreparable harm; and

b. an award of damages will be inadequate.

4. Temporary Restraining Orders are generally not appealable under §1291 because Rule 65 says they are good for 20-days so it would not make sense to appeal within that time frame.

5. *Swiss Cheese Rule*: this does not apply to an order denying a motion for summary judgment in an action in which a permanent injunction is sought [*Switzerland Cheese v. Horne's Market*].

E(2). 28 USC §1292(b): This is an interlocutory appeal by permission and is an exception for certification of important issues (used to be used for class action certification decisions, but now that is governed by Rule 23(f)).

1. When the district judge, in making a order not otherwise reviewable is of the opinion that such order:

a. *involves a controlling question of law* as which there is ground for substantial difference of opinion; AND;

b. than an immediate appeal from the order may *materially advance the ultimate termination of the litigation*.

c. The court of appeals in its *discretion* may then permit an appeal to be taken for the certification issue.

2. If the district court believes the issue is controlling, it just means he believes it is very important like a jurisdictional issue, he is just indicating to the court of appeals that it needs resolution now.

3. The case then moves to the court of appeals and the court of appeals can exercise its discretion to take the appeal or on the issue embraced in the interlocutory order. The appellate court is not taking the entire case, it is just taking the certified issue.
4. Certifications are relatively infrequent (because they will add a couple of years onto the trial) but are more common in big complex cases or for issues of constitutional dimension.

E(3). Rule 23(f): a court of appeals *may in its discretion* permit an appeal from an order of a district court granting or denying certification under this rule if application is made to it within 10-days after entry of the order.

1. Usually both parties will not object to the appealability of a certification decision; however, if the appellate court, in its discretion, denies the appeal on the issue of denial of certification, there are possible counter-arguments (although they been rejected by the Supreme Court):

1. *Death Knell Doctrine*: the death knell doctrine assumes that without the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of the adverse class determination [*Coopers & Lybrand v. Livesy*].

2. *Analogous to Injunction*: there is also the argument that denial of certification, is like 1292(a)(1) denial of an injunction, and therefore appealable because it is tantamount to a dismissal of the case [*Westinghouse Broadcasting*].

\*Both these arguments have been rejected by the supreme court and are dead today.

E(4). Rule 54(d)(2)(B),(C): attorney's fees, if they are available and awarded, is a separate issue which can be determined after final judgment.

E(5). Collateral Order Doctrine: the collateral doctrine order is an exception to the final judgment rule which allows an immediate appeal for orders that are final with respect to certain collateral matters. There are four elements to invoke the collateral order doctrine:

1. the order must be final (not subject to revision);
2. the order must be collateral (has nothing to do with the merits, like the posting of a bond, disqualification of a judge or law firm);
3. immediate review must be the only effective way to review; and
  - a. the only effective way to review requirement is met when a party should not have to go through an entire trial with the issue undecided.
  - b. this is the most difficult element to satisfy because there is usually another effective way to review; namely, after final judgment has been entered.
4. the order in question must be too *important* to deny immediate review.
  - a. *Important*: important has two connotations in this respect, sometimes the Court holds that importance is with respect to the parties and sometimes to the development of the law generally.

E(6). Hardship Finality Exception: the court makes an exception to the final judgment rule if a court order would result in *irreparable injury* to the defendant or plaintiff. The court will allow a person to appeal who suffers irreparable injury from the court's order [*Forgay v. Conrad*].

E(7). Pragmatic Finality Exception: the Court has held that when an appeal is *fundamental to the further conduct of the case* a plaintiff may be allowed to appeal despite the fact there is not a final judgment in the action. This exception has a lot to do with the existence of prejudice to the parties [*Gillipsie v. US Steel*].

E(8). Writs of Mandamus or Prohibition: [28 USC §1651]: in all systems a party can appeal a point even though there is not a final judgment when the party is asking the appellate court to demand or mandate that the trial court do, or be prohibited from doing, something. Writs of mandamus are difficult to have issued because in the federal system a party is really asking the appellate court to review an action that happened below because the trial judge had no jurisdiction to do what it did, or the trial court was jurisdictionally required to do what it did not. So it makes the writ of mandamus more or less synonymous with a *violation of the trial court's jurisdiction*.

1. **G/R:** the power of the court of appeals to issue writs of mandamus may be granted within the sound discretion of the appellate court, like that of common-law writs and equitable remedies.
2. *Issuing Writs:* it is well settled that the writ is not to be sued as a substitute for appeal, even though hardship may result from delay and perhaps unnecessary trial, the writ is appropriately issued, however when there is an *usurpation of judicial power or a clear abuse of discretion*.
3. Factors in Determining When a Writ of Mandamus should be Issued: in order to confine the sue of mandamus to its proper office, the court [9<sup>th</sup> Circuit] has enunciated five general guidelines to assist in the determination of whether mandamus is the appropriate remedy in a particular case:
  - a. whether the party seeking the writ has not other adequate means, such as direct appeal, to attain the relief he desires;
  - b. whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
  - c. whether the district court's order is clearly erroneous as a matter of law;
  - d. whether the district court's order is oft repeated error or manifests persistent disregard for the federal rules; and
  - e. whether the district court's order raises new and important problems or issues of law of first impression.
- f. Additional considerations include:
  - i. whether the kind of injury alleged by petitioners, although not correctable on appeal, is the kind that justifies in violation of the court's mandamus authority;
  - ii. whether the petition presents a issue of law which may repeatedly evade appellate review; and
  - iii. whether there are other compelling factors relating to the efficient and orderly administration of the district courts.

