Procedure notes, Spring 2004. Professor Lewis.

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Monday, April 26

Class actions

Class actions

Amchem

- The class: a huge and amorphous one (we don't know who will ultimately be in it, in fact).
- What is a "global settlement"?
  - Δs are contemplating getting rid of all their asbestos-related litigation.
  - Πs get to settle their lawsuits and get their money.
- So, itc. is a certification issue case.
  - The district court's certification was wrong, says SCOTUS:
    - Commonality: (a)(1) commonality plus (b)(3) predomination requirement. SCOTUS says no commonality and predomination here (pp1010-1011). A money interest is not the relevant inquiry wrt. commonality—it's the factual and legal questions that are important (here, there are vast differences among the class members wrt. types of illness and treatment, e.g.).
    - Adequacy: there's a problem itc. because:
      - No adjustment for inflation.
      - Some types of injuries aren't covered.
      - Payments of fixed and relatively small.
      - Interest conflict in the attorneys—they want money now, which may prevent them from adequately representing the class members who have yet to develop a disease. (This is both an adequacy and an ethical problem.)

      But, note what good things this class action gets for the Πs:
      - The companies might go bankrupt and thus the future Πs would never get their money if not for this action.
      - Significant transaction costs are avoided.

      That might be, SCOTUS says, but the disctrict courts aren't allowed to legislate.
- How can we solve this, then?
  - Legislation

- Subclasses and subsubclasses. (Would this work? Maybe—but it could easily become unmanageable.)

Thursday, April 22

Class actions

Class actions

Communities for Equity

- What about the possible problem of limited funds, which could lead to intraclass conflicts (e.g., water polo vs. ice hockey)? The court suggests solving this by creating subclasses.

Heaven

- Δ kills the class action by counterclaiming for defaults and fraud of only some of the class members.
  - Why is that a problem?
    - It compromises the value of the class to some members—especially those whose liability might be greater than their recovery.
    - Why not just refuse to hear the counterclaims?
      - They're compulsory.
      - But that didn't stop one court—see n3pp979-980: *Ballard*: compulsory counterclaims get jurisidiction under § 1367, which is discretionary jurisidiction; so the court can refuse to exercise it. (Is that a good solution? Well, for one thing, class members' claims may be so small that they wouldn't get brought without the class action mechanism.)

Hansberry

- Lee sues to uphold a racially restrictive covenant. Hansberry answers that the covenant wasn't agreed upon, as required, by at least 95% of homeowners. Lee replies that Hansberry is bound by res judicata.
  - N.b., the Hansberrys may have been able to seek R 60 relief from judgment (but this may have been time-barred).
- The court says due process will not allow parties to be barred by res judicata if they weren't adequately represented at the prior proceeding.
- Itc. suggests that every class action is potentially subject to collateral attack on constitutional grounds (i.e., FRCP 23(a) takes on a

constitutional flavor after itc.)

Shutts

- A (b)(3) class action.
- Δ argues that the court has no personal jurisdiction over many of the Π class members—those who don't have minimum contacts with Kansas and haven't voluntarily consented to PJ. So, Δ argues for an opt-in rule, whereas FRCP 23(c) contemplates an opt-out rule.
- The court rejects Δs argument:
    - PJ caselaw is generally protective of Δs, no Πs.
    - N.b., Πs' property interest here is their choses in action.
- So, what's required to bind absent class members, then? The court gives a constitutional flavor to FRCP 23(b)(3):
    - First class mail is now constitutionally required.
    - A chance to opt out is now constitutionally required.
    - An opportunity to participate is constitutionally required (!).
        - This isn't generally going to be a problem, though:
            - Most members won't exercise this right.
            - Courts can still refuse to hear redundant arguments.
- Note that the court limits its holding to class actions seeking money damages. Otherwise, it would be imposing a huge burden (of notice) on public interest class actions (which generally seek injunctive relief).

Tuesday, April 20

Class actions

Class actions

FRCP 23

- (a) The prerequisites
    - Numerosity: are there so many parties that it would be hard to join all of them? (Approximately 25 is the lowest number.)
    - Commonality: are there common questions of law and fact?
    - Typicality: is the class representative's claim typical of the class members' claims?
    - Adequacy: does the class representative have the resources and skills for pursuing the claims?
- (b) The types.
- (c) The procedures.
- (d) Settlement procedures.

nsp967

1a. Typicality. Won't satisfy.

1b. How good are your lawyers? How much resources do you have?

1c. (b)(2): seeking to enjoin the fee increase.

- How does the lawyer get paid?
  - Statutory relief for attorney's fees.
  - Private attorney general (itc., it would be an uphill battle, Lewis says).

2a. Adequacy problem—representative won't be representing the students who graduate or leave.

2b. Goes from (b)(2) to (b)(3). This move adds the 23(c)(2) notice burden, which is a substantial financial burden (that's funded by the law firm).

Communities for Equity

- Certification:
  - The class definition: girls who are atheletes or would have been atheletes.
  - The prerequisites:
    - Numerosity? Sure—thousands here.
    - Commonality? Yes. There are lots of individual questions, but the court says there is an overarching common question (¶1p970). If each individual in the class has to offer separate proof, though, a class won't be certified (itc. isn't such a case, though).
    - Typicality?
      - *Falcon*: trial courts have the obligation to make sure representation is actually typical.
      - Itc., different sports may be competing for funding—so, for typicality, you'd need a group of class representatives.
    - Adequacy?
      - There are lots of potential class members here who may not want changes—this isn't a problem, the court says, because the class is defined so as to exclude all those who aren't adversely affects (and because Δ will take care of defending the status quo).
      - *Newbury*: a victim who wants to stay a victim has no standing to complain.

Monday, April 19

Appeals

Appeals

Final judgment

Moment of final judgment

- See RR 58 and 79.
- FRCP 79: final judgments are entered in the "civil docket." So, you can look at the civil docket every day until the final judgment is entered—when it's entered, that's the date of the final judgment.

Appeals too soon: see FRAP 4(a)(2): these will be treated as having followed the entry of final judgment.

Exceptions to final judgment

Lauro Lines

- The collateral order doctrine:
  1. Finally determine
  2. Collateral to the merits (and important)
  3. Effectively unreviewable. (This is Lauro's problem itc.)
- Immunity cases:
  1. Finally determined? Yes—you're going to trial.
  2. Collateral? Yes—immunity doesn't have anything to do with the underlying rights in question.
  3. Effectively unreviewable? Yes—the value of immunity is the right not to be tried.
- But, the court itc. says Lauro's situation is not like the immunity cases, because it will eventually have to stand trial somewhere.

n4p729

a. 1. Yes—no bond.
   2. Yes. (Important? Maybe.)
   3. Yes! After trial, the bond is irrelevant (i.e., otherwise, we'd be forcing Δ to go to final judgment without security).

b. Just like *Cohen* (a): the party here loses its security.
c. 3. Yes—if the party really can't afford it, there will never be anything to appeal from otherwise.
d. 1. Yes.
2. Yes (procedural).
3. Yes—if remanded, the review will be in state court, which could not review the federal remand order.
e. The attorney-client privilege is like immunity—it is absolute protection against disclosure.

Mandamus: available when the court has either:
- Not done something it must do, or
- Done something it has no power to do.

Bessemer City
- The clearly erroneous standard:
  - If there are two permissible views of the facts and the court chose one of them, that's not clearly erroneous.
  - Isn't that just like review of a jury verdict??
  - Is this consistent with *U.S. Gypsum*, which said review is appropriate when the "court has a firm conviction of mistake" (even if there's evidence to support the trial judge's view)? Lewis argues that itc. clearly contradicts *Gypsum*.
- Itc. also says that it doesn't matter whether documents or witnesses are involved (this overrules prior cases, such as *Orvis* (n2p791)).

Review of interlocutory review

How do you get interlocutory review?
1. 28 U.S.C. § 1291: appeal from final decision (the basic, default kind of appeal).
2. 28 U.S.C. § 1292(b): certification. There must be:
   1. A controlling question of law.
   2. A substantive ground for difference.
   3. Advance of the termination of litigation through interlocutory review.

   N.b., in Idaho, if the trial judge refuses to certify, you can ask the court of appeals to certify. This is unlike in the federal system, where if the trial judge won't certify, you're out of luck.

Was certification available in *Lauro*? Probably not, because there probably wasn't a controlling question of law involved —the trial judge's decision involved the facts only (the notice of the forum selection clause to passengers).

3. FRCP 54(b): multiclaim/multiparty. The trial judge can order entry of judgment on <u>some</u>, but not all, of the involved claims or parites. If he doesn, you have a decision appealable under § 1291.
4. Mandamus
5. Collateral order doctrine.
6. 28 U.S.C. § 1292(a): injunctive relief exception to § 1291.

Harmless error: see 28 U.S.C. § 2111.

<u>Thursday, April 15</u>

Appeals

Appeals

<u>n3p65</u>

a. Yes—a final decision in <u>that</u> court.
b. No—we end up trying the case and risking a wasted trial. (Mandamus? Hmm. The trial judge has lawful authority to proceed <u>until</u> a contrary ruling, so probably not.)
c. No—same interest (against wasted trial) as in (b), though.
d. Yes—but, n.b., the trial judge nees to give the party leave to amend at least once.
e. Interlocutory? No (*Hickman* involved one because of contempt—which is a final order). Mandamus? You'd have to show that the trial judge exceed his authority. (Can this happen in the context of discovery? Maybe —there's an argument when a trial judge demands privileged materials, but the other party could argue the trial judge has the power to proceed until there's contrary judgment. So, it's usually only when a trial judge actually breaks the FRCP that mandamus is appropriate.)

<u>n1p755</u>: adversity. What constitutes an adverse judgment?

a. Maybe—e.g., if the housing act allowed relief <u>not</u> allowed on Π's other theories. (If Δ appeals, Π then can cross-appeal on its housing act theory.)
b. Yes—the party got less than all the relief she was seeking.

Aetna

- Aetna can argue that is has won in a way dischargeable in bankruptcy, whereas under its other theory (which it lost on) its relief would not be dischargeable. Thus, it can appeal because its relief was not of the quality it sought.

Liberty Mutual

- The court raises the appealability issue itc. sua sponte. This is because the court only has the jurisdiction that congress has given it (§ 1291); i.e., this is an SMJ issue and so the court must address it.
- Itc. there was no final decision—only a partial SJ on liability, not on relief.
- But what about FRCP 54(b), multiple claims? This doesn't work here—this is a single claim seeking multiple forms of relief. That, the court says, is not a multiple claim.
- What about interlocutory appeal? See § 1292(b): if there's a tough question involved, the trial judge can certify it to the appeals court. you can then appeal if the appeals court does certify it.
    - Could the trial judge have done that itc.? No, because he couldn't show that certification would move things along—the judge itc. would do better just to issue the injunction and let the § 1291 appeal happen.

Tuesday, April 13

The jury's role
New trial

The jury's role

Would SJ have been appropriate in *Reid*?

