SYLLABUS

Purpose Of The Course

The three words of this course’s title convey important information. First, this course covers federal, not state, procedure (though you will learn a bit about state procedure along the way).

Second, this course covers civil, not criminal, procedure. Most people have seen some criminal procedure in cop shows; it governs how the state proceeds when it investigates, arrests, and prosecutes someone for a crime. Civil procedure appears on many fewer TV shows (mainly Suits and The Good Wife) and governs lawsuits between private parties (you, me, companies, unions, governments, etc.). Many actions have criminal and civil consequences: a death can be murder (criminal) and wrongful death (civil).

Third, this course covers procedure, which gives the structure but not the substance of a lawsuit. Procedure tells you how to sue someone, while other areas of the law (contracts, torts, patent law, etc.) tell you what you can sue for (breach, negligence, patent infringement, etc.).

The course loosely tracks the progress of a federal civil suit, covering (1) jurisdiction over parties and cases, (2) pleadings, (3) discovery, and (4) judgment with and without trial, and then, at the end of the semester, uses (5) joinder of claims and parties to tie many threads together.

You will learn the policies behind modern civil procedure and how to interpret and apply procedural rules, statutes and cases. You will gain a good understanding of where and how to file a lawsuit in federal court and of how to pursue that lawsuit to its conclusion without trial. (The specifics of trial – which is an increasingly rare event in litigation – are covered in courses such as Evidence and Trial Advocacy.)

Civil procedure uses the case method, where you read a court case to find the rule the court arrived at and why; it also introduces you to statutory interpretation. Like all law school courses, this course will help you learn to “think like a lawyer.” More than most courses, civ pro also allows you to think about the strategies, tactics, ethics, and etiquette of being an attorney.

Required Materials

The required materials for the course are

- Rowe, Sherry, & Tidmarsh, Civil Procedure (3d ed. 2012) (hereinafter Rowe);
- the 2014 Rowe Supplement (Supplement) (contains the Federal Rules of Civil Procedure (Rules), relevant statutes, and late-breaking additions to Rowe);
- Harr, A Civil Action (1995) (any edition you can find, paper or electronic);
- i>Clicker+ (ISBN 1464120153) or i>ClickerGO (the smartphone app); and
- the CopyPak for this course.

Strongly recommended, but not required, are

- Glannon, Civil Procedure: Examples and Explanations (7th ed. 2013); and
Reading Assignments and Texts

In general: A list of reading assignments is attached to this syllabus; a separate document ("Class Dates and Times") matches those assignments to the specific dates of this semester. Use the headings on the assignment list and the ROWE chapter headings to help keep the structure of the course in view.

Textbook, Supplement, and CopyPak: The primary texts are ROWE, its Supplement, and the CopyPak. A typical assignment: a case or two (with notes) from ROWE, the Supplement, or the CopyPak, along with a Rule or statutory provision (almost always found in the Supplement).

Each assignment comes with questions/notes on the attached assignment list and in the text that will help your understanding. You will be encountering unfamiliar words and phrases. Look them up; this will slow you down at first, but you will soon develop the vocabulary you need.

A Civil Action: Law students often find civil procedure abstract and difficult. The non-fiction account A Civil Action gives you the real-world story of a tort case brought by ordinary people against two large corporations, in which the Rules play a key role. (The Rules have been amended substantially since the book was written; you need learn only the current Rules.)

I emailed everyone who was assigned to this class by late July and suggested that you read A Civil Action before school started; if you have not read it yet, you should plan on completing it by September 12. I will bring it into class discussion after that. John Travolta and Robert Duvall starred in the film; you will watch the movie during class on October 17.

Glannon: Glannon's Examples & Explanations: Civil Procedure is a strongly recommended (not required) text. If you choose to get it, use it during the semester as a review for each topic. Glannon covers more topics than we will; skip the parts that do not match our class coverage.

Other resources: Meador & Mitchell's American Courts is a useful introduction to the federal and state courts (especially if it’s been years since you took an American Government class). Wright & Miller's Federal Practice & Procedure (on reserve) is the gold-standard treatise on civil procedure, among other subjects; you may find it useful to consult during this course, and certainly you will use it throughout your career. For more real-world background, Civil Procedure Stories (on reserve) provides the history and litigation strategy of a number of important civil procedure cases, including several you will study.

Problem Sets

Sometimes, in addition to or in lieu of the assigned reading, I will assign problem sets (found in the CopyPak). We will discuss the problems in class, so please answer them as part of your class preparation. You will not turn in your answers. I will publish model answers and explanations on the class website after class discussion. The problem sets will give you the opportunity to test how well you’re understanding the material. Follow up with me on any misunderstandings.

Class Scheduling and Participation

Special note: My father is very ill. I will be canceling a few Friday classes so that I can visit him. I may also need to cancel class unexpectedly. Therefore, in consultation with the Dean and the Associate Dean of Academic Affairs, I have added extra class time to the early part of the semester so that we need not hold excessive makeup classes later in the semester, when you will be busier. A separate handout ("Class Dates and Times") shows the changes to the schedule.
Class participation: Bring Rowe, the Supplement, the CopyPak, and your i-clicker to class with you each day. You will participate regularly in two different ways.

First, you will use the i-clicker (or the i-clickerGO app) to respond to multiple choice questions in class. Everyone should participate in this way, whenever such questions are asked. You will not be graded on whether you give the correct answer: the questions are for you to assess your own understanding and for me to assess the class’s general understanding.

Second, each day, I will “cold-call” (meaning at random, with no advance notice) on several students to help discuss the assigned material. Always be prepared to discuss the material assigned for the current date, even if we carry over discussion from the previous class.

Two Free Passes: You will probably have a bad day at some point. Each of you has two free passes from cold-calling, but to claim a pass you must email me at least 30 minutes before class starts (at helliott@law.ua.edu) and you must hand me a note at the beginning of class telling me you are claiming a pass. If you fail to take both steps, you are fair game.

A note on class participation: Do your best to participate early and often; at the same time, do not monopolize the discussion, stay on topic, and be respectful of the others in the class. If I believe that someone is participating too much, too little, or inappropriately, I will contact that person. If cold-calling intimidates you, please come to my office hours so we can chat about it.

Grading

Your grade is based solely on the following components:

- Final examination, letter-graded: 70%
- Three practice examinations, pass/fail: 10% each

Final examination: The final examination will be a cumulative in-class examination given at the time assigned by the Law School (currently December 1 at 1:30 p.m.). You will take it anonymously, using your Law School exam number. The examination consists of a multiple-choice section and an essay section. The multiple-choice questions must be answered on a Scantron; there is no penalty for wrong answers. On the essay section, you may handwrite or use your computer as provided by the Law School. If you use a computer, you must use ExamSoft or the like (as approved by the Registrar). All of the exam is open-book (defined below).

I will explain what I expect from you on the examination throughout the semester, provide extensive sample examination questions, and hold a final question-and-answer session. That final session will consist only of your questions and our answers to them; I will not provide any kind of general review of the course. You may continue to ask me questions via email (or in person, if you see me) until 3 p.m. on the day before the exam commences. You may not contact me with questions after that deadline.

Grading the final examination: The multiple-choice questions on the final will be graded simply for correctness (though I give you the opportunity to write out an explanation if you believe I have made an error). There is no penalty for wrong answers, so you should guess on any question about which you are unsure.