## §7.2: AMBIT OF REVIEW

### I. ISSUES SUBJECT TO REVIEW

A. **Rule 52(a): Clearly Erroneous Standard:** findings of fact, whether oral or documentary, shall not be set aside unless clearly erroneous and due regard should be given to the district court.

1. **Test:** something is clearly erroneous when the appellate court is left with a *definite and firm conviction that a mistake has been committed*.
2. The appellate court does not review findings of fact de novo.
3. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently and this is so even if the district court's determinations

do not rest on credibility determinations but are based on physical or documentary evidence from the facts.

4. When findings are based on determinations regarding the credibility of witnesses Rule 52(a) demands even greater deference to the trial court's findings.

\*[*Anderson v. City of Bessemer*].

A(1). **G/R: Findings of Fact:** Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Rule 52 does not make exceptions or purport to exclude certain categories of factual findings from the obligation of the court of appeals to accept a district court's findings unless clearly erroneous. There is no distinction between facts, such as ultimate and subsidiary facts.

A(2). **G/R: Conclusions of Law:** Rule 52 DOES NOT apply to conclusions of law; if a district court's findings rest on an erroneous view of the law, they may be set-aside on that basis.

A. **G/R: Scope of Review:** there are a number of well-defined limits on the scope of appellate review:

1. The alleged errors must appear in the trial court record;

a. Thus it is vital during the course of pretrial preparation as well as during trial itself that an attorney make certain that all rulings and events that might form the basis for an appeal be formally recorded.

2. An aggrieved party must have promptly objected to the trial court regarding rulings or events that the judge could have corrected or ameliorated;

a. Normally an error is waived unless objection was taken.

3. Even if the issue that the appellant seeks to have reviewed has been presented properly below and has not been waived, it must not constitute harmless error—that is, it must have effected substantial rights; and

a. **Harmless Error Rule: Rule 61:** courts of appeal will not review a case in which any errors committed were harmless, in that the outcome of the case was not affected. Only when there is a reasonable chance that an error committed during trial was substantial enough to have caused some prejudice to either party will the courts of appeal be willing to accept rather than dismiss an appeal.

4. An alleged error must be presented to the appellate court in appellant's brief and the relevant portions of the trial court record must be brought to the appellate court's contention.

B. **G/R: Preserving the Right to Appeal:** an appellate court will not consider an issue on appeal if the appellant neither pleaded it as an affirmative defense, nor raised, considered, or objected to it at the district court level.

1. If a party does not preserve its right to appeal, by objecting or raising the issue at trial; the appellate court will not hear the case because the appellate court does not want parties sandbagging trial courts and raising a bunch of issues for the first time on appeal.

\*[*JF White Contracting v. New England Tank*].

2. The general rule confining the parties upon appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at trial [*Ward v. Taggart*].

C. **G/R: Winning Party:** a party may not appeal from a judgment or decree in his favor for the purpose of obtaining a review of findings he deems erroneous which are not necessary to the support of the decree.

1. A party has the right to appeal judgments not decisions; thus, the winning party may not appeal a finding of the court in his favor on liability, if the winning party would ever desire such a thing.  
\*[*Electrical Fittings v. Thomas and Betts*].

D. **G/R: New Issues:** no issue that was not litigated during the trial may be presented for examination for the first time on direct appeal. Only questions in some manner considered for decision during the trial may validly be appealed by either party [*Standard Accidents Ins. v. Roberts*].

## **§8: THE BINDING EFFECTS OF PRIOR DECISIONS: RES JUDICATA AND COLLATERAL ESTOPPEL**

### **§8.1: TERMINOLOGY**

A. **Analytical Framework:** if confronted with an former adjudication problem on the exam:

1. START with **claim preclusion**; that is, determine if the plaintiff is precluded from bringing the action at all. To figure this out you will have to:

- a. Determine whether the same claim is being asserted in action #2:
  - i. Use transaction and occurrence test: the P in action #2 cannot attempt to re-litigate any other aspect of the same transaction and occurrence.
- b. Determine if the judgment in action #1 was valid and on the merits.
  - i. Valid means the court had jurisdiction, and complied with due process;
  - ii. On the merits means decided at trial, on post-trial motion, summary judgment, basically anything that a judgment is entered for including dismissals with prejudice and default judgments.
- c. If the plaintiff won in the first action and these are satisfied, then his original claim is merged with the judgment from action #1 and he can't bring it.
- d. If the plaintiff lost in the first action, and these are satisfied, then his second claim is barred by the first action.  
\*\*Remember with claim preclusion the parties in the first suit HAVE to be IDENTICAL to the parties in the second suit.