- SJ is only inappropriate if someone's asserted a genuine issue of material fact.
    - You can't just say Π has no proof (that would be insufficient under *Celotex*).
    - So, what you can do is send interrogatories asking what evidence Π has. What's the right interrogatory question?
        - Ask a contingent interrogatory about the cow, the fence, and negligence.
        - We have to get to an answer about where the fence was broken.

What do you submit with the SJ motion?

- Answers to interrogatories which say the broken down fence was approximately one mile from the cow's body.
- Affidavits from railroad workers saying the cow was near the open gate.

Then you'll probably get SJ.

The bottom line is that if you're pursuing SJ by showing Π can't prove its case, *Celotex* requires you to demonstrate that it can't in supporting affidavits (both your affidavits and Π's interrogatory answers).

Would SJ have been appropriate in *Penn. RR*?

- Δ would have to submit affidavits of employees who saw no collision—then if Π can't produce evidence to oppose those affidavits, you get SJ.
  - This is a *Celotex* type (1) SJ: you're proving your <u>lack</u> of liability (rather than Π's inability to prove its case).
  - By moving for SJ, you shift the burden to Π to identify a genuine issue of material fact.
- Π could oppose SJ with Bainbridge's testimony in an affidavit. But Δ still would get SJ under the rationale expressed by the court in *Penn. RR*.

Renewed JMoL (JNOV)

This is the same as a regular directed verdict, except it comes <u>after</u> the jury has returned a verdict.

- In federal court, to make a JNOV motion, you <u>must</u> have moved for JMoL <u>at trial</u>. This is because of amdt. VII—there was no JNOV at common law in 1791, so we treat JNOV as a "delayed" directed verdict to make it constitutional. Also, note that a judge likes JNOV, because if a (pre-verdict) directed verdict is wrong, the case could be remanded. If JNOV is wrong, however, the appeals court will just reinstate the jury's verdict—that' more efficient.
- In Idaho, you don't have to "preserve" JNOV by moving for directed verdict at trial (this is because Idaho is not constitutionally limited in the same way the federal courts are).

JNOV is <u>exactly</u> the same as directed verdict, which is essentially the same as SJ. The only real difference is in the timing.

Snapper

- Is itc. distinguishable from *Penn. RR*? Itc., the court says Π

introduced evidence from which a reasonable jury could find for Π (that is, the evidence about the dead-man device—a juror could have seen the connection between the lack of the device and Π's injury). So, the difference may be between inferences (itc.) and speculation (*Penn*.).

Instructions and comments to the jury

- English practice: the judge makes lots of comments to the jury.
  - A federal judge can make lots of comments too, if he wants.
  - In Idaho, judges can <u>not</u> make any comments—they must remain totally neutral.

New trial

<u>FRCP 59</u>

- Idaho: the Idaho rule gives examples of when new trial is appropriate in the rule itself:
  - Legal error
  - Improper admission or exclusion of evidence
  - Juror misconduct
  - Newly discovered evidence that couldn't reasonably have been discovered for trial
  - Improper comments or instructions to the jury
  - Insufficienty of evidence
    - This is the most commonly used reason (but this is problematic, too—it puts the right to jury trial in danger of being usurped by judges).
  - Remittitur and additur

Lind

- Why was JNOV wrong? Because the jury had the right to believe a "lying" witness. That is, the case came down (apparently) to credibility—and credibility is the jury's domain.
- N.b., if the dissent got its way, how could Π <u>ever</u> win this case??

<u>Remittitur and additur</u>: additur is not available in federal courts.

Peterson: the trial court was wrong because it granted a new trial based on inadmissible evidence—viz., jury questioning after trial.

- What <u>is</u> admissible? See FRE 606: e.g., bribery ("outside influence"), "extraneous prejudicial information."
  - In Idaho, "resort to chance" (e.g., coin flipping), and "quotient verdict" (where jurors average their damage

verdict opinons—so, this is essentially as resort to chance, too).

Monday, April 12

The jury's role

The jury's role

Three possible states in a jury "trial":

1. Jury can't reasonably find either way.
2. Jury can reasonably find only one way.
3. Jury can reasonably find either way. Only this will go to the jury.

Which one of these is *Reid*?

- The court says it's a (1). (But, n.b., you can make an argument that it's a (2): i.e., the jury couldn't reasonably find for the rancher.)
- What if the cow was closer to the broken fence than the open gate? Then it's a (1), in favor of the rancher.
- What if there's hot, steaming evidence that the cow went over the fence? Then it's a (3), that goes to the jury.

n1p720: the burden of persuasion matters only when either:

1. there's no proof on point, or
2. the evidence is exactly evenly balanced.

What about probabilities? See n6p716:

a. Can Π argue that this is a (2)? Π can say there's a 75% chance. But then White Cab would be liable whenever we don't know which kind of cab hit a Π. (However, n.b. the generic drug tort cases—Δs pay a pro rata share of the damages, based on their market share.)
b. 95%? Same problem as in (a)??
c. All, but maybe out-of-town? Is a directed verdict appropriate??
d. A witness? Then the case would probably go to a jury, so it can evaluate the witness.

Pennsylvania Railroad

- Why might the three employees lie? Because they might be responsible, and thus lose their job if Δ employer is held liable here.

- The employer can argue here that there is no real conflicting evidence. But Π can argue that the decedent is an experience railroad employee.
- The bottom line question is wrt. FRCP 50(a) "JMoL" (directed verdict).
    - We can take a case away from the jury when there's no legally sufficient basis for a reasonable jury to find for one of the parties. This is because we don't want a jury making any inferences other than reasonable inferences. (So, DV is essentially the same as SJ.)

Thursday, April 8

The jury's role

Voir dire

Challenges for cause—these rules are set out in statute.

- Idaho:
    1. Related by blood or marriage to a party.
    2. Employment or financial relationship to a party.
    3. Interest in the outcome of the dispute.
    4. Unqualified belief as to the merits or key issues.
    5. Bias or prejudice against or in favor of a party (this is the most subjective cause).

    Particularly on (4) and (5) (which are the source of most VD questioning), note the difference between strict and lenient judges. Some will limit questions to those directly aimed at bias.

The jury pool

- n1bp699: 28 U.S.C. § 1861 outlines the policy—we want a fair cross-section of the community.
    - Are "college students" a distinctive group that ought to be represented on a jury pool? Are "women"?

What about a challenge for cause where a juror is the best friend of one of the parties, but says he will be unbaised?

- This doesn't fall into any Idaho's five categories, but most judges would at least consider dismissal for cause here.

Honesty in questioning. See *McDonough* (n3bpp701-702): the value served by

this decision is the finality of decisions.

- Hypos:
  - Martha Stewart juror who lied about his arrest record.
  - Medical malpractice case: juror nurse doesn't respond a lawyer asks the pool if any work in the medical profession. Could the lawyer demonstrate the nurse's bias??
  - A lawyer asks the pool if any has a financial interest in the outcome. It turns out that the foreperson's husband is the director of the something at the Δ hospital. The foreperson thought the question meant whether she would have to pay anything if the suit came out in any particular way. Note that this isn't really failure to answer a question honestly.

Batson

- SCOTUS says the prosecutor can not make peremptory challenges based on race. It's not Δ's rights that the court is worried about—it's the juror's rights to serve on a jury.

Edmonson

- How does *Batson* apply in civil cases?
  - The court says there's no problem unless there's state action. Where's the state action, then? It's because peremptory challenging serves a state purpose—that is, private litigants are empaneling the state's jury.
  - Dissent (Scalia): itc. will mean that criminal Δs can't make discriminatory peremptoy challenges to get a favorable jury (e.g., striking whites).
  - Concurrence (O'Connor): O'Connor goes along because the U.S. was a party itc.
    - N.b., *J.E.B.* might extend *Edmonson* to all private litigants.

What's the impact of *Batson*? See *Parkett* (n5cp709). SCOTUS says the "pretenses" given there are acceptable under *Batson*. So, maybe, as Lewis argues, *Batson* has no teeth anymore.

Tuesday, April 6

The jury's role

The jury's role

What kind of remedy is backpay? I.e., when is it equitable and when is it legal? Or, the question might be: when is it restitutionary? E.g., in *Terry*, if Π had sought backpay from his employer, rather than the union, it would probably be seen as restitutionary.

Amendment VII

- How might the amdt. VII analysis turn on the complexities of the case?
  - SCOTUS has suggested that the jury's ability to comprehend the case is something to pay attention to.
  - See n8pp679-680: *Markman*.
    - SCOTUS "finesses," says Lewis, its way into considering who should hear patent cases. (N.b., in 1791, patents were considerably simpler than they are today.) SCOTUS decides that who should hear a patent case should be decided based on the relative abilities of judge and jury to understand the case. This moves the amdt. VII analysis slightly away from the conventional historical analysis.

n9p681: is there a constitutional right to a bench trial? I.e., can congress assign statutes to juries where an analogous claim wouldn't have been heard by a jury in 1791? n9a—yes, because there's no constitutional right to a bench trial. n9b—no (this is *Terry*).

Amoco

- Π Amoco's claims:
  1. Ejectment—legal.
  2. Permanent injunction against Δ's use of the premises—equitable.
  3. Permanent injunction against Δ's use of Π's logo—equitable.
  4. Restitution of mesne profits (i.e, money Π made by wrongfully using the premises and the logo)—equitable.
  5. Lost profits—legal.
  6. Fees and costs—legal.
- Δ's counterclaims:
  1. Injunction for Π to comply with the franchise agreement—equitable.
  2. Lost profits—legal.
  3. Costs and fees—legal.
- So, given the mix of law and equity claims, does it matter which claims are tried first?
  - *Beacon Theatres*: except in extraordinary circumstances, you have to hear the legal issues (those triable to a jury) first, in order to avoid infringing, through res judicata,

the right to a jury trial.

- *Dairy Queen*: claims for equitable relief and an accounting are involved itc. Accounting was an equitable remedy in 1791 (n.b., in 1791, courts took the position that jurors, who were mostly illiterate at the time, didn't have the skills necessary for an accounting. Itc., the court says that's not true anymore, so the jury can no do an accounting).

Bliss Valley (handout)

- BV sues investors for foreclosure on a loan—an equitable remedy. Δs counterclaim for bad faith, breach of good faith, and breach of fiduciary duty. The court tosses out most of Δs' claims.
- The trial judge noted, on record, that if he'd have been the fact finder, he would have found for BV. But he wasn't the fact finder—the case was tried to a jury before the (equitable) foreclosure was tried.
    - This was consistent with *Beacon Theatres*.
    - Is it consistent with Idaho law? Well, *Steed I* relied on *Beacon Theatres*. The majority itc. says that the equitable issues ought to be determined by the bench, and that the bench is not bound by the jury's prior determinations. Does this overrule *Steed I*? The majority doesn't say it does, but it's clearly contrary. (Note that the majority cites N.M., Cal., and Fla. (!!!) to support its rationale. But those states don't have Idaho's constitution!!!!)
    - So, what's the authority now in Idaho?
        - The court hasn't revisited this question since *Bliss Valley*, so the law is unsettled. Both arguments can be made.

Administrative adjudication

Can congress assign adjudication to an agency and thus effectively eliminate jury trials?