I will grade your answer to the essay questions using several criteria:
PLEASE READ THIS DOCUMENT CAREFULLY; YOU ARE RESPONSIBLE FOR ITS CONTENTS,

· your ability to see the legal issues raised by the fact pattern given;
· your ability to provide the legal rules relevant to the issues, whether from the Federal Rules of Civil Procedure, the U.S. Code, or a case;
· your ability to use the rules and the facts to analyze the issues and to show me the steps in your argument as you reach a particular conclusion to each issue;
· your recognition and analysis of potential flaws in your argument (because the facts cut both ways, the law is uncertain on this issue, or the like); and
· the persuasiveness with which you state your argument.

The better your answer is organized, the better I can see how you satisfy these criteria. I do not take off points for misspellings or grammatical mistakes, but such flaws may make it more difficult for me to understand your reasoning and thus may indirectly affect your grade.

**Final grades in this class follow the mandatory curve imposed by Law School policy.**

I will circulate a memorandum before classes end about how to follow up with me in the spring semester about your performance in the class and on the exam.

**Mandatory practice examinations:** There will be three mandatory pass/fail practice examinations; none is given anonymously. One will consist solely of multiple choice questions; the other two will include both multiple choice and essay questions similar to those you will see on the final exam. The purpose of the practice examinations is to let you try taking a law school exam before you take your final examinations and earn grades.

· The first mandatory practice examination will be an **in-class multiple-choice examination taken on Thurs., Sept. 4**, it will cover material up through Aug. 28.
· The second mandatory practice examination will be an **in-class multiple-choice and essay examination taken on Fri., Oct. 3**, covering material up through Sept. 26.
· The third mandatory practice examination will be an **in-class multiple-choice and essay examination taken on Fri., Oct. 24**, covering material up through Oct. 16.

If anyone misses a practice examination for an acceptable reason, I will consult with him or her to set a make-up time. An acceptable reason is a serious or infectious illness supported by a doctor’s note, a serious injury supported by a doctor’s note, a serious illness or death in your close family, or the equivalent. Unacceptable reasons include (but are not limited to) attendance at a social event such as a wedding, attendance at an away game, or vacationing with family.

Because each practice exam is pass/fail, anyone who turns in a response that reflects serious effort will receive the full 10% allocated to that exam. If you miss a practice exam for an unacceptable reason, or if your response to the exam questions convinces me that you did not take the exercise seriously, you will receive an F and thus lose 10% from your final grade.

I will give feedback on your exams and return them to you; we may also take some class time to go over them. **I will not give letter grades on any of the practice exams, nor will I guess what final grade might be predicted from your practice exam performance.** Because final grades are curved, your performance is relative to your classmates’ performance; it is therefore impossible to predict your final grade from your practice exams. Note that if everyone takes all three practice examinations and passes them (I have only failed one person in seven years on a practice exam), everyone heads into the final examination on equal footing.
What "open book" means: All the tests in this course are open book, meaning you may use any inanimate, non-electronic resources, including the course materials, your own outline, another student’s outline (so long as you have the author’s permission), and commercial outlines. You may not talk to anyone about the exam while you are taking it (other than to ask a question of the proctor or the Registrar’s Office), and you may not use any electronic resources (for example, you cannot use the Internet or refer to the electronic version of your notes while taking the exam). Print out, in advance, anything you wish to use during any test in this course.

Studying for exams: The materials discussed in the previous paragraph can certainly be helpful in studying. It would be a mistake, however, to bring lots of supporting materials with you to any exam. No law school exam affords you time to look up much information at all, and if you plan to rely heavily on your materials, you will do poorly. The material needs to be firmly established in your head by the time of the exam.

Thus, you should prepare for all exams as if they were closed-book. The only real difference will be that, during an open-book exam, you may refer to a document if you suddenly “blank” on an issue. Yes, this means flashcards will be helpful study aids.

Course Webpage

The course webpage is hosted by The West Education Network (TWEN). There you will find this syllabus, the reading assignment list, the class calendar, discussion forums, sign-up sheets for activities (including the lunches discussed below), announcements, and links to supplemental material. I will also use the email function of the website to contact the members of the class periodically; in particular, I will email you if an emergency requires me to cancel (or delay the beginning of) class.

Everyone should sign up at http://lawschool.westlaw.com/ (follow the link to TWEN, provide any information requested, click “Drop/Add,” and add this class). You must supply an email address you actually use when you sign up for the TWEN site. Do not use your UA email address if you do not check it at least daily. This is especially important this semester, given my father’s health.

Please remain enrolled in the TWEN site after this semester is over; I like to email follow-up info in the spring.

Course Policies

Office hours: Office hours are Tuesdays and Thursdays after class; these are times that fit your class schedule. For appointments at other times, email me at helliott@law.ua.edu.

I encourage you to come to office hours as often as you wish, whether to talk about civil procedure, being a law student, being a lawyer, or maintaining your sanity in the face of all three. If you know you plan to stop by, please email me so that I may schedule my time accordingly. If you have not planned in advance to attend office hours, you are still welcome to come by, but you may need to wait while I talk with someone else who got there first.

I am a SafeZone Ally, one of many resource people on campus who provide an open door for individuals seeking information or assistance regarding sexual orientation, gender identity, harassment, and/or discrimination. Feel free to talk to me at any time if you or someone you know has questions or concerns.
Lunch: Early in the semester, I would like to meet with you in groups of five or six to have lunch, *my treat*. Please go to the TWEN site for this course, where you will find sign-up sheets (look in the left-hand column on the home page and click on “Signup sheets”). You are not required to come to lunch, but I hope you will.

Emailing me: I check my email regularly, but I do not usually check my email after work hours. If you email me in the evening, I will try my best to respond to your email the next day. Do not freak out if I do not respond immediately.

Attendance: Class attendance is mandatory. A roll sheet will be circulated each day. If you do not initial it, you are absent, regardless of the reason for your absence. The law school’s attendance policy provides that “A student who is absent *for any reason* from more than three class hours per semester credit hour in a course may be dropped from the roll or not allowed to sit for the exam and receive an ‘F’ for the course. If a student’s absences exceed three class hours per semester credit, the Dean, after consulting with the professor, will determine whether the student will be withdrawn without a penalty or not be allowed to sit for the exam and receive an ‘F’ for the course” (emphasis added).

For this four-credit course, you may miss no more than 12 classes.

**Do not email me to explain any particular absence.** You are an adult, and you are in control of how you spend your time; unless you have missed one of the mandatory practice examinations, I do not need to know that you are going to a wedding or that you are feeling under the weather.

**However, if the total number of classes you miss approaches the maximum of 12, you must contact me.** The Honor Code provides that “Knowing failure to report having missed more than a certain number of classes to an Instructor who specifically requires all Students to do so constitutes an Honor Code violation.” Should something occur that you believe will cause you to miss an inordinate number of classes, immediately contact the Associate Dean of Academic Affairs so that you may make appropriate arrangements to deal with your situation.

Electronic devices: Cellphones, PDAs, and similar devices must be off during class unless you are using the i-ClickerGO app. You may not send or receive calls, text messages, instant messages, or the like during class unless special circumstances (an imminent birth, for example) justify leaving your phone on. Someone whose use of such a device interferes with the classroom learning experience may be asked to leave class and will be considered absent for that day.