2. If the same claim is not being asserted in action #2, then it is a different claim (cause of action) entirely, and the question then is whether **issue preclusion** applies; that is, whether an issue that was litigated in action #1 should or should not be re-litigated in action #2; to determine this:

1. the issue has to be *the same* issue;
2. the issue must have been:
  - a. *actually litigated*: issue preclusion only applies to actions that were actually decided, and not issues that might have been litigated.
  - b. *necessarily decided*: you must be able to tell which issues were decided, if you can't tell which issues were decided (like with a complex case and a general verdict) you can't use issue preclusion.

\*\*Remember: the parties in the first action *do not* have to be *identical* to parties in the second action.

2(A). If it was the same issue, and was actually litigated, and necessarily decided, who can assert collateral estoppel?

1. does non-mutual defensive issue preclusion apply? If you're the defendant, you can always assert non-mutual defensive issue preclusion, it is not discretionary if the elements are met.
  - a. was the issue identical;
  - b. was there a final judgment on the merits;
  - c. was the party against who the plea is asserted a party or in privity with a party to the action.
2. if you're the plaintiff can you assert non-mutual offensive issue preclusion against the defendant?
  - a. if the plaintiff should have joined in the first action, or where the application of non-mutual offensive collateral would be unfair to the defendant, it cannot be used. It is largely discretionary.

**B. G/R: Four Doctrines of Preclusion:** there are four main doctrines of preclusion:

1. *Stare Decisis*: court generally will follow adjudications that are binding on them by courts of higher jurisdiction;
  - a. Stare decisis is always relevant, even if the parties are different.
  - b. The doctrine of state decisis becomes law after a judgment is entered, and everyone is bound by the decision even if they are separate parties; however, a party is always free to argue that state decisis is not controlling because:
    - i. the previous case was erroneously decided; or
    - ii. the previous case only contains dicta, and not an actual holding, on point.
  - c. Stare decisis is a more flexible preclusion doctrine than the other three.
2. *Law of the Case*: [**direct estoppel**]: is claim preclusion within one lawsuit itself. It is analogous to the doctrine of exhaustion. It only precludes the party from bringing the lawsuit at that point in time, and he can subsequently bring the action at some other time or in some other jurisdiction.
  - a. Ex: in an employment discrimination case, the court holds P liable, grants an injunction, which is appealed all the way to the Supreme Court; then it is remanded to the district court for damage computation. In the second phase of the trial, some years later, the D says I don't have to pay damages because I am not liable. The court would say we have already litigated that issue, it is the law of the case, therefore all we are deciding is damages.
3. *Res Judicata/Claim Preclusion*: deals with merger, bar, and the rule against claim splitting (see below).
4. *Collateral Estoppel/Issue Preclusion*: the issues must have been actually litigated and necessarily decided to have preclusive effect.

**B. G/R: Res Judicata/Claim Preclusion:** a final judgment on a claim or cause of action precludes re-assertion of that claim or cause of action in a subsequent suit.

1. *Merger*: if judgment was for the plaintiff on the claim, there is a merger of that claim into judgment; the prejudgment claim is transformed into the judgment claim.
2. *Bar*: if the judgment was for the defendant, it is a bar against the plaintiff's suing on the claim.

**C. G/R: Collateral Estoppel/Issue Preclusion:** preclusion prevents not only re-litigation of the a claim, but also, in some circumstances, relitigation of issue of fact resolved in the prior proceeding. A decision on an issue of fact may be binding in subsequent litigation between the same parties, or, in some circumstances between one of the parties and a different adversary.

D. **G/R: Four Common Principles of Former Adjudication:** [claim and issue]:

1. A party ordinarily only gets once chance to litigate a claim; if a party only litigates a portion of the claim the first time around, she risks the chance to litigate the rest;
2. A party ordinarily only gets once chance to litigate a factual or legal “issue” and once litigated, she cannot ask the court to decide differently later;
3. A party is entitled to at least one “full and fair” chance to litigate before being precluded; and
4. Preclusion may be waived unless it is claimed at an early stage in the litigation.

E. **Policy:** the purpose of these doctrines is twofold:

1. to avoid the time and expense of multiple litigation over the same matter—judicial economy; and
2. to give stability to the results of adjudication—to prevent inconsistent results; and
3. finality, to give litigants a piece of mind after a claim has been litigated.

## §8.2: CLAIM AND DEFENSE PRECLUSION

### I. CLAIM PRECLUSION

A. **G/R: Claim Preclusion:** (true res judicata) treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same *claim* or *cause of action*.