- *Atlas Roofing*: yes, congress can, when the case deals with the sovereign protecting the public's rights.
- Hypos:
    - Injuries from accidents on U.S. highways are decided by an agency. No—this involves a private right of action, in tort.
    - Trucker's violations are decided by the FTC. Yes—the rights being enforced are the public's rights to safety.

Voir dire

- Federal courts: federal judges conduct voir dire; not lawyers.
  - The judge has broad discretion. In fact, voir dire is usually very limited in federal courts.
  - Attorneys can propose questions to the judge for him to ask. The questions ordinarily must go directly to biases (e.g., <u>not</u> things like "what organizations do you belong to?").
- Idaho: judges have discretion, but most give the lawyers wide latitude. Often, lawyers can ask things like "what magazines do you read?"

<u>Monday, April 5</u>

The judge's role
The jury's role

The judge's role

What makes for a good judge?

- Impartiality—this might be the single most important quality, Lewis argues.
- Intelligence—demonstrated how, though?? Academic record?? Legal writing ability??
- Experience—what kind??
- Politics??
- Religion??
- Age??
- Gender??
- Race??
- Organizational memberships??

Recusal

In re Hatcher

- The judge itc. had watched his son, a 3L, present witnesses in a substantially related trial to the one he was hearing.
- 28 USC § 455
  - (b)(1): judge shall be disqualified where he has personal knowledge of evidentiary facts. This doesn't apply itc.: this provision is meant to cover things like judges who are witnesses to the facts of the trial they're hearing.

- (b)(5): same proceeding itc.? Technically not—because (b)(5) requires mandatory recusal, the courts interpret this provision strictly.
- (a): what's important here is the public's perception of bias (or not).

n4bpp661-662: this judge should have recused himself as soon as he was informed that the U.S. was investigating him—a § 455(a) issue.

n4cp662: Lewis says the dissenter here is full of it. There's plenty reason to think this judge would take his frustration out on counsel.

28 U.S.C. § 144: recusal on specific grounds.

- You must allege a specific basis for finding bias.
  - N.b., IRCP 40(g)(1): you only have to file a motion to disqualify a judge. One only. No grounds for disqualification are needed.
- n7p665: *Berger* (Lewis notes that the precis in the book is inaccurate): the original judge decides only if the affidavit satisfies § 144. If there's a fact question, the original judge can't rule on it.

The jury's role

- Why would you want a jury?
  - Partiality
  - Sympathy
  - Appeals to common sense
  - Disregard of legal technicalities
- Why might you prefer a bench trial?
  - The judge will have to write out an analysis of his findings and holdings.
    - This provides for a more detailed basis for later issue preclusion.
    - And for a better basis for appeal.

Constitutional right to a jury trial

- Amendment VII: this applies only to the federal government. You must look at the states' constitutions for the jury trial rights in the states.
  - Amdt. VII looks back at 1791, because the amdt. says the right of trial by jury shall be "preserved," and only in suits at "common law." Problems wrt. this come up when:
    - There's a mix of law and equity involved in a case.
    - A case involves new statutory actions that are silent about the right to jury trial.
    - A case involves new procedural devices (e.g., declaratory

judgment).
- Congress assigns adjudicatory matters to agencies.

Terry

- Π claims:
  1. Employer breached a contract (collective bargaining contract).
  2. Union breached its duty of fair representation.

  Note that although Π dropped its claims against the employer, they still have to prove claim (1) in order to win on claim (2).
- The seventh amendment problem arises in part because collective bargaining was illegal in 1791.
- The *Tull* two-factor test for new statutory actions:
  1. What's the 1791 analog to this new action?
  2. What remedy is sought?

  pbsp669

  1a. law
  1b. equity
  1c. equitable remedy
  1d. equitable remedy
  2a. law
  2b. equity
  3a. law (trover/conversion)
  3b. law (replevin)
  4a. law
  4b. law

Thursday, April 1

Summary judgment
Pretrial
The judge's role

Summary judgment

Visser

- Dissent: the dissent proposes its own test for SJ (¶3p641). This test is inconsistent with the majority, and more like *Adickes*—it puts the burden on the movant to prove its innocence.
- The *Celotex* SJ test requires the movant to only either:

1. Prove its innocence, or
2. Show that the nomovant can't prove its case.

So, Δ can, itc.:

- File an affidavit saying Π wasn't fired because of his age. (If Δ does this, Π must come forward with evidence to rebut that affidavit if it wants to avoid SJ.)
- Or, as it did itc., file Π's response to an interrogatory that shows (in fact, claims) that it has no evidence that Π was fired because of his age.

Houchens

- Π must prove that her husband (1) died (2) accidentally.
  - Π could prove (1), but not (2), itc.
- How do we distinguish itc. and *Martin*? In *Martin*, the decedent was last seen in peril—thus, a jury there could reasonably conclude the decedent's death was accidental.
- What could Mrs. Houchens do, then?
  - Get police reports saying her husband was not murdered.
  - Get affidavits from doctors showing he didn't die from disease.
  - Get other similar things—anything that might lead a reasonable jury to conclude that it is more probable than not that he died accidentally.

Note that R 56(f) allows you to come to court an explain why you can't get the affidavits you need.

Pretrial

Pretrial conferences: what do they address?

- What witnesses will be used.
- What documents will be used.
  - Stipulations as to these documents authenticity.
- Outline the path of further discovery.
- Estimate the number of days needed for trial.
- Propose jury instructions.
- Identify the issues to be tried.

Sanders

- A three judge panel believed that notice by the court ("sanctions") and notice in FRCP 16 was enough to warn Π. Thus, it believed that dismissal without a hearing was appropriate, under *Link v. Wabash* (¶1p647).
- The en banc rehearing doesn't say can ignore pretrial orders—because, for one thing, the case can still be dismissed. But, what you do is you

take the initiative and seek a continuance.

McKey

- Π would have done better to have moved to amend (because the amendment standard is liberal under the FRCP).
- But, since Π went to pretrial, the standard becomes strict—pleadings can then be modified only to prevent injustice (FRCP 16(e)).

The judge's role

- Selecting judges
  - Federal courts—by appointment.
  - Idaho—a "modified Missouri" plan. Judges are appointed, but they can be challenged by an opponent periodically.
- What are the costs and benefits of an elected judiciary?
  - A benefit is that judges have to respond to the people.
  - A cost is that sometimes a correct decision is an unpopular one.
- What makes for a good judge?
  - Political involvement.
  - Diverse experience:
    - Public defender
    - Prosecutor
    - Private practice
    - Commercial experience
    - Government experience

Tuesday, March 30

Arbitration
Summary judgment

Arbitration

Ferguson v. Writers Guild

- Π wants the court to review the procedural improprietites of this arbitration.
- The court, however, decides it will only reivew the contract—this, because the parties have contracted for ADR.

Engalla

- Π attacks the contract for arbitration on two grounds:
  1. Fraud: due to how Δ is administering the arbitration, it has

made a misrepresentation to Π which was fraud.

2. Unconscionability.
    - The court rejects this argument—there was no overwaning bargaining power involved, here, it says.

- Dissent: the dissent's worried that the majority opinion allows parties to withdraw from arbitration whenever they don't like how it's going.

Summary judgment

- SJ weeds out disputes where there are no issues of material fact, and keeps them from going to trial.
- N.b., R 12(b)(6) buttressed with affidavits is treated as a an SJ (so, in a true 12 (b)(6) motion, the facts come only from the pleadings).

n5p629

a. The court will assume the truth of the hearsay for purposes of the SJ.

b. This is a vague statement of belief. Instead, the lawyer should have signed an affidavit of Π saying "I saw Δ sign the note."

Celotex

- This is a seminal civil procedure case. It has significantly increased the availability of SJ.
    - The previous authority was *Adickes*, which used a "prove your innocence" standard.
- Δ itc. filed an interrogatory where Π said Π had no witnesses of decedent's exposure.
    - Note that Δ does not file any affidavits to prove Π was never, in fact, exposed (as might have been required under *Adickes*).
- Π opposes the SJ with three things:
    1. Transcript of a deposition of the decedent.
    2. Letter from decedent's former employer.
    3. Letter from decedent's insurer.

    Wrt. (2) and (3), see R 56(e): these letters are not the proper form for SJ affidavits—only:
        - Depositions
        - Interrogatory answers
        - Further affidavits

        will be considered for SJ. So, Π should have gone to the authors of these letters and get (sworn) affidavits regarding their contents.
- So, what's the new, *Celotex*, SJ standard? You can get SJ in either of two ways:
    1. Movant can negate, with evidence, an essential element of the

nonmovant's claim. (That is, prove movant's innocence—this is the same as *Adickes*.)

2. Movant can show that the nonmovant's evidence is insufficient to establish an essential element of the nonmovant's case. (That is, show that the nonmovant can't prove its case (this is the *Celotex* annex of *Adickes*).)

Visser

- What was wrong with Visser's SJ motion? The affidavits were only speculation about the firor's motives. (If the affidavits had said "I heard firor taling about firing because of age," that would work.)

Monday, March 29

Settlement
Mediation

Settlement

Matsushita

- Federal courts had exclusive jurisdiction over securities claims; but a Delaware state court overaw a settlement—how could it do this? SCOTUS says the Full Faith and Credit Act make federal courts have to recognize the Delaware court's settlement if Delaware courts would recognize it.

Neary* and *Bancorp

- The same issue is involved in both of these cases, but they reach opposite results.
- Who owns a judgment?
  - What interest does the public have? It's interest is in the law becoming precedent—it wants to own the statements of law.
  - So, if the parties can vacate the judgment, they can manipulate precedent on their own.
- *Neary*: the parties ought to be allowed to stipulate dismissal and vacatur. That is, the parties own their case.
- *Bancorp*: the public owns the case.
- N.b., these two cases might be consistent if you realize that in *Bancorp*, there was no stipulation for vacatur between the parties, whereas in *Neary* there was.

Mediation

pbsp604

1a. The starting point is to find out the wants of each party. This is usually done in private with each party. Both tangible (money) wants and other, intangible wants should be determined. Also, the mediator should determine how each party views the other side.

1b. The mediator is not there to make a decision—he's there to facilitate the parties coming to their own decision.

2. Ask: what is the likely future situation between the parties? Note that the mediator is not usually there to be an evaluator.
3. The benefits of a judge as a mediator:
    - He probably knows the case well.
    - The parties probably trust him.
    - He might be able to facilitate settlement.

    The primary detriment is the risk of partiality on the bench.

N.b., IRCP 16(j): in custody matters, a court can order mediation (in fact, it's routine that they do). Also, IRCP 16(k): a court can also order mediation in any other civil matter.

Lockhart

- Did the judge have any power to do what he did? Maybe, see FRCP 16(c)(9). The court can force you to negotiate in good faith (meaning, in part, negotiation by someone with the authority to settle).

Thursday, March 25

Settlement

Settlement

pb2p579

- Employer's concerns
    - Confidentiality:
        - Don't want copycat suits.
        - Don't want harm to the company's reputation and goodwill.

        How do provide for confidentiality? With a contract for confidentiality.