Laptops are permitted in class only for taking notes and for viewing websites or other documents that I have asked you to pull up. You may not use your laptop for any other purpose during class. Someone whose laptop use interferes with the classroom learning experience may be asked to leave and will be considered absent for that day. Laptops must be set up before class starts.

**A note about laptops:** Many students attempt to transcribe every word said in class, feeling that only word-for-word transcription produces good notes. However, study after study shows that *trying to transcribe a lecture word-for-word actually reduces your comprehension* – your brain doesn’t do any work to paraphrase or understand the material but instead merely moves your fingers to type letters in response to the sounds you hear. **I will say it again: you do not learn when you are transcribing our class discussion on a laptop.**

Instead, those who take notes by hand learn far better, because to write notes by hand you must paraphrase – and thus must understand the material. Understanding is even better for those who
take notes by hand and then type them up later. You may wish to experiment early in the semester to see whether you learn better through handwriting or through typing.

**Recording devices:** The use of recording devices in class is prohibited without my prior written permission. I give permission only for disability-related purposes or for absences due to circumstances beyond your control; you may not record class simply because you believe it will aid your studying or because you will be out of town for an away game.

**Disability policy:** If you have a disability which requires accommodation (for classes, exams, or both), please contact the Associate Dean of Academic Affairs.

**Nondiscrimination Policy:** The University of Alabama is committed to providing an inclusive environment that is free from harassment or discrimination based on race, genetic information, color, religion, ethnicity, national origin, socioeconomic status, political beliefs, sex, sexual orientation, gender expression, gender identity, age, ability, size, or veteran status. The University of Alabama prohibits any verbal or physical conduct that threatens or endangers the health or safety of any individual or group, including physical abuse, verbal abuse, threats, stalking, intimidation, harassment, sexual misconduct, coercion, and/or other communication or conduct that creates a hostile living or learning environment. Harassment or other illegal discrimination against individuals or groups not only is a violation of University Policy and subject to disciplinary action, but also is inconsistent with the values and ideals of the University.

**The Honor Code**

The Honor Code governs your conduct in this class, as it does any other activity in which you participate at the Law School. “The goal of the Honor Code is to ensure that no Student gains an unfair advantage in Law School over another Student and to promote those ideals of honor and integrity that are germane to the practice of law. Pursuant to this goal, all students while enrolled at the University of Alabama School of Law shall refrain from intentionally lying, cheating, stealing, or tolerating such action by another and shall refrain from other reprehensible acts.”

**N. B.** This syllabus, along with the Reading Assignments handout and the Class Dates and Times handout, is available on the TWEN site for this course, should you misplace it.
READING ASSIGNMENTS

The assignments below are numbered Class 1, Class 2, etc. On a separate handout with the title "Class Dates and Times," I tell you what day to read each assignment. Make sure to read the material assigned for each date, even if we did not finish discussing the previous assignment on the previous date.

A typical assignment will include a case or two (with notes) from ROWE, the Supplement, and/or the CopyPak, along with a Rule and/or statutory provision. Rules are assigned by Rule number, and statutes by statutory citation (neither by page numbers). As noted on the Syllabus, sometimes there is a problem set in addition to (or in lieu of) assigned reading.

Each assignment comes with questions and notes (here and in ROWE, the Supplement, and/or the CopyPak) that will help your understanding. Generally, you should determine:

1. what principle(s) each case stands for;
2. how/why the principle was followed, abandoned, or modified in other cases (including note cases);
3. how the cases and the assigned statute/rule interact;
4. how this reading fits in with prior readings;
5. your answers the questions posed in the textbook/assignment list; and
6. what questions remain.

You are responsible for the note cases as well as the primary case(s), though you will not usually need to fully brief the note cases – instead, ask what the note case adds to or changes about the primary case, and pay attention to which facts are most important in answering that question.

I prefer to cover jurisdiction at the beginning of the semester, even though the chapters on jurisdiction are in the second half of ROWE. Do not be alarmed when the second assignment requires you to turn to page 409.

Some of the materials in the CopyPak are provided to give you an idea of what court documents look like. These are often marked in the assignment list with “skim” – when a document is so marked, just it look over to get a sense of it, rather than reading it carefully.

RST = Rowe, Sherry, & Tidmarsh, Civil Procedure (3d ed. 2012). Always check the Supplement for Developments and Clarifications to the assigned RST material. That part of the Supplement is keyed to the pages of RST.

Supp = Supplement. Only used when an entire case is found in the Supplement.

Rule(s) = Federal Rules of Civil Procedure, found in the Supplement (as are assigned statutes).

CP = CopyPak, with numbered assignments (e.g., “CP 3” means Assignment 3 in the CopyPak).
OVERVIEW

Class 1. The Course of the Course

Read RST 1-27; read A Civil Action by 9/12; read Meador & Mitchell, American Courts if you need more of a background on the U.S. courts

Please register on TWEN (http://lawschool.westlaw.com) and sign up for lunch.

PERSONAL JURISDICTION

Class 2. Jurisdiction over the Person: When Is It Fair to Haul Someone into Court?

Read this syllabus; RST 409-10 (up until Part 9.A), 416 (only the middle paragraph), 421-426 (notes 5-6, International Shoe, and notes 1-3); U.S. Const. art. III, ams. V, XIV; remember to read A Civil Action by 9/12

Make sure you have read the Syllabus thoroughly. You are responsible for its contents.

The Pennoyer case (which we are skipping) had held that “no State can exercise direct jurisdiction and authority over persons or property [outside] its territory.” If a non-resident could not be served inside the State’s boundaries, the state court could exercise jurisdiction only if the non-resident happened to own property within the State, so that the property was subject to the State’s territorial jurisdiction. “If the non-resident [has] no property within the State, there is nothing upon which the [courts] can adjudicate.” As note 5 on page 421 suggests, this rule became untenable as the United States came to have a large interstate economy. Imagine buying something over the Internet and having no recourse against the seller, even if she defrauded you, simply because she lives in another state!

What is the specific law that limits a State’s exercise of jurisdiction over a person?

As you will read on page 451, we don’t usually worry about personal jurisdiction over the plaintiff. She can usually sue wherever she wants to, so long as she can get jurisdiction over the defendant and meet other requirements we’ll discuss. Why is that? Why shouldn’t we ask about the plaintiff’s connections to the forum?

Even under Shoe’s more expansive definition of jurisdiction over the person, the relevant boundary for personal jurisdiction is still the State boundary. Federal trial courts take the personal jurisdiction of the States in which they sit (see Rule 4(k)(1)(A)). Do you agree with limiting personal jurisdiction by state lines? Why not have everyone in the U.S. subject to jurisdiction anywhere in the U.S.?

Importantly, the Shoe analysis applies only to ABSENT defendants. If you are served while present in the State, even if there only temporarily, you will be subject to the State’s jurisdiction (see Burnham, assigned below).

And, of course, you have no objection to the jurisdiction of the courts in the State where you live. Why is that?

Class 3. Jurisdiction over the Person, continued, and Long Arm Statutes

Read RST 436-450 (read through note 4 on page 450) (World-Wide Volkswagen); CP 1 (long arm statutes)

Even if an exercise of jurisdiction would be permissible under the U.S. Constitution, the State must have implemented that jurisdiction through a long-arm statute. Some states (such as California) exercise the full jurisdiction permitted by the Due Process Clause; other states (such as New York) exercise only portions of that jurisdiction. Why would a State choose not to exercise the full jurisdiction permitted to them?