1. When the plaintiff obtains judgment in his favor, his claim *merges* in judgment, and he may seek no further relief on that claim in a separate action.
  - a. In other words, merger is the claim preclusive effect on the party who won.
2. Conversely, when a judgment is rendered for the defendant, the plaintiff’s claim is extinguished and the judgment acts as a *bar*.
  - b. In other words, bar is the claim preclusive effect on the party who lost.
3. Ex: P wins action #1, files again for more money, then since prevailed in action #1, she is precluded from bringing an additional damage suit because the damages are merged in her judgment in action #1.
4. Ex: In the same situation, if the P wins and brings a separate suit to enforce the judgment, then D says I am not paying because I am not liable, he cannot do that because he is barred from a raising a new defenses and attempting to re-litigate the merits of the case, which were previously litigated.

A(1). **Claim Preclusion:** the doctrine of claim preclusion operates as a bar to subsequent suits involving the same parties, or those in privity with them, based on a claim which has once reached judgment on the merits.

1. The classic situation in which claim preclusion comes into play is where a *second claim* between the same parties is based on the same operative facts as the earlier one.
2. The issues tried in the first claim, and any other issues, which could have been dealt with there, are forever barred by the first judgment.
3. Claim: the term claim refers to a group of facts limited to a single transaction or occurrence without particular reference to the resulting legal rights.
  - a. It is the facts surrounding the occurrence, which operate to make the claim, not the legal theory on which the plaintiff relies.
4. *Policy:* the doctrine of claim preclusion is a barrier against multiplication of litigation. Litigation is the means for vindicating rights, but it may also involve unwarranted friction and waste. The doctrine reflects the refusal of the law to tolerate needless litigation. Litigation is needless, if by fair process, a controversy has once gone through the courts to conclusion.

B. **G/R: Definition:** one formulation of claim preclusion is that in certain circumstances when a second suit is brought, the judgment in a prior suit will be considered conclusive, both on the parties to the judgment and on those in privity with them, as to matters that were actually litigated, or should have been litigated in the first suit.

C. **G/R: Elements of Claim Preclusion:** for claim preclusion to operate three elements must be present:

1. The parties in the subsequent action must be *identical* (or in privity) to those in the first;
  - a. This requirement is one of the most important distinctions between claim preclusion and issue preclusion.
2. The cause of action or claim must be the same cause of action or claim that was involved, or should have been involved, in the first action.
  - a. **Test:** any claim/cause of action arising out of the same transaction and occurrence must be included in the first cause of action or the plaintiff is impermissibly splitting claims.
    - i. *Cause of Action Test:* if the SAME evidence will support all the claims against the defendant, there is but one cause of action.
    - ii. *Transaction and Occurrence Test:* a factual grouping constitutes a single transaction and occurrence if they are related in time, space, origin, or motivation; form a convenient trial unit, and their treatment as a unit conforms to the parties expectations or business understanding or usage.
  - b. The claim in the second suit must involve matters properly considered included in the first action.
    - i. this requirement turns on what the first action decided or should have decided.
  - c. In other words, claim preclusion prevents a party from reasserting any aspect of a claim that was litigated, or *could have been* litigated.
3. Only judgments that were *valid, final, and on the merits* have preclusive effect.
  - a. *Valid:* means that the court in the first action had proper jurisdiction and used the proper procedural due process protections.
  - b. *On the Merits:* means that the case was decided at trial, on a post-trial motion, summary judgment and judgment was entered. This is a final decision.

D. **G/R: Waiver:** a party may waive the benefits of preclusion by failing to raise it as an affirmative defense in the second suit.

E. **G/R: Exceptions to Claim Preclusion:** there are two major exceptions to claim preclusion:

1. When a prior judgment was obtained by the sue of fraud, courts generally will not consider it binding; and
2. when there was a clear and fundamental jurisdictional defect that should have prevented the first court from hearing the suit, courts will often hold that the judgment has no preclusive effect.
3. *Possibly:* one could possibly use Rule 60 as an exception to claim preclusion if new evidence is discovered within a year of the final judgment in the first action; but after a year the policy considerations favoring broad issue preclusion probably outweigh the policy considerations for allowing the claim to be brought, but you could probably argue either way.

F. **G/R: Parties:** if claim preclusion is to be applied, the parties in the suit have to be IDENTICAL to the suit in the first action [*Rush v. Maple Heights*].

**G. G/R: Rule Against Claim Splitting:** a party is not allowed to split his claims, if the issue could have been brought in the first action, or should have been decided, the same preclusive effect applies. There three main types of claim splitting:

1. *Theory Splitting*: using to different theories to hold one defendant liable, in different actions.
  - a. Ex: P tries to show that the defendant was negligent, and then hold him liable for breach of contract.
2. *Arithmetical Splitting*: suing in separate actions for different injuries.
  1. Ex: P gets his arm and leg blown off by D. Then brings action to recover for his arm, thinking that if he doesn't prevail, he can bring another action for injury to his leg. P is precluded from doing this because the injuries should have been decided in the first action when liability was tried.
3. *Splitting Relief*: bringing an action for compensatory damages, then bringing a subsequent suit for punitive damages.