        - Should the employer get Π to promise not to say anything? No—that would risk the contract being voided as against public policy.
    - How to keep Π from filing suit? (The employer does not want the suit to even be filed, because then it's in the public record.)
        - Π won't want to relinquish all claims—so how can we narrow the relinquishment?
            - Relinquish all claims up to this point.
            - Relinquish all claims arising from the transaction in question.

Kalinauskas: under this case, you probably ought to advise your client that the confidentiality agreement is not airtight.

- The court's decision may devaule confidentiality agreements (note that this leads to less settlement, generally).
- The other possibility would allow Δ to purchase Π's testimony—we don't want something scary like that.

- Employee's concerns
    - Health insurance and a good reference.
    - So, the best option for the employee might be a consent decree.

How can we reconcile the employer's and employee's concerns, then?

- Make it expensive for the employer to breach:
    - Liquidated damages (e.g., as to the good reference (protecting the employee) and confidentiality (protecting the employer). (Note that compensation and health insurance for the employee can be determinatively calculated, so we don't need liquidated damages for those.)
    - Attorney's fees for the employer (to sue employee to enforce the agreements) in case of the employee's breach.

So, who gets what?

- Employer:
    - Written agreement
    - Agreement by employee not to sue
    - Confidentiality of employee
    - Liquidated damages clause for breach (by it or the employee)
    - Attorney's fees if it has to go to court to enforce the agreements against the employee
- Employee:
    - Compensation and health insurance
        - The employer will want to set a time limit

for this (so employee doesn't laze around forever on employer's dime).
- A good reference
  - The employer will want to set the terms of the reference (perhaps it ought to let the employee write an initial draft).
- Liquidated damages clause for breach (by her or the employer)
- Attorney's fees if she has to go to court to enforce the agreements against the employer

Tuesday, March 23

Discovery
Default
Dismissal

Discovery

Chudasama

- Who as at fault?
  - Πs—because they sought too much discovery?
  - Δs—because they were stonewalling?
    - Note that when Δ couldn't get the judge to rule on its motions, it ignored its discovery obligations. This behavior is not contemplated by the FRCP.
    - Then again, though, what could Δ have done? Well, it could have sought a writ of mandamus.
    - Nevertheless, Δ still did ignore its discovery obligations —so maybe the appeals court should not have let Δ off so easy (i.e., maybe it should have penalized Δ somehow).
  - The judge—because he was too detached from the proceedings?
- The trial judge itc. decided on two rules:
  1. R 26(g): mandatory sanctions.
  2. R 37(b)(1): discretionary sanctions.

Defaults

pbsp567

1a. Call the other party and ask, "Where's your answer? (motherfucker?)."
1b. Note the R 4(a) carrot for the Δ.

Can you conclude Δ is in default if you don't have its answer? No—the mail can take a while. So, you have to go to the court clerk.

Compenents of default

1. Entry of default
    - Δ can get relief from an entry of default, under R 55(c), by showing good cause.
2. Default judgment
    - Π must move for default judgment. (Π can combine this motion with its motion for entry of default.)

Hearing requirement

- If the damages sum is certain or calculable, the court can enter default judgment without a further hearing.
- Otherwise (e.g., in a tort case, or in a contracts case with intangible damages), the court must hold a further hearing.
    - If Δ has appeared, it is entitled to three days notice of that hearing.

Peralta

- When can't you demand there be a meritorious defense (before default judgment can be set aside)? When the judgment is void: in such a case, a meritorious defense requirement would cause Due Process problems.
- So, if default judgment is legitimate, you can demand a meritorious defense before the default can be set aside.

Involuntary dismissal

pbsp572

1. (a) (in that case, the court granted a continuance) or (b) (itc., the court dismissed an appeals court—and the dismissal was affirmed?
    - So, the upshot is that the trial judge has a lot of discretion in involuntary dismissals—and appeals courts are likely to uphold.

What's the consequence of an involuntary dismissal? It's an adjudication on the merits (unless the trial court says otherwise).

Voluntary dismissal

Voluntary dismissal is . . .

- without leave of court if it comes:
    - before the answer, and
    - all parties agree to it.

You get one free voluntary dismissal before the adjudication is considered on the merits.

- with leave of court when it's with the leave of the court. See *Manshack* (n2ap575): there, the court was very liberal with voluntary dismissal (likely because Π was very candid with the court).

Monday, March 22

Discovery

Discovery

The work-product rule

Hickman

What if . . . ?

- Fortenbaugh inspects the tug and sees charred areas?
  - He has to tell the other side—it's a fact (even though the other side could have inspected (or did inspect) the tug on their own; they are entitled to know if you saw what they saw).
- The other side asks if there is any work product?
  - You have to tell them—otherwise, how could the other side show a substantial need for work-product if they don't know what exists?
- The other side asks for the identity of witnesses you've interviewed?
  - You have to tell them.
- The other side asks what facts that you learned from a particular interview?
  - You don't have to tell them. You only have to say what the facts are—not what you learned. What you learned is the same as your interview itself, which you don't have to give them.
- The other side asks you to recreate an interview you did with a witness who is no longer alive?
  - Fortenbaugh didn't have to do this in *Hickman*, at least. Note FRCP 26(b)(3): "the court shall protect mental impressions . . . ." So, the other side could argue that you had to give them this,

but it's a longshot argument.

- The other side asks for your photographs?
  - You probably don't have to give them these, unless it was no longer possible for them to take those particular pictures. Otherwise, they're work product.

Expert witnesses at trial

FRCP 26(b)(4)

- Trial experts
- Non-trail experts: someone who learned what they know through participation in the events involved in the case.

pb2p539: we would have to know why Welby examined Π's back. Kildare is a witness of Π's injuries and know what Π's treatment was in the operating room.

Under FRCP, if you've retained an expert and expect to call him at trial, you must provide a report, under R 26(a)(2)(B).

What if you then decide not to use an expert? See the exceptional circumstances exception. Why insulate these? Because it allows attorneys to go to experts without fear of getting a negative opinion.

- Also, the rule doesn't say it, but courts have said you don't even have to give out those experts' identities.

Thompson v. The Haskell Co.

- We have to know why Π went to the doctor before we can know if those doctors were retained for trial.
  - But this doesn't matter to the court, itc., because whether a doctor is a 26(b)(4)(B) expert of not, the doctor's identity is discoverable.
  - Because Π went to the doctor only three days after her alleged injuries, Δ can't get that information. (If Π had gone to the doctor six months, e.g., later, Δ could get the information under R 35 (and note that Δ could not force Π to go to the doctor until it was sued).)

Chiquita

- R 26(b)(4) expert? Yes—because he was retained for trial.
  - A (B) expert? Yes—because he's not planned for trial.
  - But, only a fact witness? No—he did see facts, but he only saw them because he was hired to do so.
- How is this expert different from the expert in *Thompson*? Here,

Δs had the opportunity to send their own expert (especially since it was <u>their</u> boat); nothing <u>prevented</u> them from using their own expert.

- Note that Δs can still whatever information from the expert that is <u>not</u> his opinion—you can't shield otherwise discoverable information by giving it to a non-testifying witness. As a result, parties must log what information they're withholding (or at least they better).

<u>Thursday, March 11</u>

Discovery: work-product rule

Discovery

The work-product rule

Hickman

What's the scope of R 26(b)(3)?

- Prepared
- by and for the party or representative of the party
  - "Representatives" includes people like PIs, paralegals, and insurers.
  - What about Δ's employee? Depends. Was it prepared in preparation for trial?
- in preparation for trial.

- Witness statements
  - Discoverable under R 26(b)(3)? Maybe—the other party had an opportunity to interview the same witnesses.
- Memoranda
  - Discoverable? No in part, maybe in part.
    - The court will protect a lawyer's mental impressions, theories, etc.
    - How does a court do this in real life? It will review the memoranda in camera and select certain portions for the other party get.
    - What obligations does a lawyer have in answering interrogatories?
      - See ¶2p529.

- There is a clear distinction between facts and impressions of facts. Materials you created and impressions you formed are work product; facts are not.
- You have to answer interrogatories to the extent that they ask for facts.
    - You do not have to write out a transcript (because the questions you asked may reveal your theory of the case).
    - The interview itself is work product, but what you learned in the interview is not.

- Memory of the witness statements
    - Discoverable? Not really. The other party is entitled to the facts only. We don't want to make a witness out of the lawyer. The only way the other party can get to these memories is through interrogatories asking for facts.
- Notes about the case
    - Discoverable? No in part, maybe in part—these are just like the memoranda.

Problems, p535

3a. It depends—was it made in preparation for trial?

3b. B must disclose—the witness's identity is a fact. It doesn't matter how much B spent.

4a. You can get the statement. FRCP 26(b)(3).

4b. Frank can get his statement. Boris can get it from Frank if Frank wants to give it to him. (But Boris can't get it directly from the other party.)

5a,b. Probably yes in both cases, since the other party can't get that information anymore.

6. See FRCP 33(c), the contention interrogatory. This is a crucial type of interrogatory. The incentive is for the other party to give as much information as possible, becase it could lose the opportunity to use at trial whatever information is does not give.

Tuesday, March 9

Discovery

Discovery

Problems, p429Supp.

2. Won't be allowed to use the witness (unless the failure to disclose was harmless).
3. Here, the failure to disclose is harmless. But note that sanctions are still available under FRCP 37(c)(1) for:
    - Reasonable expenses
    - R 37(b)(2) (the heavy sanctions)
    - Inform jury of the failure to disclose

4a. The steps:

1. Confer (or attempt to confer).
2. Make a motion to compel.

4b. FRCP 37(a): assert privilege and the other party takes you to court.
FRCP 26(c): assert privilege, go to court for a protective order.

- R 26(c) is probably better:
    - You eliminate the risk of having to pay attorney's fees to the other side.
    - The court may view your claim in a better light since you took the initiative (the party resisting discovery is always better off taking the initiative).

4c. Not good enough—the party must state the nature of the privilege.
FRCP 26(b)(5). What should the response look like?

- Claim attorney-client privilege.
- Indicate there are 12 letters regarding the interpretation of the contract, dated on such-and-such dates, between the attorney and the client.

That is, you should respond with enough information to give the other side the ability to assess the validity of the privilege claim.

FRCP 35: different from other discovery rules because it involves a much greater invasion of personal privacy.

Schlegenhauf

- N.b., Contract Carriers were not making a claim against the bus driver. But the court says this isn't a problem (see ¶¶1-2p519).
- Nevetheless, the court says the discovery was improper:
    - Trial court ordered 9 exams when the parties only requested 4.
    - There was no "good cause" to satisfy the rule (except for maybe the eye exam).
- The point: having a suspicion that exams might turn up something is not the same as "good cause." This is because physical exams are viewed as intrusions.

- But note that physical exams or personal injury Πs are routinely permitted, because Π has put his own physical conditions into controversy by bringing the claim.

n6p512

- Wouldn't the father be a witness to Π's condition??
- Where should we draw the line re: social relationships??
- Lewis says that Π here has opened the door pretty widely by brining a claim for emotional damages.