How do McGee and Hanson change/implement/contradict Shoe? Are these two cases consistent with each other? Why or why not?
PLEASE READ THIS DOCUMENT CAREFULLY; YOU ARE RESPONSIBLE FOR ITS CONTENTS.

Should personal jurisdiction be different for human beings and corporations?

Do you think *World-Wide Volkswagen* is consistent with *International Shoe*? Does Justice Brennan (whose dissenting opinion is provided in part) appear to reject the minimum contacts test? Or does he think the majority has misread *Shoe*?

What does the majority in *WWVW* mean by “foreseeability”?

Class 4. Jurisdiction over the Person, continued

*Read RST 450-470 (start with note 5 on 450) (a variety of notes cases plus McIntyre); remember to read A CIVIL ACTION by 9/12*

Read the notes cases very carefully, comparing and contrasting the facts and conclusions in each case. Link the name of each case to the principle it provides.

Why does Keeton say that the plaintiff’s connections with the forum are irrelevant?

Is Keeton consistent with *WWVW*?

*Calder* is said to create an “effects” test – if you commit an intentional tort (like libel) that causes negative effects in a forum, you are subject to jurisdiction in that forum. Similarly, *Burger King* gives us the concepts of “purposeful availment” (you reached out and availed yourself of a State’s benefits, as in *Shoe*) and “purposeful direction” (you directed your activities at a State and caused harm there, even if you didn’t benefit therefrom). Why, if at all, are *Calder* and *Burger King* consistent with the *Shoe* test? What about torts that do not require intentional action? Could you be sued for negligence based on the effects test?

Remember the “stream-of-commerce” argument used with respect to cars in *WWVW*. What about putting parts into the stream of commerce for inclusion in larger products? Is a manufacturer of widgets subject to jurisdiction in any state where its widgets end up, even if it sells widgets only to one assembler in one state, who uses the widgets in a widget, who then distributes the widgets to other states?

*Burger King* and *Asahi* seize on language present in *WWVW* (expressed, in your textbook, in Justice Brennan’s dissent) that the personal jurisdiction inquiry is not only about contacts, but also about other factors of fairness. What are those factors?

Does *McIntyre* mean that a foreign company need only use an independent distributor to avoid risk of suit in the U.S.? Does *McIntyre* make sense compared to *Shoe*?

Does the *McIntyre* Court hold that there is a contacts problem, an *Asahi* problem, or both?

Does the Court’s focus on New Jersey alone make sense? Would the result be different in federal court? See Rule 4(k)(2).

Class 5. New Limits on Personal Jurisdiction? What About “General” Jurisdiction?

*Read RST 478-85 (stop before Part 9.D.2) (Goodyear), Supp 21-30 (Daimler)*

*Goodyear* addresses a loose end created by *Shoe*, which had stated (in dicta) that contacts with a forum could be “so substantial and of such a nature” that the defendant could be subjected to suit for anything in that forum. For example, if Google is subject to “general jurisdiction” in Idaho, it could be sued there for an event that occurred in Florida and has no connection to Idaho. What does *Goodyear* tell you about general jurisdiction? Is it only present where a corporation has its principal place of business?

*Daimler* is a recent follow-on to *Goodyear*. What does *Daimler* add?

Should Congress be able to open American courts to the claims of the plaintiffs in *Daimler*? Can these plaintiffs obtain justice against Daimler in Argentina? In Germany? Should that matter?

Why does Justice Sotomayor concur in *Daimler*? Do you think this case can be resolved as *Asahi* was resolved?
Class 6. Tag Jurisdiction and Consent; Some Details of Service Under the Federal Rules

*Read RST 485-499 (stop before Part 9.D.3; skip note 6, p. 498) (Burnham); Rules 3, 4(c)-(k); CP 2 (service documents) – skim; remember to read A CIVIL ACTION by 9/12*

Would Justice Brennan find service fair on a defendant who had *unknowingly* crossed a state border into California while on a Nevada hunting trip?

Is Justice Brennan really applying a minimum contacts analysis? What about Shoe’s repeated emphasis on the *connection* of the contacts to the lawsuit? Do Mr. Burnham’s contacts with California, as Justice Brennan describes them, have anything at all to do with the Burnham divorce?

If the question is whether the exercise of jurisdiction comports with our notions of fair play and substantial justice, isn’t Justice Scalia right that tag jurisdiction comports with due process because we’ve always done it that way? Isn’t a process “due” if everyone knows to expect it?

A defendant can waive his objections to an exercise of personal jurisdiction and acquiesce in that exercise. That’s consent. Consent can also arise from a contract or other agreement.

Rule 4(d) sets up a process by which a defendant can be asked to waive personal service of the plaintiff’s summons and complaint. This allows the plaintiff to get those papers to the defendant by mail. Note, however, that this is not “service by mail” — it is *waiving* personal service by accepting documents through the mail. Why would a defendant waive service? Why not force the plaintiff to hire a process server?

For what reasons might a plaintiff seek to serve a defendant in person rather than request a waiver of service (and thus save money and hassle)?

Class 7. Venue

*Read RST 515-519 (stop before Piper); CP 3 (Ferens); 28 U.S.C. §§ 1391(a)-(d), 1404, 1406; remember to read A CIVIL ACTION by 9/12*

A plaintiff can sue only in the specific federal district courts where she can show that venue is proper. She must also be able to obtain personal jurisdiction over the defendant in those courts. Would venue ever be proper in a place where personal jurisdiction is lacking? If not, what is the primary effect of venue?

Note that venue is different for corporations than for human individuals (compare 28 U.S.C. § 1391(c)(1) with 1391(c)(2) and (d)). Why these differences?

Do you think *Ferens* is an example of great lawyering, or of abuse of process?

A defect in venue is a waivable defect, and defendants frequently waive such defects for strategic reasons; can the defense waive a venue defect in a *transfer* of venue?

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**SUBJECT-MATTER JURISDICTION**

Class 8. Federal Question Jurisdiction

*Read RST 526-27 (stop before Doernberg article), 534-39 (stop before Part 10.B.2) (Mottley); Rule 84; Form 7 (the forms are part of the Rules and are presented after Rule 86); 28 U.S.C. § 1331; reread U.S. Const. art. III, s.2, cl.1*

A plaintiff must obtain personal jurisdiction over the defendant AND file in a proper venue AND file in a court that has subject-matter jurisdiction (SMJ) over her claim. SMJ in the federal courts is determined both by the Constitution and by statute: Article III sets the limits of federal SMJ, and Congress must implement that SMJ by passing statutes. Congress has never implemented the full scope of Article III.
SMJ may mean that a suit can be filed only in state court or only in federal court (called exclusive jurisdiction). Usually, both state and federal courts have SMJ over a claim (called concurrent jurisdiction), and the plaintiff may choose either. This means there is no necessary connection between the court you are in and the law that is applied to your claim: state courts can apply federal law, federal courts can apply state law, and both courts can apply the law of other forums (e.g., a federal court in Georgia can apply Alaska law to a case; a state court in Idaho can apply New York law to a case; a federal court in Maine can apply English law to a case...). This issue is called “choice of law” and is covered in the course “Conflict of Laws.”