**G(1). G/R: Transaction and Occurrence:** the standard for claim preclusion is that a party cannot violate the rule against claim splitting if there is more than one cause of action arising out of the same ***transaction and occurrence***; that is, the party will have to combine all claims in the first action in the first action or he is impermissibly splitting claims.

\*[*Mathews v. NY Racing*].

**H. G/R: Parties in Privity:** if the second action is to have preclusive effect the parties must be the identical parties to the first action, or in privity with those parties.

1. *Parties in Privity*: a party in privity is a legal relationship such as:
  - a. employer/employee;
  - b. successors in interest;
  - c. trustor/trustee; and
  - d. other kind of commercial relationships.

**I. Test: Transaction and Occurrence Test:** the test for whether a factual grouping constitutes a single *transaction and occurrence* requires an evaluation of whether:

1. the facts are related in time, space, origin, or motivation;
2. they form a convenient trial unit; and
3. their treatment as a unit conforms to the parties expectations or business understanding or usage.

\*[*Rst (2) Judgments §24*].

\*\*This is a transactional test that extends the doctrine of claim preclusion further than any other, and most states (including Wyoming) have adopted it.

\*\*\**Policy*:

- a. Favoring broad claim preclusion: solves all disputes in one lawsuit; it is wasteful and harassing for the system when evidentiary matter overlap to try an action more than once.
- b. Against Broad claim preclusion: in complicated fact situations the jury may be more confused; may take more time; people may lose valid claims because a lawyer makes a mistake and brings two lawsuits instead of one.

**I.(1). Evidence Test: Cause of Action Test:** one of the principle tests in determining whether a demand/claim is single and entire, or whether it is several, so as to give rise to more than one cause of action, is the identity of

the facts necessary to maintain the action—if the same evidence will support both actions, there is but one cause of action/claim [*Jones v. Morris Plan Bank*].

## II. DEFENSE PRECLUSION

A. **G/R: Defense Preclusion:** deals with splitting defenses, as opposed to claims, or splitting a defense on a counterclaim.

1. The doctrine of defense preclusion can be seen as a doctrine that requires compulsory joinder of claims.

B. **G/R:** the general rule is that if the defendant is sued, and has more than one defense, affirmative or otherwise, he has to raise them all in the first lawsuit and cannot wait until an enforcement judgment is brought against him and raise more defenses subsequently in the second action [*Mitchell v. Fed. Intermediate Credit Bank*].

1. Ex: P sues D. D has a counterclaim, but does not assert it. D then files suit against P in a separate action. D would be precluded from bringing the second action because of defensive preclusion.

D. **Rule 13(a):** under the Federal Rules, defensive preclusion is not an issue because under Rule 13(a) compulsory counterclaims that are not raised may not be raised in subsequent litigation in federal court. In most situations the broad sweep of compulsory counterclaim preclusion thus makes it unnecessary to consider how and whether defense preclusion might apply.

## §8.3: COLLATERAL ESTOPPEL/ ISSUE PRECLUSION

### I. OVERVIEW: BASIC RULES

A. **Issue Preclusion:** (collateral estoppel) recognizes that suits addressed to particular claims may present issues relevant to suits on other claims. In order to effectuate the public policy in favor of minimizing redundant litigation, issue preclusion bars the re-litigation of issues actually adjudicated, and essential to the judgment, in prior litigation between the same parties.

A(1). **General Principle:** the general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground for recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken conclusively established, so long as the judgment in the first suit remains unmodified.

A(2). **Differences Between Issue Preclusion and Claim Preclusion:**

1. ***Claim Preclusion*:** under the doctrine of claim preclusion, a claim may be merged or barred by a party's failure to raise the claim in a prior action.
2. ***Issue Preclusion*:** in issue preclusion applies only to matter argued and decided in an earlier lawsuit. For issue preclusion to exist, a proceeding must involve the same *issue* as a previous suit.
  - a. ***Issue*:** the term issue, like the term transaction in the context of claim preclusion, is ambiguous and subject to manipulation.
3. The basic difference between the two doctrines is that in claim preclusion we are talking about the same person trying to split the same action in two; whereas, in collateral estoppel, we begin with the

assumption that there is two different lawsuits, the issue is not whether a second suit can be brought, it is whether the issue in the previous action needs to be re-litigated.

4. **G/R:** to trigger the doctrine of issue preclusion more than just a duplication of the issue is required. It is necessary to examine the nature of the first action, and the treatment that the issue received in it.

A(3). **Elements of Issue Preclusion:** there are three main elements to issue preclusion which can be described as the **ISSUE MUST HAVE BEEN ACTUALLY LITIGATED AND NECESSARILY DECIDED.**

1. **Issue:** The *issue in the second action* has to be the *same issue* that was litigated in the first action.