Hickman

- How much of what a lawyer creates in preparation for litigation is discoverable?
- Focus on the different things Fortenbaugh created:
  - Written statements, signed by witnesses, from his interviews with them.
  - Notes and memoranda regarding the interviews.
  - Memoranda of the interviews where there were no signed witness statements.
  - Oral recollections of other interviews.

Monday, March 8

Discovery

Discovery

Johnson Matthey (p486Supp.): the party here is arguing the old rules ("subject matter"). Now its "claim or defense."

- But aren't both of the cases involved about unjust enrichment? Yes, but the unjust enrichment claims arise from different events. So the court is giving "claim or defense" a pretty close reading.

Blank: would itc. be decided differently under the new rules?

- Under *Johnson Matthew* (a close reading), maybe not.
- N.b., the "admissible" part of FRCP 26(b)(1) is a broadening of discovery, unrelated to the "claim or defense" limitation.

Problems, p427Supp.

1a. Interrogatories are available only against parties to the action. Depostition is the only discovery available against nonparties.

1b. Too many interrogatories—you only get 25 unless you can get the court to order more.
2a,b. When can you tell a deposition witness not to answer?
- When the answer is privilege. FRCP 30(d)(1).
- When you're going to go to court to get a ruling on the propriety of the question. FRCP 30(d)(1).

2c. Go to court and make your case. Bring the transcripts.
3. FRCP 37—the stick rule.
- You can get attorney's fees. What expenses do you ask for?
  - Cost of making and arguing the motion.
  - Cost of reconvening the deposition.
- What if you unnecessarily move to compel? <u>You</u> might have to pay for the other side's fees.

<u>Problems, pp428-429Supp.</u>

1a. You want Π to perjure herself—if you show the photo in advance, Π can make up an excuse. Δ can argue that it will use the photo only for impeachment. But not that then Δ will run the risk . . .
1b. If you don't want to produce you have to get a protective order. FRCP 26(c).

<u>Problems, p429Supp.</u>

1a. Discovery conference, then mandatory disclosure, and only <u>then</u> can you notice depositions.
1b. How many depositions per witness? One, and for no longer than a day (without a court order for more or longer). Note that you shouldn't tell a witness not to show up for a deposition, because you or she could be subject to sanctions—get a protective order for delay of the deposition. FRCP 26(c).

Stalnaker: the women could have sought a 26(c) protective order. Why didn't they? Because that would be costly. The judge here limits questioning to questions about the relationships between the women and this particular Δ.

<u>Thursday, March 4</u>

Interpleader
Discovery

Interpleader

Cohen

Did Cohen have a claim to the paintings? No. But even if he did, he still could have used interpleader (as long as the interpleader requirements were otherwise satisfied—an interest is not required).

§1335 interpleader vs. FRCP 22 interpleader

- Diversity: §1335 requires minimal diversity between claimants only. FRCP 22 requires complete diversity between Π and all Δs.
- Personal jurisdiction: §1335 permits nationwide service, therefore relaxing the personal jurisdiction hurdle, since federal District Courts have national jurisdiction. FRCP 22 requires traditional personal jurisdiction tests (FRCP 4 and otherwise).
- Amount in controversy: §1335 requires the amount in controversy be deposited with the court, but that amount can be as little as $500. FRCP 22 does not require a deposit, but requires the §1332 amount in controversy ($75K).

What risk is Cohen facing? The liability of turning the paintings over to the wrong party—a conflicting claims problem.

Why wouldn't Cohen interplead Marcos? Maybe Marcos was out of the country, causing a personal jurisdiction problem.

Marcos's intervention: Marcos wouldn't be bound as a legal matter if she didn't intervene, but she could be as a practical matter (e.g., if Braemer gets the pantings, he could sell them). But is Marcos adequately represented by existing parties? No—her agent, Braemer, asserts a lien on the paintings.

n3p961: why no interpleader? The claims are not conflicting (see FRCP 22, sentence 1).

Discovery

N.b., discoery is a, if not the, major part of modern litigation.

Discovery motives: WE don't want to let THEM know the most damaging information about our case. So, with our system, where you only get what you ask for, each party will give a discovery request its narrowest possible reading. Therefore, requests should be very carefully drafted.

- Word games will be used (e.g., don't ask for "reports," ask for "any information").
- N.b., depositions allow for a more freeform discovery.

N.b., Idaho has not adopted the amendments to the FRCP re: discovery.

- In Idaho there is no mandatory disclosure at all. (The extent of mandatory discovery, though, was limited in the 2000 amendments to the FRCP—you must now only disclose helpful things under the FRCP).

Scope of discovery

Blank: what do Πs want that Δ doesn't want to give? The partner-making information. Δ says its irrelevant to the subject matter (which was the test under the old FRCP) of this lawsuit. The court says the partner-making policies might be relevant to overall gender policies and so are relevant to this suit.

Would they still be relevant to the new "claim or defense" rules??

Steffan: Π's case was dismissed at trial for failure to make discovery. The appeals court says the questions were not relevant to Π's wrongful discharge claim—if Π was wrongfully discharged, then it's as if he never was discharged at all, so Δ's "we couldn't reinstate him" argument is irrelevant considering the two possible outcomes of this case.

Monday, March 1

Joinder of parties review
Intervention

Joinder of parties review

FRCP 19

Helzberg's: Π was put at risk of inconsistent obligations (but the court decides the other way).

pb6p937:

a. Mary wants the phone company to stop listing the former wife as "Mrs." Can Mary get complete relief if the former wife is joined?
   - The former wife's listing would have to be changed, so why shouldn't she be joined so she can make any arguments she has against the listing being changed?

b. Rule 19 problem here? Either the trustee or the court could raise the Rule 19 issue, on behalf of the children (who have an interest).

c. Rule 19: who is at risk here? W1 and the insurance company. W2 is not at risk. However, the insurance company is at risk of inconsistent obligations if W2 isn't joined.
d. This is like *Synthes*: no compulsory joinder of joint tortfeasors.

Intervention

- Note the similarities between FRCP 19(a) and FRCP 24(a), and those between FRCP 20 and 24(b).
- It is difficult to get permissive intervention.
- Existing parties often may not want outside parties in because they might:
  - Prolong the proceedings.
  - Make the litigation more expensive.
  - Require more discovery.
  - Otherwise mess up the suit.

NRDC

NRDC sues NRC and NMEIA. UN wants in and can get in under FRCP 24. But should Kerr McGee and AMC be allowed in under FRCP 24?

1. NRDC claims that an environmental impact statement (EIS) is required.
2. UN seeks intervention because it wants to protect its license, and is undisputed as a proper intervenor.
3. Kerr McGee and AMC seek to intervene, and are denied intervention by the trial court:
   - They won't win on appeal under FRCP 24(b) permissive intervention (because permissive joinder is purely discretionary for the trial court).
   - So they must contest FRCP 24(a) intervention by right.

NRDC says it hasn't asked for any injunction against KM or AMC. But the court allows the intervention since KM and AMC has a strong claim regarding stare decisis—both of them could be back in court for litigation of the exact same law and facts as itc. Their interests:

- KM has land and may be able to get licenses.
- AMC doesn't have as strong an interest as KM in that regard, but it can bring to the table an industry perspective.
  - Note, would members of AMC (a trade organization) be bound by an adverse judgment against AMC because of res judicata? Maybe—there are good arguments on either side of this question.

Could these interests be adequately represented by NRC and NMEIA?

- Is UN adequately representing them? Doesn't UN have the same kind of interest, and won't it be making the same kind of arguments?
- The court says No—UN might settle in order to keep just its own license and allow for enforcement of the EIS requirement against all others. UN has a license already, whereas KM doesn't yet.

Martin v. Wilks

- 1st suit: NAACP sues City and Board, BFA (white FF organization) denied FRCP 24 intervention.
  - NAACP gets a consent decree—City and Board must enact programs to hire more black firefighters and promote firefighting to blacks.
  - BFA claims an interest in jobs and promotions; court says their intervention would satsify Rule 24 except that it was not timely filed.
- 2d suit: White firefighters sue City and Board, claiming the consent decree is invalid, but loses.
- 3d suit: Wilks sues City and Board.
  - City and Board claim they are just following the consent decree.
  - Wilks claims he is not bound by the consent decree (due to res judicata). The trial court says he is—he had an interest in the 1st suit, had notice of the 1st suit, but didn't intervene. The appeals court reversed.

SCOTUS says Π Wilks wasn't required to intervene in the 1st suit—no compulsory intervention. This means that some of the parties are at risk:

- City and Board might have inconsistent obligations.
- NAACP might lose part of its judgment.

The City and Board should have filed an FRCP 19 motion to join some party to the 1st suit that would have sufficiently represented all white firefighters.

Congress responded to itc. by enacting a narrow exception:

- Parties like white firefighters in employment discrimination suits must intervene or else be bound by any judgment.
- Otherwise, the law remains as it was held itc.

Thursday, February 26

Joinder

Joinder

OPPD / Owen Equipment

1. Δ OPPD impleads Owen Equipment under FRCP 14, based on derivative liability (even if OPPD is held negligent, Owen Equipment would or may owe OPPD contribution for its own liability).
2. Π sues Owen Equipment under FRCP and *Gibbs*.

SCOTUS says no—since Owen Equipment is a citizen of both Nebraska (where OPPD is) and Iowa (where Π is), allowing Π's claim against Owen would defeat the complete diversity requirement (which is clear since Congress had reenacted the diversity statues, without changing them, after *Strawbridge*). Note that Π still can't add Owen, under §1367(b).

N.b., unless Π knew from the outset that there might be a jurisdiction problem with Owen, it's hard to see why Π wouldn't join Owen in her original complaint (since otherwise she would run the risk of OPPD successfully defending her claim).

FRCP 19

Temple v. Synthes Corp.: Δ manufacturer moves for dismissal under FRCP 19. Follow the FRCP analysis:

- Not 19(a)(1) (relief can be accorded itc. between existing parties).
- Not 19(a)(2)(i) (the hospital wouldn't be bound by any liability determinations in Synthes's trial).
- Note 19(a)(2)(ii) (Synthes wouldn't end up with inconsistent obligations).

So, the hospital is not a compulsory party.

Helzberg's

FRCP 19 analysis:

- 19(a)(1)? Maybe.
- 19(a)(2)?

- Lord's has an interest.
- (2)(i)? No?, since Lord's won't be bound by an injunction here? But, that's only as a legal matter. What about as a practical matter (as the rule requires)? Lewis says Yes—after an injunction, Lord's will be forced to clear out or sue Valley West.
- (2)(ii)? Would there be inconsistent obligations for Valley West? The court says any such obligations would be Valley West's own fault. But whether Lord's was going to open a full-line store hasn't yet been tried on the merits, right!? It could be that Lord's wasn't going to. Right now at least, Lewis says, it's unknown.

Lewis asks: Isn't itc. exactly what FRCP 19 was written for? Lewis believes itc. is wrong.

What if there are no alternative venues—how could the court shape the relief to lessen prejudice? It could write an injunction conditioned on another lawsuit determining the obligations between Valley West Lord's.

Tuesday, February 24

Joinder

Joinder

Blazer

How could we find two separate transactions?