State courts hear federal-law cases all the time. Indeed (and ignoring a few exceptions), state courts were the only trial courts for federal-law cases until 1875, because that’s when Congress authorized federal SMJ over federal-law questions. The U.S. Supreme Court heard federal questions before 1875, largely on appeal.

Why is a defect in SMJ not waivable (as a defect in personal jurisdiction is)?

Compare the language in Article III, section 2, with the language in 28 U.S.C. § 1331. Can you find any language supporting the idea that jurisdiction hinges on “the well-pled complaint”? Did Congress clearly implement this limited form of federal-question jurisdiction when it wrote § 1331? Would it be constitutional to exercise jurisdiction over cases where the federal question arose only in the defendant’s answer as a defense?

“Well-pled” does not mean “well-written” or anything like that; it is in contrast to “artfully pleaded,” meaning pleading that is trying to cheat on federal jurisdiction.

Since both plaintiff and defendant in Mottley were citizens of Kentucky, the case could have been heard in state court; why sue in federal district court?

**Class 9. Federal Question Jurisdiction, continued**

*Read RST 539-54 (Merrell, Grable); Supp 31-37 (Gunn); reread 28 U.S.C. § 1331*

If the plaintiff sues directly under a federal law, so that the federal law creates her claim (or cause of action), there is definitely a federal question, and the federal court must exercise its SMJ over her claim (see note 5, p. 554). The *Merrell* and *Grable* cases raise the issue of a state-law claim that has a federal ingredient.

The majority in *Merrell* puts great emphasis on Congress’s failure to include a private right of action under the Food, Drug, & Cosmetics Act (FDCA): only the Food & Drug Administration (FDA) may enforce the FDCA by suing manufacturers in federal court; if a private person is harmed by a violation of the FDCA, that person has no private federal remedy. (By contrast, for example, a person harmed by pollution has the right to sue directly under the Clean Air Act to obtain an injunction stopping the pollution and civil penalties that punish the polluter.) The majority and dissent differ in their views on the significance of this fact. Which side is more persuasive to you?

Could *Merrell* have been removed to federal court on diversity grounds? Take a look at 28 U.S.C. § 1442(b) to find the answer.

Do you think the federal issue was of sufficient importance in *Grable*? Or did the Court wave the magic wand of “federal taxation” over the case?

What does *Gunn* tell you about the “necessary” and “substantial” prongs of the *Grable* test?

**Class 10. Diversity Jurisdiction**

*Read RST 554-568 (stop before Part 10.C.2) (Sheehan, Hertz); 28 U.S.C. §§ 1332(a)-(c),
(e) (ignore (d)); remember to read A CIVIL ACTION by 9/12*

By definition, a diversity case involves a federal court hearing a state-law claim. If the claim arose under federal law, SMJ would be present under § 1331.
Look carefully at the way Article III, section 2 and 28 U.S.C. § 1332 define the diversity jurisdiction. How does the Court interpret “citizenship of [a] State[]” in 1332(a)(1)? Why require complete diversity? Does the Constitution require it?

You are a citizen of the state where you are domiciled. What does that mean, according to Sheehan? See also note 5, p. 559.

To be a citizen of a State, you must be also a citizen or permanent resident of the U.S.; if you are not a citizen or permanent resident of the U.S., then you are a citizen or subject of a foreign country under § 1331(a)(2) and (3), no matter how long you’ve lived in the U.S.

Oddly, however, you can be a citizen of the United States but not a citizen of a State! If you are domiciled abroad, then you are not a citizen of a State, even if you have retained your U.S. citizenship. Someone in this situation cannot be sued in diversity, because he does not satisfy 1332(a)(1)’s requirement that he be a “citizen[] of [a] State[]” or 1332(a)(2)’s requirement that he be a “citizen[] or subject[] of a foreign state.” This led to the dismissal of a case for lack of SMJ when a Hollywood studio tried to sue Elizabeth Taylor for breach of contract in federal court in California. She had moved to London to live with her husband, Richard Burton, but she had not become a British subject, so she could not be sued using § 1332 as a basis for jurisdiction.

Do we still need diversity SMJ in our interconnected, interstate United States? Why or why not? What benefit is there from the federal courts hearing state-law cases? Why not just leave all those cases to the States’ courts?

How does Hertz affect employees who live in Phenix City, AL, and work in a plant in Phenix City which manufactures 100% of the goods produced by a company headquartered in Columbus, GA, just across the Chattahoochee?

Class 11. Diversity Jurisdiction, continued, A Little Bit on Joinder, and Removal

Read RST 568-72 (JTH), 589-94 (Spencer); Rules 20-21, 81(c); 28 U.S.C. §§ 1441(a)-(c), (f), 1446-1448; CP 4 (Civil Action removal petition) – skim

What are the policy considerations behind limiting federal cases to those matters that exceed $75,000? Is that figure outdated? Many federal judges recommend raising the amount in controversy to as much as $1,000,000.

Note the tricky interaction of jurisdiction and merits in JTH: the district court decides it lacks jurisdiction because, even though the plaintiff sought $80,000 in its complaint, it later (in seeking judgment) decided it was owed about $60,000. Does the plaintiff have to actually recover more than $75,000 to have jurisdiction? Do you see why the answer has to be no?

Rules 20 and 21 permit liberal joinder of parties and give the courts ways to deal with improper joinder. Such joinder has important implications for subject-matter jurisdiction. Note 4, p. 571 discusses the aggregation of parties’ claims to reach the requisite amount in controversy. Some of the limits on aggregation of claims can be overcome using the supplemental jurisdiction statute, 28 U.S.C. § 1367. Other limits on subject-matter jurisdiction prevent the joining of certain parties and claims. We will return to this issue at the end of the course.

You might be surprised to read that the federal question statute (28 U.S.C. § 1331) once had an amount-in-controversy limitation; cases involving $500 or less were left for the state courts to decide. When you remember that Congress did not implement federal question jurisdiction until 1875 (see Class 8) and left all federal-question cases to the state courts before then, this amount-in-controversy limitation is less surprising.

Why have removal? Refresh your memory of Merrell and Grable (see Class 9), which were also removal cases. Why did those defendants want to be in federal court?

What procedures apply to a removed case? Does the plaintiff have to replead her case? Look at Rule 81(c).

What are the limitations on the defendant’s power of removal? What are those limitations for? Think carefully through the implications of §1446(b)’s statement that “a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.”
Pleasing

Class 12. The Complaint, Including Some Issues of Joining Claims and Parties

Read RST 28-43 (stop before note 4) (Conley, Swierkiewicz); Rules 1-3, 7-8, 9(b), 10, 18, 77-80; reread Rules 20-21, 81(c); Forms 1-2, 11; 28 U.S.C. §§ 2072-2074; 29 U.S.C. § 623; CP 5 (Civil Action complaints) – skim

Where do the Rules come from? What are the goals of the Rules? Do you agree with the Rules’ general emphasis on substance rather than technicality?

What hurdles did Schlichtmann face in drafting the pleading for Woburn citizens?

What goals might you have in drafting a complaint? Who is your audience?

What strategic advantages and disadvantages appear to be created by the notice pleading discussed in Conley?

What would it mean if the complaint could be dismissed very early in the proceedings? If it can’t?

Does the Conley rule (a complaint should not be dismissed under Rule 8(a) unless “the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”) seem broader than required to resolve the case before the Court?

The Court in Swierkiewicz says that the substantive law of discrimination law should not be read to change the mandates of Rules 8(a) and 9(b). Why?