2. **Actually Litigated:** actually litigated means that the issue was actually litigated in the first action; that is, issue preclusion does not apply to issues that might have been litigated. Issue preclusion does not apply to issues that were merely alleged, or even discovered on, but at trial they turned out to be alternative matters, or matters that end up not meaning much.

3. **Necessarily Decided:** issue preclusion cannot apply if the court cannot determine which actions were actually decided in the first action. There are many issues in cases that are decided, there is a ruling on them, but that ruling was *not necessary* to achieve the result that was achieved in the first action. The issue must have been *necessarily decided* which means it affected the outcome of the case in a determinative way.

4. **Judgment:** just as in claim preclusion, the judgment in the first action must have been of a certain quality; that is, it must have been valid, final, and on the merits.

B. **G/R: Offensive Issue Preclusion:** issue preclusion can be invoked offensively, when the plaintiff in the second action seeks to preclude litigation of an issue that was decided favorably to him in a prior action.

C. **G/R: Defensive Issue Preclusion:** issue preclusion can be invoked defensively when the defendant in the second suit seeks to preclude re-litigation of an issue that decided in his favor in a prior suit.

D. **G/R: Direct Estoppel:** when two suits involve the same cause of action, issue preclusion is sometimes referred to as direct estoppel.

E. **G/R: Collateral Estoppel:** when the second suit involves a new claim or cause of action, issue preclusion is referred to as collateral estoppel.

F. **G/R:** even if the issue in the first case that was decided was blatantly wrong, the issue is still precluded from being brought again; this is because the policy matters are the same in either decision. This is the same with claim preclusion.

## II. ACTUALLY LITIGATED

A. **G/R: Actually Litigated:** where the second action between the same parties is upon a different claim or cause of action, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

1. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, and not what *might have been* thus litigated and determined.

\*[*Cromwell v. County of Sac*].

2. *Policy*: various considerations other than the actual merits may govern a party in bringing forward grounds of recover or defense in one action which may not exist in another action upon a different claim such as:

- a. the smallness of the amount in controversy in the first action;
- b. the difficulty of obtaining necessary evidence;
- c. the expense of litigation; and
- d. the person's own situation at the time.

### III. NECESSARILY DECIDED

A. **G/R: Necessarily Decided**: a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties.

1. But to this operation of the judgment it must appear, either upon fact of the record or be shown by extrinsic evidence, that *the precise question was raised and determined* in the former suit.
2. If there be any uncertainty on this issue in the record then the new action will be open to a new contention unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined.
3. If the record is devoid of any certainty, which is essential to its operation as estoppel; that is, the previous case did not necessarily decide the issue of in the second action, it cannot have issue preclusive effect.

\*[*Russel v. Place*].

B. **G/R: Rst. (2) Judgments §27**: there cannot be issue preclusion if the court cannot decide which actions were actually decided in the first action. Issue preclusion only applies to those matters in the earlier lawsuit that were *essential to the court's determination*; that is, essential to the cause of action (or defense) established by the judgment. Other matters even though litigated and ruled on are not binding in a later action.

1. **Test**: an issue is *essential* to the court's determination in the former action only if it appears that the judgment could not have been reached without determining the issue.
2. Ex: P sues D for personal injuries arising out of a collision of their automobiles. D answers, denying negligence and affirmatively pleading contributory negligence. If D subsequently sues P for his own injuries arising out of the same action, may defendant rely upon the first judgment as establishing any part of the case? No, because you cannot tell what the general verdict decided.

C. **G/R: Independent Alternative Grounds**: if the jury renders special verdict and comes back with independent alternative grounds, each of which was relied on for the judgment of the case, then the courts take two approaches:

1. Some courts hold that you get issue preclusion on both issues [*Malloy v. Trombly*].
2. Other courts hold that unless there is an appeal on the first issue, then you get issue preclusion with respect to neither, if you appeal and get an affirmance on one ground and not the other, you get issue preclusion with respect to ground which the appellate court affirmed, but not the other.
3. **G/R**: [modern view]: if there are two aspects of the decision, under the modern view, a party can only get collateral estoppel on those issues which were appealed, and affirmed.
4. Ex: The jury returns a special verdict, finding P and D both negligent. P loses because he was contributorily negligent, and D wins. In a subsequent suit against D, the new P cannot use issue preclusion because all that was needed to decide the first action; that is, all that was necessary was

finding P contributory negligent. Therefore, since D never appealed, it was not necessarily decided that he was negligent because the court does not know if the jury took that case seriously.

\*[*Rios v. Davis*].

D. **G/R: Co-Parties:** generally, a judgment does not act as collateral estoppel between co-parties unless they are adversaries, and they are considered adversaries only if there is a claim for relief by one co-party against another.