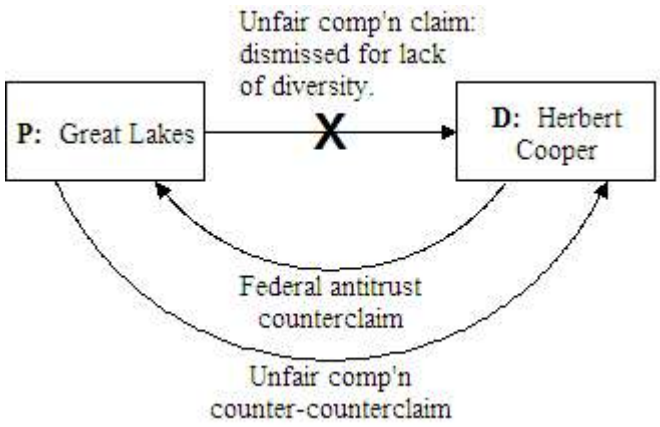
- Π could prove her truth-in-lending case by introducing the lending document—it either complies or doesn't with the truth-in-lending act.
- Δ could prove its debt case by introducing evidence of the loan and testimony by Π of what she's paid on it.

These two "transactions" seem different—does that mean Δ's counterclaim is permissive? It simply depends on what a court says. Contrast *Blazer* with *Whigham* (n2cp900), and note the competing policy concerns:

- Creditors are worried that they may never recover on notes if they can't setoff in cases like these.
- Debtors may not be motivated to bring truth-in-lending suits if they risk facing a counterclaim on their debt.

This is a hard question, Lewis says.

n6pp902-903: *Great Lakes Rubber*.



Is the unfair competition counter-counterclaim compulsory or permissive? It's compulsory—Δ called Π's "unfair competition" into question in its counterclaim, so Π's originial claim is now a compulsory counterclaim.

Mosley

There are a number of claims amongst the Πs:

- 8 Πs worked or wanted to work for Chevy.
- 2 Πs worked or wanted to work for Fisher Body.
- Some of the Πs are black, claiming either:
  - They weren't hired due to racial discrimination.
  - They were fired due to discrimination.
  - They were retaliated against for complaining of discrimination.
  - They were not promoted due to discrimination.
  - They did not receive proper relief pay due to discrimination.
- Some of the Πs are women, claiming either:
  - They weren't hired due to gender discrimination.
  - They didn't receive proper relief pay due to discrimination.

So why do they want to sue all together?

- Probably because their discrimination claims will be bolstered by being all together in court—their testimony may very well overwhelm the jury, convincing them that there is systemic discrimination at GM.
- Also, they can share litigations costs this way.

Note that, for these sames reasons, GM would probably like to take on each Π separately.

FRCP 20 analysis:

- Πs don't have a joint interest.
- Πs do have several claims:
  - Same transaction? No.
  - Or same series of transactions? Maybe. What makes a "series"? The court itc. says a policy of discrimination at GM would be a series. (But should the women be allowed to sue with the blacks?? I.e., would a policy of discrimination against blacks be sufficiently interconnected with a policy of discrimination against women??)
  - And, is there a common question of fact or law? Yes, the court says.

Once you have joined claim, what can you bring? As far as the FRCP is concerned, you can bring anything, per FRCP 18 superjoinder; however, there may be jurisdiction problems preventing some claims.

Watergate Landmark

The joinder problem itc. comes out of the Δ property manager's 3d party claim against the waterproofers, since Π did not sue the waterproofers. The manager could have properly impleaded the waterproofers if it had hired them, since the waterproofers could have failed in their legal obligation to the manager in such a case. Here, though, Π hired the waterproofers, not the manager—derivative liability is required for impleader; i.e., the 3d party Π must be entitled to indemnification from the 3d party Δ.

What situations usually lead to indemnification relationships?

- Construction projects.
- Torts. See n5bp917.

n5bp917: Paul sues Dan on a personal injury claim. Dan believes Donna may be wholly or partially responsible for Paul's injuries. Can Dan

implead Donna?

- In Idaho? No—Idaho isn't a joint and several state, so Donna's negligence will determine in Dan's responsibility in his trial whether Donna's there or not. I.e., Dan will never be exposed to more than his share of the liability.
- In a joint and several state? Yes, since Dan may have a right of contribution from Donna.

N.b., in *Watergate*, Π risks Δ successfully defending Π's claim. Then, when Π sues the waterproofers, the waterproofers <u>are not bound</u> by the determination in the prior trial, since they haven't had their day in court (that is to say, collateral estoppel is a one-way street).

Monday, February 23

Amendments
Joinder

Amendments

<u>FRCP 15(c) and *Zielenski*</u>: Π could have sought to amend under FRCP 15(c)(3) (name correct party) and, with relation back, avoid the running of the SoL. How would it happen?

1. Π names right the right party in an amendment.
2. Δ answers with SoL defense.
3. Π moves to strike SoL defense (FRCP 12(f)) under relation back (FRCP 15(c)(3)):
   - Same transaction? Yes.
   - Δ prejudiced because of bad notice? No.
   - Δ knew of should have known about the action? Yes.

   This is because Δs questioned the proper party shortly after receiving the complaint.

<u>FRCP 15(b)</u>

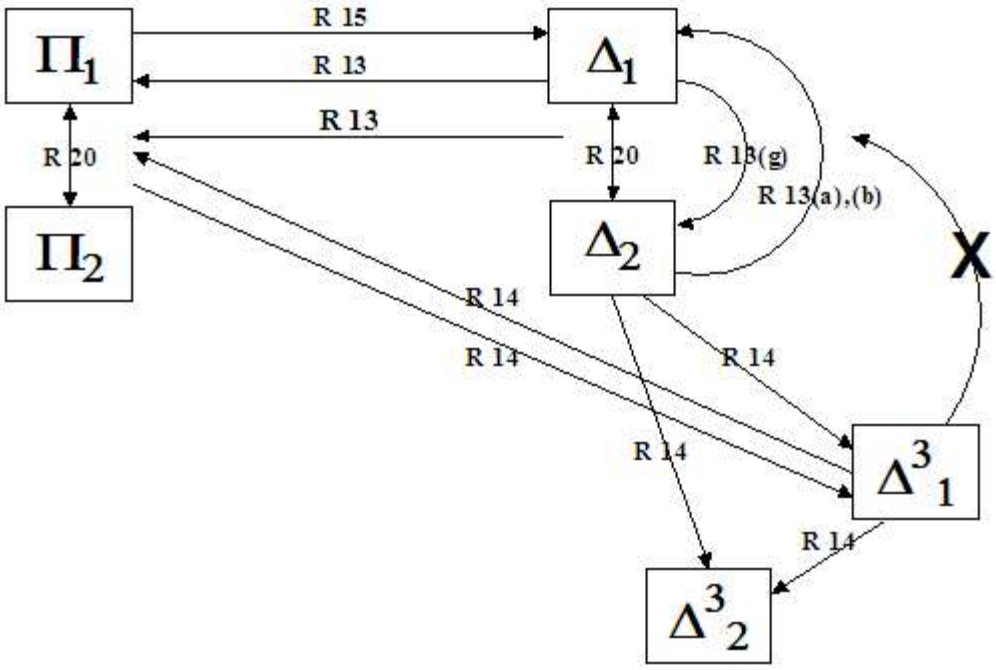
- If the parties to a suit are willing (expressly or implicitly) to try an issue, it doesn't matter if that issue was set out in the pleadings or not. Implicit willingness to try is evidenced by lack of objection when an issue comes up at trial.
- Even if there are objections, 15(b) still sets out a liberal policy—amendments are permitted unless they would prejudice the other party, considering the availability of continuance (plus costs for the continuance, when appropriate).

Joinder

Roadmap

- Keep focused on the FRCP.

1. Between 1 Π and 1 Δ: there is no limit to the kinds of claims Π may bring against Δ as far as the FRCP is concerned (FRCP 18; but the common law may limit such claims—e.g., through res judicata or jurisdiction requirements).
2. Whenever any party to litigation has a claim against someone else permitted for joinder by the FRCP, that party can add as many claims as it has against that person (FRCP 18).
3. When parties want to join together, either as Πs or as multiple Δs, there must be a shared claim (and after that, FRCP 18 superjoinder kicks in, and any claims can be added).
4. Δs are not free to join whatever outsiders they want.
    - In some situations, Δ can force Π to join additional parties (FRCP 19).
    - In other situations, Δ can force joinder of a third-party Δ for indemnification (FRCP 14).
    - A counterclaiming Δ can bring in additional parties to the counterclaim (FRCP 13(h)).
5. Usually, joinder is not required.
    - Only one rule requires joinder of a claim—compulsory counterclaim (FRCP 13(a)).
    - Only one rule requires joinder of a party (FRCP 19).
    - Still, there are sometimes powerful incentives to join; e.g., potential claim or issue preclusion problems, or collateral estoppel. So, when in doubt, join claims.



Problems, p894: n.b., the supplemental jurisdiction test—same case of controversy, per Article III.

1. Yes.
2. No—no transactional relationship.
3. Yes, under §1367(a) (but no under *Findlay*, which §1367 overruled).
4. No, see §1367(b).
5. N.b., remember that you must have personal jurisdiction, too.

6a. No—FRCP 18 permits any claims you have.

6b. §1338(a) give federal courts exclusive SMJ over copyright matters.

Blazer: discerning "transactions."

- Permissive → not from the same transaction → no supplemental jurisdiction.
- Compulsory → from the same transaction → supplemental jurisdiction.

Note that we can view the transaction is different ways: favorable to the Δ (transaction as the entire loan) or favorable to the Π (representation by the creditor only).

Tuesday, February 17

Response
Amendments

Response

n5p463

a. B cannot deny the allegation. B must admit it, because it's true.
b. B can deny on the basis that he's without sufficient information. You can claim a lack of knowledge only in good faith.
c. B could deny, as in in (b).

Layman v. SWBell: a failure to assert an affirmative defense is a waiver of it (FRCP 8). Note that FRCP 8(c) does not list all affirmative defenses—it just gives examples.

- How do you figure out if something is an affirmative defense?
  - See ¶2p465—Δ gave a general denial.
  - What did Π allege?
    - Π owns Blackacre.
    - Δ trespassed, installed cables without Π's consent.
    - Δ continued to trespass in order to maintain the cables.
    - Damages.
  - So, can Δ give a general denial? No. But Δ could deny on grounds that it was without sufficient information.
  - Δ can argue that evidence of an easement is to disprove that they entered with consent—meaning that it wouldn't be an affirmative defense. But FRCP 8(c) include "license" as an affirmative defense, and that's pretty close to easement.

Therefore, "when in doubt, plead it," is the moral of this case.

n4p467

a. Some courts say yes, some say no. "When in doubt, plead it."
b. Courts are split. "When in doubt . . ."
c. This goes to disprove Π's claim (no injury, etc.), and so is not an affirmative defense.
d. This goes to disprove negligence and cause, and so may not be an affirmative defense. However, the "suprise principle" could be at play.
e. Affirmative defense.
f. Affirmative defense—PER is a legal excuse.