Rule 18 provides for liberal joinder of claims, and Rules 20 and 21 provide for liberal joinder of parties. The Rules may seem to permit joinder even when the joined claim or party would defeat subject-matter jurisdiction (for example, the party to be joined would defeat diversity). In such cases, subject-matter jurisdiction prevents the joinder. We will return to this issue at the end of the course.

Class 13. The New Specificity

Read RST 53-67 (stop before Part 2.B.3) (Iqbal); Forms 10-12

As you can tell from the majority opinion, Iqbal was preceded by Twombly, an antitrust case in which the Court held that bare allegations of conspiracy, with no specific facts of an actual conspiracy alleged in support of the claim, were insufficient under the Sherman Antitrust Act. (The Sherman Act prohibits conspiracies, but it does not prohibit parallel actions that may look like conspiracies.) Many thought that Twombly’s new requirement of specificity in pleading was limited to the antitrust context. Iqbal shows that together, Twombly and Iqbal (or Twiqbal) dramatically change the Rules’ pleading requirements.

Where in Rule 8 and 9 does the Court find the “plausibility” requirement?

Does Iqbal make it practically impossible to state a claim for unconstitutionally motivated conduct by government officials? If not, what does a future plaintiff have to include in her complaint that Mr. Iqbal did not include in his?

Would Iqbal pose problems for Schlichtmann, if he were suing Grace and Beatrice today?

Class 14. Service Revisited

Read RST 67-76 (Río); Rules 4(m), 5; Forms 3-6; review Rules and CP reading from Class Six

Why are the requirements of Rule 4 so much more complicated than those of Rule 5? What accounts for the different approach in the two rules?
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Why do the Rules allow state-law methods of service? (See Rule 4(e)(1).)

What does it mean for statutes of limitation, that Rule 4(m) allows service up to 120 days after the lawsuit is filed with the court? What does Rule 3 provide about the commencement of a suit?

Why allow a case to be dismissed for technical failures of service, when the defendant received actual notice? Doesn't that run against the spirit of the Rules, which were meant to remove technical barriers to suit and focus on the substance of a plaintiff's claim? If a defendant received actual notice, hasn't he received due process?

Class 15. Responding to the Complaint: Motions to Dismiss

Read RST 76-78; Rules 6, 12, 41; Form 40; reread Rules 8, 20, 21; CP 6 (Problem Set on Motions to Dismiss and Timing)

Read Rules 6, 12 and 41 carefully, and then work through the problem set to discover the Rules' intricacies. Make sure to answer the problem set assigned for today.

Think about the Conley, Swierkiewicz, and Iqbal cases: how was Rule 12 used by the defendants in those cases? Which Rule 12 motion was made in those cases?

Why are some defenses so easily waived under Rule 12, and others are not? What policy/policies lie/s behind that difference?

Class 16. Responding to the Complaint: Answers; Defendant's Joinder of Claims and Parties

Read RST 79-87 (Milton, Racick); Rules 13(a)-(b), (g), 18, 54(c), 55; Forms 30, 31; reread Rules 7-8, 12, 41; CP 7 (Civil Action answers) – skim

Milton is primarily about poor drafting technique; do you think all judges will be as apparently tolerant as Magistrate Judge Wilkerson in the face of poor drafting? What might a judge do instead, do you think? See note 2 on page 81.

What does it mean to have a portion of the complaint "deemed admitted"? What consequences does that have for the defendant?

Is Judge Fox correct in applying Twiqlal to affirmative defenses in Racick? Why? What would happen if he held otherwise?

What happens if a defendant fails to answer? Why might a defendant do that?

The defendant must not only think about how to respond to the plaintiff's allegations but must also consider whether to join his own claims against the plaintiff to the case. This joinder of counterclaims by the defendant against the plaintiff is provided for in Rule 13. The defendant may also be able to bring claims against third parties in certain circumstances under Rule 14, a form of joinder called impleader which we will touch on toward the end of the semester. Note that Rule 18 also provides for extensive joinder of claims by any party already asserting a claim, counterclaim, crossclaim, or third-party claim.

Pay attention to the difference between the language in 13(a), 13(b), and 13(g). Why are some counterclaims mandatory while others are not? Why are cross-claims arising from the same transaction or occurrence never mandatory, but counterclaims arising from the same transaction or occurrence are always mandatory?

Class 17. Amendment

Read RST 87-97 (Williams, Tran); Rule 15; reread Rules 7-8, 12(h); CP 8 (Problem Set on Counterclaims, Crossclaims, Relation Back & Parties)

Note that there is a typo in the quote presented at the bottom of page 89; the corrected text is given in the Supplement.
PLEASE READ THIS DOCUMENT CAREFULLY; YOU ARE RESPONSIBLE FOR ITS CONTENTS.

If courts routinely applied the Williams trial court’s strict rule for amendment, combined with Twigbal, wouldn’t we have a very different system of civil procedure than that created in 1938? What do you think the Rule drafters would think about the appellate court’s ruling in Frantz?

Why allow “relation back”? Why shouldn’t a party be stuck with the statute of limitations?

**Class 18. Ethics in Pleading: Rule 11**

*Read RST 97-112 (Patsy, Pennie, Franz); Rule 11; review “Rule 11” and “Blindman’s Buff” chapters of A CIVIL ACTION; CP 9 (Civil Action Rule 11 motion and ruling) – skim*

What is the purpose of the “safe harbor” provision of Rule 11? Why is there no such provision for a court’s *sua sponte* Rule 11 motions? Note this distinction’s role in *Pennie.*

How should the lawyers in *Patsy’s Brand* have behaved differently? How suspicious should you be of your client? (Answer: reasonably suspicious.)

Think back to *Conley* and note 3 on pp. 36-37. Is it proper under Rule 11 to bring a 12(b)(6) motion in order to force the plaintiff to say more about her claim? It is actually fairly common for motions to have multiple motives; sometimes they have fully improper motives. How likely do you think it is to obtain Rule 11 sanctions in those circumstances?

Under what “unusual circumstances” should monetary penalties under Rule 11 go to the opposing party?

How has Rule 11 changed since Cheeseman used it in the Woburn case?

What is the line between legally frivolous claims and claims that attempt to “extend[], modify[], or revers[e] existing law”? How close to that line should parties be allowed to tread?

Note the distinction the appellate court in *Frantz* makes between the plaintiff’s sanctionable behavior, and the defendants’ apparently excessive demand for sanctions. The district court believed that the defendants’ excessive request vitiated any need for sanctions; the Seventh Circuit makes clear that the plaintiff needs to be sanctioned for its frivolous complaint, regardless of the defendants’ allegedly excessive request for fees. Is there any kind of Rule 11 issue with the defendants’ request for fees?

**DISCOVERY**

**Class 19. Scope of Discovery**

*Read RST 113-119 (stop before Part 3.B); 125-143 (Cooper, Aubuchon); Rule 26(b)(1-2)*

What is the difference between “relevant to the subject matter of the action” and “relevant to the claim or defense of any party”? Why does the court have to approve discovery seeking information that falls within the first category but does not have to approve discovery seeking the second? What showing must be made to the court?

The Federal Rules of Evidence, for a variety of reasons, provide extensive limits on what may be admitted at trial. Why is discovery permitted of information that would not be admissible at trial?