### III. DEFINING AND CHARACTERIZING THE ISSUE: EXCEPTIONS TO ISSUE PRECLUSION

A. **G/R: Defining the Issue:** the doctrine of issue preclusion does not apply to unmixed questions of law. For example, where a court in deciding the case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both actions. Thus, unmixed questions of law are not subject to issue preclusion.

1. But a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view, or by erroneous application of the law.

\*[*US v. Moser*].

B. **G/R: Intervening Actions between the First and Second Causes of Action:** the principle of issue preclusion is designed to prevent repetitious lawsuits over matters which have once been decided and have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become to obsolete or erroneous with time, thereby cause inequities.

1. Where two cases involve same issue, in different years, issue preclusion must be used with its limitations carefully in mind so as to avoid injustice. It must be confined to situations where the matter raised in the second suit is in all respects identical with that decided in the first proceeding and where the controlling facts *and applicable rules remain unchanged*.

2. **G/R:** a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of issue preclusion inapplicable.

a. The intervening decision need not be necessarily that of a State court, a decision by the Supreme Court may also effect a significant change in the situation.

b. The supervening decision cannot justly be ignored by blind reliance upon the rule of issue preclusion.

c. **g/r:** it naturally follows that an interposed alteration in the pertinent statutory provisions can make the use of issue preclusion unwarranted also.

3. **G/R:** where a question of fact essential to the judgment is actually litigated and necessarily decided in the first proceeding, the parties are bound by that determination in a subsequent action even though the cause of action is different.

a. If the very same facts and no others are involved in the second case, a case relating to a different cause of action, the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change.

b. But if the relevant facts in the two cases are separable, even though they may be similar or identical, issue preclusion does not govern the legal issues, which reoccur in the second case.

c. If the second case involves an instrument or transaction identical with, but separable from, the one dealt with in the first proceeding, the court is free in the second proceeding to make an independent examination of the legal matters at issue.

- i. It may reach a different result, or if consistency in the decision is considered just and desirable, reliance may be placed upon the ordinary rule of stare decisis.
- ii. Before a party can invoke the issue preclusion doctrine in these circumstances, the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first decision.

4. **G/R:** this is basically an exception to issue preclusion because it allows the intervening decision/action/statute to change the outcome of the second action, which then is not barred by collateral estoppel.

C. **G/R: Characterizing the Issue:** the courts no longer make the distinction between “ultimate” and “mediate” facts, and do not follow the *Evergreen Doctrine*; and follow the *Restatement* rule that preclusive effect may be accorded to a decision on an issue if that issue was actually recognized by the parties as important and by the trier of fact as necessary to the first judgment [Rst. (2) judgments § 27].

1. If the court’s are concerned with foreseeability, the look at foreseeability of the entire case, and do not break down into mediate and ultimate facts. Thus the entire case must be entirely foreseeable, and it is accepted that as a general matter, but is not invoked very often because future litigation is always reasonably foreseeable if the litigation is reasonable.

D. **G/R:** when the claims in two separate actions between the same parties are closely related, it is not ordinarily necessary to characterize the issue as one of law or fact for purposes of issue preclusion. In such a case, it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the issue in what is essentially the same controversy, even if the issue is regarded as one of “law.” [Rst. (2) Judgments §28].

#### IV. QUALITY OF THE JUDGMENT

A. **G/R: Judgment:** there are three criteria for the quality of judgment:

1. *Valid:* a valid judgment is one rendered by a court of competent jurisdiction, adhering to the requirements of due process. An invalid judgment is one in which the court does not have jurisdiction over someone and enters a default judgment on the party, so if it is collaterally attacked, it can be overturned.
2. *Final:* a final judgment must wrap up the case after judgment has been entered by the district court. If an appeal is pending, then there is no clear answer as to whether the judgment is final, but after the appellate court renders its decision, the judgment is final.
  1. The pendency of an appeal generally should destroy the findings of the trial court; however, practically, the other court should stay the proceedings until the end of the appeal.
3. *On the Merits:* if the case is decided at trial, or on appeal, or on a post-trial motion, or a summary judgment it is on the merits because there has been an adjudication and there are no more issues of material fact and the judge is entering judgment as a matter of law.

B. **G/R: Consent Judgments:** *claim* preclusion and *defense* preclusion apply unless otherwise stipulated in the consent agreement. A party is free to enter into a consent agreement and say this consent agreement does not have preclusive effect, that is fine, freedom of contract lives on.

a. With *issue preclusion* however there is no preclusive effect because the agreement usually does not admit liability by one party or the other; therefore, no issue has been decided.

C. **G/R: Default Judgments**: a judgment against one party in the first action, although by default, is entitled to the same preclusive effect under *claim preclusion* as to any other judgment because a default judgment terminates the cause of action.

D. **G/R: Default Judgments, Issue Preclusion, and Rule 41(b)**: there is a split of authority over whether a default judgment has preclusive effect:

1. *Classic view*: a default judgment is conclusive as to all issues that were necessarily involved in the former suit, even though the action went by default and there was no actual litigation thereof.