Amendments

Aquaslide: what did Π do wrong? Π didn't sue enough Δs.

- FRCP 15(a): liberal policy on amendments.

- *Foman* (¶3p472): reasons to deny an amendment itc.:
  - Undue prejudice (both to Π (statute of limitations) and Δ (how would Δ defend if suit goes forward?)).
  - Undue delay.

What happens when the statute of limitations runs? FRCP 15(c), relation back.

Moore v. Baker: why doesn't amendment relate back? Because the added claim doesn't arise out of the same transaction in question in the original pleading (FRCP 15(c)(2)). But note that this views the "transaction" as the consent only, itc.

Bonerb: why does the amendment relate back? Because both claims arise out Π's injury while playing basketball in Δs program. Note that Δ would argue that the amendment doesn't relate back, because it doesn't arise out of the maintenance of the basketball court.

Thursday, February 12

Form of the complaint
Response

Form of the complaint

See handout, which shows how Lewis was taught to write a complaint—it is just one way that works. Four sections:

1. Jurisdictional allegations and party allegations.
   - Identify the parties correctly.
   - Abbreviate their names after the first use.
2. General allegations—background allegations that set the scene and are common to all claims.
3. Counts—the individual claims. Add allegations specific to each claim.
4. Damages.

Strive for simplicity. Don't use legalisms.

Response

Taxonomy

1. Factual denials.
2. Affirmative defenses.

3. Legal sufficiency (FRCP 12(b)(6)).
4. Technical defects (FRCP 12(b)(1) – (5), (7)).
    - No jurisdiction (PJ or SMJ)
    - Improper process
    - Improper service
    - Improper venue
    - Lacks necessary joinder
5. Counterclaims.
6. More definite statement (FRCP 12(3)). This is rarely granted anymore —complaint doesn't have to be detailed, because discovery is used to flesh out complaints under the FRCP scheme.

Note FRCP 12(f). See nn7 – 8p455. A "mini 12(b)(6) motion"; strikes a portion of the complaint.

Rule 12 mechanics (n9p456)

a.
1. No—12(h)(1).
2. No—12(g) consolidation requirement. But B can move for judgment on the pleadings.
3. No—12(g).
4. He can, but it will be stricken on a 12(f) motion (due to 12(h)(1)).
5. Yes—12(h)(2).
6. Yes—12(h)(3).

b.
1. No—12(h)(1).
2. ??
3. No—15(a), an exception to 12(h)(1), which gives a party 20 days to amend or clean up. See IRCP 4(i).

Zielinski: What did Δs do? The gave a general denial. But, Δ must specify which part of ¶5 it denies. Even better, though, Π should have broken up ¶5 into distinct averments.

Tuesday, February 10

FRCP 11
Pleading requirements

FRCP 11

FRCP 11 uses an objective test—no "pure heart, empty head" defenses.

n9p434

(a) Neither can be sanctioned—there has been no representation to a court.
(b) No—see FRCP 11(d), which carves out discovery motions from FRCP 11.

N.b., IRCP 12-123, "Sanctions for frivolous conduct in a civil case," (handout).

Pleading requirements

Pratt & Whitney: is this a pleading problem of form or substance?

- That's hard to say. FRCP 9(b) pleading looks like code pleading, since specificity is required in this special case; Π must plead why statements were fraudulent, and that's Π's problem here. This means that Π has to allege that the statement makers either (a) knew what they said was false, or (b) recklessly disregarded whether it was true or false. In this way, then, Π's problem might be either form (didn't plead "on information and belief") or substance (has no way to prove either (a) or (b)).
- Why treat fraud differently? It's quasi-criminal. A fraud complaint is nearly slanderous and could damage Δ's reputation whether the complaint is meritorious or not.

N.b., n6p440: Private Securities Litigation Reform Act—here, "on information and belief . . ." is not enough.

Leatherman: about immunity, the right not to be sued at all. The 5th Circuit holds a heightened pleading standard in order to effectuate the immunity policy. Π's problem is getting to discovery in order to even see Δ's policies. SCOTUS says:

- Δ doesn't have immunity—it just gets special consideration in these types of cases.
- The heightened pleading standard doesn't jibe with lenient FRCP pleading requirements.

N.b., p414Supp.

Gomez: what did Π allege, exactly? See ¶1p449: Π must allege that

1. Δ deprived him of a federal right, and
2. Δ acted under color of law.

Π didn't allege anything about Δ's state of mind, and SCOTUS says he didn't have to.

Why didn't Π amend? Because if Π pleads it, then he will probably have to prove it at trial. Note that Δ is in the best position to know what his

state of mind was, so Δ should plead that, if anybody should.

N.b., the concurrence itc., which discusses the burden or pleading as opposed to the burden of persuasion.

N.b., the current state of the law in cases like this uses an objective standard, rather than a subjective standard as here.

Monday, February 9

Pleading

Pleading

- *Superior Court (Hernandez)*: problem of form—insufficient information in pleading.
- Haddle v. Garrison: problem of substance—what does "property" mean under the relevant statute?

Consistency in pleading

See pp422-424.

Inconsistent theories: under FRCP, you can plead inconsistent theories. This can be helpful when, for instance, you want to sue multiple Δs and don't know which Δ is really at fault.

- However, this raises an ethical/FRCP 11 issue re: allegations. See FRCP 11(b)(3): if you allege facts likely to have support after discovery, you must specifically identify that.
- FRCP 11(b)(3): note that you can plead "on information and belief . . ." in order to identify those facts that you (only) expect to be proven.
- Idaho hasn't amended IRCP 11 to match the newer FRCP 11. Differences:
  - IRCP only purports to regulate an attorney's signature only.
  - No safe harbor provision (FRCP 11(c)(1)(A)) in IRCP 11.

Business Guides: note that Π attorney didn't violate FRCP 11 w/r/t his signature in the first pleading because of the circumstances, which required immediate action for a temporary restraining order (TRO). But Π attorney

did violate the amended FRCP 11—FRCP 11(b) says "or later advocating." Π attorney didn't conduct a reasonable inquiry after filing; especially once Π found 3 of 10 seeds weren't seeds. Instead, Π continued to press the claim until the court itself fournd out what was going on.

Gerbode: sanction itc.: moving party gets one half of its costs, court gets the other half. So the court is taking away some of the FRCP 11 carrot.

- IRCP 11: the court shall impose a penalty.
- FRCP 11: the court may impose a penalty, and the penalty shouldn't exceed the amount needed to deter.

Thursday, February 5

Pleading
Bridges
Superior Court (Hernandez)
Haddle

Pleading

Bridges v. Diesel Service: FRCP 11 requires reasonable research and truthful allegations in pleadings. Counsel wasn't fined itc. because he tried to remedy the situtation asap, in good faith; because he sought to withdraw the complaint; because the court thought counsel had seen the error of his ways already.

People v. Superior Court (Hernandez)

What are the essential elements of a complaint?
(N.b., when in doubt, include it – but, don't trap yourself by pleading nonexistent facts. Also, the more specific allegations you make, the more you'll learn from Δ's answer.)

What must you allege on a tort claim (see FRCP From 8)?

1. Negligence; i.e., duty and failure.
2. Proximate cause.
3. Damages.
4. In a code pleading jurisdiction – how negligent.

Itc., what's essential?

1. Median without barrier, which means the highway was unsafe.
2. State had responsibility for maintenance.

3. As a result, the vehicle crossed the median.
4. The vehicle collided with Πs, seriously injuring Πs.

Haddle v. Garrison: the issue itc. comes down to statutory construction – what does "property" mean? The Court looks to authority from definitions contemporary with the enactment of the statute.

Tuesday, February 3

Fuentes
Pleading

Fuentes

Prejudgment seizure of property: why does the 14th Amendment apply – it applies only to states, right? Because the creditor has got the power of the state to repossess (by the writ of replevin).

Writ of replevin requirements:

- Post a bond (SCOTUS says this is not good enough because if the repossessor is wrong, the taking still would have happened).
- Allege entitlement.
- Expose yourself to liability.

Note that the creditor's concern is that the debtor will sell or destroy the property.

Mitchell v. W. T. Grant (n4p379): held that a Lousiana statute allowing repossession without preseizure hearing is constitutional. This is the current state of the law.

Di-Chem (n4p379): Georgia statute that was like that in *Fuentes* was not constitutional, despite *Mitchell*.

Pleading

Two important things to learn re: pleading:

1. What is the minimum you have to do? I.e., how bad can you be?
2. What is good pleading?

History of pleading

English common law: to get heard at the King's Bench, there had to be a breach of the peace, so *vi et armis* was pleaded.

- Writ of debt: not liked by creditors because Δ could "wage his law" with oath helpers. So, creditors started using writ of trespass, indebitatus assumpsit.
- Equity – differences from law:
  - No jury.
  - Longer, factual pleadings.
  - Depositions.
  - Subpoenas.
  - Parties required to testify (whereas at law, the parties could not testify).

Problems, p391

1. FRCP 12(b)(1)-(5). What's the FRCP equivalent of a "traverse"? Answer with denial. What's the equivalent of "confession and avoidance"? Affirmative defense.

Procedural reform

The Field Code: first appeared in the 1800s in New York, and was quickly adopted by many jurisdictions. What it did:

- One form of action – the civil action. Merged law and equity.
- Did away with writs. Instead, a complaint had simply to set forth the "facts constituting the cause of action" (n.b., "cause of action" is a code pleading term – no such thing under the FRCP).

Code v. notice: consider the *Hernandez* case at np402.

Bell v. Novick: the court tells Π its in the wrong court – federal court requires only a short, plain statement. See FRCP Form 9 (p172Supp).

- What advantage is conclusory pleading to Π? Π can plead that it Δ was negligent without knowing why Δ did what he did.

Monday, February 2

Attorney's fees
Provisional remedies

Attorney's fees

Contingency fees

Ethics: you must represent your clients first and only – the impact of fee considerations must be zero.

- Some lawyers will adjust contingency fee percentage if the case settles early.
- Another possibility is a hybrid contingent/hourly fee.

Common fund (see p351): often used in class actions.

Private attorney general: available in Idaho and perhaps elsewhere.

- Sometimes a private firm benefits the public as an attorney general would.
- Appropriate when:
  1. Lawsuit provides a substantial public benefit.
  2. Necessity of private action – usu. this means you have asked the attorney general to prosecute the claim and he refused.
  3. Large number of people are benefited.
  4. Lawsuit is brought for public purposes.

See handout concerning Idaho statutes re: attorney's fees.

FRCP 68: encourages Π to accept reasonable settlement offers, because otherwise Π loses attorney's fees going forward (from the offer). And if Δ wins, Π must pay Δ's post-offer costs (less attorney's fees in federal court; including them in Idaho when proper).

IC 12-301: Π can make an FRCP 68-like settlement offer to Δ. If Π makes an offer and recovers more at the end of a trial, Π can recover also the interest on the judgment from the time the offer was made.

Evans v. Jeff D.: the Court says it wants to encourage settlement.

Provisional remedies

The problem is that we have to change the status quo now without knowing all the information.