How has electronically stored information altered the discovery calculus?

How much does the court in *Aubuchon* appear to be punishing Benefirst for maintaining its business records in what seems to be a deliberately unhelpful way?
Class 20. Methods

Read RST 119-25; Rule 26 (ignoring 26(a)(2)-(3) and 26(b)(4)), Rule 30 (ignoring 30(b)(5), 30(f)) and Rules 33-36, 45; Forms 50-52; CP 10 (Civil Action discovery documents) — skim

Several Rules are assigned for today. When reading them, extract the information to fill in the chart on p. 120.

For your information, the disclosure provisions of Rule 26(a) were added in 1993. What do you suppose might have prompted the Rules Committee to add them?

Can you use the discovery rules before you’ve filed a complaint, to see if your client is telling the truth? If not, how do you verify your client’s statements?

How do the discovery rules fit with the pleading rules? What do you see in Rule 26 and the other rules that links discovery to the pleadings?

How might the discovery in A Civil Action look different if undertaken today?

Compare depositions and interrogatories. How do they differ in terms of flexibility, resources, and requirements of parties and attorneys, etc.? How are they similar?

How did Rule 30(b)(6) come up in A Civil Action? What is a 30(b)(6) witness? Can you have more than one?

What strategic advantage might be provided by admissions under Rule 36?

How did the course of the depositions affect case strategy in A Civil Action?

Appellate court rarely become involved in discovery disputes, because most are resolved by negotiation between the parties, some are resolved by magistrate judges at the consent of the parties, and those resolved by the district courts are not appealable until final judgment (so that later events often render the discovery dispute moot). Even those district court decisions that are appealed are subject to an “abuse of discretion” standard. Is discover essentially unsupervised by the appellate courts? Do you think more appeals would be better?

Why does Rule 35 provide for more involvement by the court than do other Rules?

Can you make someone who is not a party participate in discovery? How?

Class 21. Methods, continued

Read CP 11 (Problems Set on Discovery Mechanisms)

Make sure to answer the problem set assigned for today.

As you work on the problem set, think through how the different Rules impose different kinds of limitations and requirements on the parties. Why treat different methods of discovery so differently?

Class 22. Privilege and Work-Product Protection

Read RST 144-156 (stop before note 9 on page 156) (Hickman); CP 12 (United Shoe and Problem Set on Attorney-Client Privilege and Work Product Protection); review Rule 26(b)(3)

Make sure to answer the problem set assigned for today.

Pay careful attention to the procedural history in Hickman. Both the district court and the appellate court sat en banc. This is in part because the Rules were so new: they had been adopted only in 1938.
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"Hickman highlights the problems of broad discovery in an adversary trial process." What does this statement mean?

Why should "mental process" work product be more protected than fact WP?

Rule 26(b)(1) permits “discovery of any non-privileged matter that is relevant to any party’s claim or defense.” That exclusion of privileged matter would prevent discovery of anything protected by the attorney-client, priest-penitent, doctor-patient, spousal, or other privileges. What are the consequences of this limitation?

What is the purpose of the attorney-client privilege?

Class 23. Ethics, Sanctions

Read RST 163-175 (start at Part 3.D on page 163) (NHL, Phillips); Rule 37; reread Rules 26(c), (g), 30(g), 36(b); CP 13 (Sanctions problem set)

Make sure to answer the problem set assigned for today.

NHL emphasizes the power that the district courts have in deciding upon sanctions; the appellate courts can review only for abuse of discretion. (NHL is one of the rare discovery opinion from the Supreme Court itself.) What ethics/sanctions issues arose in A Civil Action?

JUDGMENT WITH AND WITHOUT TRIAL

Class 24. Summary Judgment

Read 42 U.S.C. §§ 1983-1988; Rule 56; CP 14 (Adickes) – note that there is a problem in the CopyPak: Adickes appears at pp. 175-177 and continues at pp. 188-190

A lot of the action in Adickes takes place in the footnotes. Make sure to pay attention to the documents that the Court quotes there.

If both parties in Adickes had presented affidavits from witnesses who would testify at trial (the city from a witness claiming that the police were definitively absent from the restaurant, Ms. Adickes from a witness claiming that police were definitively present), what outcome?

What role do you think is played by history in the Court’s decision? Do you think the Supreme Court is going to let a case like this be dismissed on summary judgment in 1970?

Class 25. Summary Judgment, cont’d

Read RST 236-249 (stop before Scott) (Celotex); reread Rule 56

Does Celotex clarify Adickes and make it easier to apply? How?

The Supreme Court remands for the lower court to apply the correct rule, rather than resolving the dispute between the parties. When the lower court applies the correct rule, it actually finds against Celotex: it finds that Mrs. Catrett has produced sufficient material to proceed to trial. So why did the Supreme Court not simply rule against Celotex during the appeal?

How are these standards for summary judgment affected by the Supreme Court’s recent decisions on pleading standards in Twombly and Iqbal?

Why did Judge Skinner flatly deny Cheeseman’s summary judgment motion?
Class 26. Summary Judgment, cont’d

Read RST 249-256 (Scott); CP 15 (Colston) (note that Colston ends on Supp p. 187)

Scott involves the defense of qualified immunity, a doctrine that allows officials (such as police officers or prison guards) to short-circuit litigation over civil rights violations by showing that they did not violate a clearly established constitutional right. The purpose of qualified immunity is to free such officers from the burden of litigation when they behaved reasonably under existing law (even if a court could, based on the facts of the case, establish a new right that had been violated and that would constrain future officials).

Is it appropriate for the Supreme Court to reverse a lower court’s decision because it disagrees with the interpretation of the events shown on a videotape?

Do Scott and Colston suggest that courts are applying different summary judgment rules to qualified immunity cases? Should they?

Class 27. Judgment as a Matter of Law

Read RST 281-290 (stop before Part 5.C.4) (Reeves); Rule 50

The term “judgment as a matter of law” (JML) replaces two older terms: “directed verdict” and “judgment notwithstanding the verdict” (JNOV). You will see the older terms in cases, so you should be familiar with them, but JML is the current term.

Why does Rule 50 require a pre-submission-to-the-jury motion for JML as a prerequisite for a post-verdict JML motion? Why not just let parties make the post-verdict motion regardless?

You may find it interesting to know that courts have found it proper for a judge to grant JML sua sponte (meaning that the judge grants JML without a motion from a party). In such a situation, the judge would issue an order to show cause why she should not grant JML, giving the parties the opportunity to brief and argue the issue. Why would a judge pursue JML sua sponte? Shouldn’t the party who would benefit from the JML be the one to ask for it?

Identify the issues which Judge Skinner resolved by JML in A Civil Action and which he sent to the jury for determination. What differentiates those issues?

Class 28. JML continued, and New Trials

Read RST 292-301(start with Part 5.C.5, stop before 5D) (Unitherm); Rule 59(a)-(d); reread Rule 50

Rule 50 is filled with traps for the unwary: if you do not make your pre-submission-to-the-jury motion, you cannot make your post-verdict motion. As Unitherm shows, you may also be in trouble if you make the 50(a) motion but do not make a 50(b) motion or a new trial motion, and then you nevertheless try to raise sufficiency of the evidence issues on appeal.

Why does Rule 50(c) require the judge to rule conditionally on a new trial motion if one is made? Think through all the possible outcomes: the judge grants the JML but denies the new trial; the judge denies the JML but grants the new trial; the judge grants both; the judge denies both. When will there be an appeal, and what happens if the judge is reversed on the JML on appeal?