2. *Modern View* [Rst. (2) Judgments §27]: a default judgment under Rule 41(b) is not on the merits for issue preclusion purposes because nothing was “actually litigated” because there was no decision by the trier of fact, and no evidence presented.

a. *Counterargument*: that the last sentence says, excluding dismissal for lack of jurisdiction, venue or failure to join a party (which involve direct estoppel) “operates as an adjudication on the merits; therefore it does have issue preclusive effect because has been litigated and decided is that there is no legally cognizable claim anymore.

E. **G/R: Dismissal for Failure to State a Claim**: a dismissal for a failure to state a claim under Rule 12(b)(6) has issue and claim preclusive effect because that is on the merits. This is appropriate because:

1. The Rule 12(b) standard is so liberal that if it cannot be satisfied there is no claim;

2. Rule 15(a) allows the plaintiff to amend his complaint, so he is not really precluded if the court dismisses his action.

## §8.4: PERSONS BENEFITTED AND PERSONS BOUND BY PRECLUSION

### I. MUTUALITY

A. **G/R: Classical Rule**: mutuality was required in all situations and if a person was not a party to the first action they could not be bound by the action, or benefit from the action [*Ralph Wolf v. New Zealand Ins.*].

B. **Types of Mutuality (or lack thereof)**: there are four situations which arise:

1. Mutuality: (a) *Action #1*: A v. B; (b) *Action #2*: A v. B. If the parties are the same, both parties are precluded from re-litigating the same issue.

2. Non-Mutual Defensive Issue Preclusion: (a) *Action #1*: A v. B; (b) *Action #2*: A v. C (“C” wants to estop “A” from arguing some issue, but it is non-mutual because only “A” can be precluded.

3. Not-Mutual Offensive Issue Preclusion: (a) *Action #1*: A v. B; (b) *Action #2*: C v. B (“C” is a new P and is trying to estop “B” from arguing some issue, like he is not liable.

4. Non-Party Offensive and Defensive Preclusion: (a) *Action #1*: A v. B; (b) *Action #2*: C v. B (“B” is trying to preclude “C” from litigating an issue which he was not a party too, or it can occur vice versa and be non-party offense preclusion.

a. This one is not allowed in federal courts, notwithstanding *In Re Bigfucking Plane Wreck* [p. 1254].

C. **G/R: Non-Mutual Defensive Issue Preclusion**: three elements must be satisfied, and then non-mutual defensive collateral estoppel can run against *anyone*:

1. The issue must be identical to the issue decided in the prior action;
2. There must have been a final judgment on the merits; and
3. The party against whom the claim is made is a party (or party in privity with a party) in the prior action.

\*[*Berhard v. Bank of America/Blonder Tongue Labs v. U. of Ill.* (federal court)].

4. *Remember*: defensive issue preclusion can run against anyone or issue necessarily decided and actually litigated in the first action. This is more common than the non-mutual offensive preclusion because it can always be asserted by the defendant as an affirmative defense.

C(1). **Defensive Preclusion**: defensive use of issue preclusion precludes the plaintiff from re-litigating identical issues by merely switching adversaries. Thus defensive collateral estoppel gives the plaintiff a strong incentive to join all potential defendants in the first action if possible.

1. Defensive issue preclusion occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant.

D. **G/R: Non-Mutual Offensive Issue Preclusion**: occurs when the plaintiff is seeking to estop a defendant from re-litigating the issues which the defendant previously litigated and lost against another plaintiff. (In both offensive and defensive issue preclusion the the party against whom estoppel is asserted has litigated and lost in an earlier action).

1. Offensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party.

D(1). **G/R**: the general rule is that incases where a plaintiff could easily have joined in the earlier case action or where the application of the of offensive estoppel would be unfair to a defendant, a trial judge should not allow it [it is discretionary]. Therefore there are five prerequisites or factors that should be considered when the judge makes his determination of whether to allow non-mutual offensive issue preclusion:

1. If the party asserting it could have affected joinder in the first action;
2. If the defendant in the first action was sued for small or nominal damages and would not have had an incentive to defend the action vigorously;
3. if it is unfair to the defendant because the judgment relied on as a basis for estoppel is itself inconsistent with one or more previous judgments in favor of the defendant;
4. if the second action affords the defendant procedural opportunities unavailable in the first action; and
5. it was foreseeable to the defendant that subsequent lawsuits would be filed.

\*[*Parklane Hosiery Co. v. Shore*].

E. **G/R: Non-Party Issue Preclusion**: is not available in federal courts. A party is NOT BOUND by a result that they were not a party to, or in privity to a party to.

THAT HAS ALWAYS BEEN THE LAW, IT IS STILL THE LAW, DO NOT FORGET THAT, DON'T BE TRAPPED OR TRICKED BY A CASE LIKE *In Re Bigfucking Plane Wreck*. NEVER apply issue preclusion against someone who was not a party in the first action.