Inglis & Sons

- Preliminary injunction – Π wants Δs to price above cost. The trial court denies injunction because it doesn't think Π's case is strong enough. The appellate court, however, says there is another test that says if the probability of harm is high, Π's case needn't be so strong.

Thursday, January 29

Punitive damages
Equitable remedies
Declaratory judgments
Attorney's fees

Punitive damages

State Farm

What is substantial? Itc., $1m is large under the facts, but how do trial courts apply this rule in the future? There is no easy answer to this. N.b., *State Farm* purports to be applying *Gore*, but clearly it has done something more.

Equitable remedies

Note that some specirfic remedies appear equitable but are nevertheless at law for historical reasons (e.g., replevin, ejectment).

Sigma Chemical

- What must Π prove to get injunctive relief?
    1. No adequate legal remedy.
        - Itc., Π can't prove any money damages, and Δ probably couldn't pay even if Π could prove them.
    2. Injury to Π will outweigh injury to Δ.
        - Δ has an argument for hardship – if the court enjoins Δ, Δ is out of work (but, Π says, only with this particular competitor).

Declaratory judgments

Declaratory judgments are legal remedies – the court declares what parties' legal rights and obligations are. Standard uses are re: contracts and by insurance companies who want to determine the extent of coverage (so they won't have to pay for a policyholder's defense).

To seek a declaratory judgment, there must be a real and existing dispute – no hypothetical disputes will be adjudicated.

Attorney's fees

- Public interest adjudication is oftern funded mainly by attorney's fees awards.

- American rule: parties bear their own attorney's fees. English rule: winner gets its attorney's fees.

Funding litigation

- Contingent fees. N.b., "stock-picker" style case selection raises some ethical issues.
- Prepaid legal services arrangements.
- Legal aid.
- Lawyer's obligation to do pro bono work.

Tuesday, January 27

Damages

Hatahley

Punitive damages

Damages

Hatahley: what damages did the Navajo suffer?

- value of burros and horses.
- pain and suffering.
  - But is there recovery available for pain and suffering as a result of damage only to personal property? Not in negligence, but an intentional tort is being sued on itc.
  - The appellate court says the Navajo can recover these damages, but they must prove them with medical testimony and individually (not as a group).
- herds and crops decimated because they couldn't be maintained.
  - The trial judge awarded Πs half of this damage; the appellate court said that was too arbitrary.
  - The appellate court also said that Πs were required to mitigate these damages by replacing their horses and burros within a reasonable time. But note that the Navajos may not have the money to mitigate, and may not be able to secure credit. (A note case suggests that a Π incapable of mitigating need not mitigate.)
- ability to travel and way of life impacted.
  - How do you measure this?

Hatahley demonstrates the limits of our judicial system in providing substitutional remedies.

Subjective damages

- How do we measure them?

- The golden rule argument is not allowed -- "how much would someone have to pay you to go through this?"
- Instead, the juries must put themselves in the Π's shoes and consider how much the change in life it worth.

Punitive damages

Oberg: Oregon constitution allows review of punitive awards only where ther is no evidence to support them. SCOTUS says this provision violates Due Process because it could make for awards that are either biases, too arbitrary, or both.

Gore: Π gets $2m in punitives on $4K compensatories. SCOTUS gives three guideposts for assessing a punitive award:

1. How reprehensible was the conduct?
2. What is the magnitude of the punitive to compensatory ratio? (N.b., would itc. look so bad if each class member got $4K each in punitives, instead of the sole Π getting it all? Probably not.)
3. What was done in comparable cases?

Walston v. Monumental Life (1996): Idaho case following *Gore*.

State Farm (in Supplement): ordinarily, single digit punitive to compensatory ratios will test the limits of Due Process.

Monday, January 26

Applying Hanna
Ricoh
Gasperini
Semtek
Litigation

Applying *Hanna*

Stewart v. Ricoh

Issue: state has anitpathy toward forum-selection clauses – must a federal diversity court apply that preference?

- Lewis says the Court should have held that contract rights are a matter of state substantive law, but that 28 USCA § 1404(a) governs this case, under *Hanna*, because forum selection is

procedural.
- The Court held, however, that § 1404 controls and the state forum-selection rules may be considered as a factor.

Gasperini

Issue: a difference in rules for judicial review of jury awards:
- State law says a judge may change a jury award only if the award "deviates materially from what would be reasonable compensation."
- Federal law allows review only if the award "shocks the conscience."

The Court's rationale: state reexamination law is substantive, and therefore a federal district court must apply it. But a federal appellate court must review the district court's rulings for abuses of discretion.

Semtek

FRCP 41(b) dismissal
- What the analysis itc. would have looked like before *Semtek*:
  1. Do we have a *Hanna* or an *Erie* problem? *Hanna*, because a FRCP is involved.
  2. Is the relevant FRCP procedural? Yes – preclusive effect sounds pretty procedural.
- Majority opinion: adjudication on the merits is not intended to affect claim preclusive effect in another jurisdiction; it simply means that the party can't refile in the same exact court (¶2p238Supp). So, FRCP 41(b) is not on point here. Instead, federal common law governs, and the Supremacy Clause is at play. The federal law says: "apply state law; there is no substantial federal interest at stake."

Litigation

Notes, p313
- n1a: most cases do not go to trial.
- n1b: not much civil litigation in federal courts – only about 1%.
- n1c: 27% of cases are criminal, and only 4% of those go to trial.
- n1d: rural areas have faster dockets, usu.
- n1e: economic data.

Remedies

Hatahley: what damaes would you want to prove if you were Π's counsel

itc.? To start with, you'd want to prove damages for the value of the horses and burros. Here the appellate court remands on the trial court's damage determination for this value because the trial judge did not apply a market analysis; the appellate court says that Π must prove a value from the market.

Thursday, January 22

Byrd
Hanna

***Byrd* redux**

How did the *Byrd* court strike a balance? It looked to the long-standing practice in federal courts of using juries (in this the court was influenced, but not controlled, by 7th amendment). See ¶3p282, re: federal judges determination of witness credibility.

Imagine a scenario where the judge-jury question would "bound-up" rights: first, identify the rights involved in *Byrd*; these were Π's rights to recover in tort or, alternatively, under the workers' comp. statutes. So, if the South Carolina supreme court had found that the judge requirement in the workers' comp. statutes was intended by the legislature so that Π-sympathetic juries should not have as much control in cases, the Δ's right to have a judge find the facts would probably be "bound-up."

Hanna

Hanna is not an *Erie* case. Why? It's really a Rules Enabling Act case – it is the applicability of the FRCP that is in question.

The *Hanna* annex to *Erie*: can we add 10 words to the *Byrd* rule to encompass the state of the law after *Hanna*?

First, *Hanna* says to consider the constitutionality of the federal rule (¶1p289): a federal rule is unconstituional when the Advisory cmte., the court, and congress all erred in placing the rule under the REA (¶1p289). The REA, when combined with the constitution, permits procedural rules and anything that you could rationally argue is procedural. So:

"Apply an arguably procedural federal fule."

Just for the hell of it, what would happen if you applied the *Byrd* rule to the facts

in *Hanna*?

1. Are the rights bound-up? You can make the argument that they are: the state may want executors to have early actual notice, and so enacted the rule. A counterargument to this is that there is no indication that this rule is important to executors' rights – it's just a way of doing things (this argument is made in the *Hanna* decision).
2. Outcome-determinative? Well, are we asking this *ex ante* or *ex post*? If *ex ante*, it's hard to imagine that the choice is outcome-determinative. If *ex post*, there is obviously a major difference – the decision determines who wins.
3. If it's not outcome-determinative, would if affect forum-shopping or cause inequitable law-application? Doesn't seem like it, but you could argue that it could be in some situations, e.g., on the last day before the statute ran, or when the executor is hard to find.

Applying *Hanna*

Burlington Northern. A 10% award bonus starts to look pretty substantive – it seems like a right, since it's about how much you get. But SCOTUS says we don't even get to *Erie* doctrine here because FRAP 38 applies. Instead, then, this is a *Hanna* problem and the federal rule applies. But is this the right decision? Note that FRAP 38 purports on plain-meaning to deal only with "frivolous" suits.

Tuesday, January 20

York
Byrd

Procedural law

What is "procedural law"? Student suggestion: "consider, does it offer an advantage to one party or the other? If so, it's substantive law; if not, it's procedural."

Guaranty Trust v. York

Procedural law:

- "the manner and means" by which a right to recover is enforced (¶3p277).
- does is significantly affect the outcome? (¶3p277). If not, procedural; if so, substantive. Note that this applies too broadly

– almost every rule affects the outcome in some way.
- are they "substantive rights" or of a "mere remedial character"? (¶1p277).

The issue in this case has to do with choosing between the doctrine of laches as used in federal equity courts and the state statute of limitations. The state statute would be specific in its terms, whereas federal laches would be open-ended. The court says the state statute is a substantive law: the outcome would be significantly affected depending on which of laches and the statute was chosen.

The outcome-determinative test: it's problematic because, again, any rule could affect the outcome.

Byrd

Byrd contains, still today, the definitive approach to the *Erie* doctrine.

Procedural law

Hypo (used on previous exams): attorneys' fees – in federal court, fee awards are determined by the American rule (each party bears their own attorneys' fees. But, in Idaho, there is a statute that says the winning party can get its attorneys' fees. The Idaho supreme court has interpreted the statute with a court rule that determines when a winner can get attorneys' fees. What law should a federal court sitting in diversity apply?

- "Form and mode" of enforcement (¶3p282).
- "bound up withrights and obligations (¶3p282).

The issue in this case has to do with choosing whether a judge or a jury decides the factual question in South Carolina workers' comp. cases.

Would *Byrd* be decided differently if the rule was in a statute? Sure. Here, though, SCOTUS finds no reasons for the rule in any South Carolina caselaw, so the rule is just "form and mode."

The holding of *Byrd* (in 25 words or less)

First, *Byrd* says that federal diversity courts must honor state-created rights and obligations (¶2p282).

"Apply state law defining rights and obligations."

Next, *Byrd* says that even "form and mode" rules must be applied

in federal diversity courts if the outcome could be significantly different depending on the rule choice (¶4p282) (n.b., as in *York*). However, outcome is not the only consideration (¶0p283).

> "Apply other state law potentially affecting the outcome, unless federal interests outweigh the outcome impact."

Thursday, January 15

Erie

Considering *Erie*

The "general law": Under *Swift v. Tyson*, federal courts sitting in diversity could look to any number of sources – restatements, treatises, caselaw across many jurisdictions – to find the law to apply. More cynically, judges of those courts could basically pick the law they liked the most.

Is *Erie* a consitutional case? Perhaps it is, in two ways:

1. Equal Protection (14th amendment (also 5th amendment, as well as the historical understandings of the rationale for diversity jurisdiction)).
2. Federalism: no part of the constitution seems to give Congress the power to make state law, so how can federal courts have the power to make it?

My question

Does *Swift* suggest the federal courts may declare the law? Or only that they can find it?

Lewis seems to think that *Swift* lets federal diversity courts declare law for states.