If the trial judge grants the new trial and denies the JML, there would ordinarily be no immediate appeal: there is no final judgment in the case. The court would simply schedule the new trial. The party who does not want the new trial is probably out of luck, unless she can persuade the district court or the appeals court to grant an “interlocutory” appeal, meaning an appeal before all the claims have been resolved by the trial court.

Rule 59(d) allows the court to order a new trial sua sponte. Why do you think a court would do that?
Class 29. Amending, Altering, and Setting Aside Judgments

Read RST 304-310 (start at Part 5.E) (Ackermann); Rules 59(e), 60

Rules 59(e) and 60(a) and (b) allow the correction of virtually all mistakes that might need to be corrected with respect to a judgment.

Rule 60(a) is for purely technical errors (such as typos) in the judgment. For example, the Clerk’s Office might have typed “$1000000” instead of “$100000” as the amount awarded the plaintiff. Or the judge may have failed to include post-judgment interest in his calculation of the judgment.

Rule 59(e) is for more substantial changes to the judgment. A party might seek reconsideration of the judge’s decision, arguing that the judge’s decision reflects manifest errors of law or fact. A party might point out that the judge found in favor of the plaintiff on a particular claim but failed to provide any relief on that claim (for example, the calculation of damages might have omitted damages for that specific claim). Rule 59(e) is subject to a strict time limit (28 days after entry of judgment).

Rule 60(b) is for setting aside the judgment altogether, after the time for JML, new trial, or 59(c) motions has passed. Pay careful attention to the different reasons a judgment can be set aside, and to the different timing rules for those reasons.

How do you square Rule 60’s one-year limit on relief from judgment on the grounds of excusable neglect, and Mr. Ackermann’s argument that he should nonetheless be excused under 60(b)(6)? The dissent would rely on the general liberality of the Rules, regardless of the time limit. Couldn’t the majority simply have said that the one-year limit is the one-year limit, end of story? Does the majority instead say something more like, “regardless of the timing, your neglect was inexcusable”?

Would you apply Rule 60(b)(1) more liberally in setting aside a default judgment than in setting aside a judgment that came after a full trial? Why or why not?

Class 30. Appeals and A Little Bit on Preclusion

Read RST 311-338 (Rush); CP 16 (appeals documents) – skim

Think back to the Spencer case (Class 11). Why would the district court’s refusal to remand ordinarily not be appealable immediately?

What is wrong with splitting one’s claims among different lawsuits, if the claims all arise from the same transaction or occurrence? It may not be wrong at all. Note that, in Rush, it becomes clear that states disagree over whether claim-splitting is wrong. However, the vast majority of states, as well as the federal courts, follow the transaction rule for claim preclusion.

What if a different group of plaintiffs had wanted to sue Grace & Beatrice immediately after the Woburn trial was over? Do the companies have to do it all over again?

JOINDER

Class 31. Joinder of Claims

Read RST 357-373 (stop before Part 8.D) (Painter); review Rules 13, 18

Think about the lawsuits in A CIVIL ACTION. Do they fit Chayes’s “public law litigation” model? Fuller’s polycentric model? Why or why not?

Why encourage a plaintiff to join all the claims she has against a defendant? What are the consequences if she does not join them all? Do the consequences vary depending on the claim omitted? (Hint: think about the rules of claim preclusion.)
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Why might a plaintiff choose not to bring certain claims against a defendant? Think first of unrelated claims: why not go ahead and resolve all the claims, even if unrelated, in the same lawsuit? Think now of related claims: why might a plaintiff forgo a claim (and live with preclusion in future lawsuits)?

Do the same considerations apply to a defendant’s defenses?

Many jurisdictional issues arise from adding more claims and parties to lawsuits. We will cover these jurisdictional issues in Classes 33 and 34. While reading Painter, simply be aware that federal courts always have SMJ over compulsory counterclaims (as defined by Rule 13(a)) but may not have SMJ over permissive counterclaims (Rule 13(b)). The question in Painter, then, is whether Harvey’s claims are compulsory or permissive.

Note that a defendant may be required to bring certain counterclaims against the plaintiff or find them waived in the future. Is the standard of “issues that were or could have been raised” for purposes of claim preclusion the same as the standard in Rule 13 for compulsory counterclaims? What are the consequences if these tests are interpreted differently?

Why do the Rules encourage such broad joinder of claims? Why have permissive counterclaims at all?

**Class 32. Joinder of Parties**

Read RST 373-390 (stop before Part 8.D.2) (Alexander, Lehman, Luyster); Rule 14 (ignoring 14(c)); review Rules 13(g), 20-21

Think through the joinder in A CIVIL ACTION. Why can all these parties be joined under the Rules?

How far do the broad party joinder rules extend? For example, what if a plaintiff had mistakenly thought that the proper defendant was John Doe only, and later found out that Johnny Public was also a proper defendant. Could the plaintiff amend the complaint to join Public and relate back under Rule 15? Assume that at the time the complaint was filed, no statute of limitations problem would have existed as to Public.

Be careful about impleader under Rule 14. Note that the Rule states that a defending party may implead a party “who is or may be liable to it for all or part of the claim against it” (emphasis added). A defendant cannot implead an alternative defendant (that party would be potentially liable to the plaintiff). Instead, the impleaded third-party defendant must be potentially liable to the defending party; this kind of liability typically occurs under an insurance agreement or an indemnification contract, or when the impleaded third-party may be liable to contribute as a joint tortfeasor (something you will surely have discussed in torts by now).

The issue in Lehman is whether, given that the FDIC had two proper impleader claims against Roffman (one for indemnification and one for contribution), it could also add a non-impleader type claim against Roffman (the claim for guaranty of the outstanding loan balance). The Second Circuit holds that Rule 18 permits this non-impleader claim to be added; what language in Rule 18 makes this possible? Could the FDIC have brought the guaranty claim if it had not already added the indemnification and contribution claims?

Note that Rule 14(a)(2-3) provide for more claims and defenses between the plaintiff, defendant, and third-party defendant. Make sure you follow all the cross-references to Rules 12 and 13.

Can the third-party defendant implead someone who is or may be liable to it for the third-party plaintiff’s claim? Look at Rule 14(a)(5). Can a plaintiff implead someone? Look at 14(b).

Why have impleader? Why not say to the defendant, “Look, see what happens in this lawsuit and then, if you lose, sue the person who may be required to indemnify you”?

Why would a defendant choose to use Rule 14, instead of simply waiting to see what happens in the initial lawsuit? What factors might lead a defendant to think that impleader is a bad idea in a particular case?

Why are cross-claims arising from the same transaction or occurrence not mandatory, when counterclaims are?

Rule 13(g) discusses “crossclaims against co-parties.” What is a co-party, anyway? This is the issue in Luyster. Which definition of co-party (which the Luyster Court calls the Narrow and Broad Definitions) fits better with your understanding of the Rules as a whole?
PLEASE READ THIS DOCUMENT CAREFULLY; YOU ARE RESPONSIBLE FOR ITS CONTENTS.

What if one defendant has a claim against a co-defendant unrelated to the plaintiff’s claim? Can the defendant add that claim against his co-defendant? What if he does have a cross-claim and brings it? Can he now add the unrelated claim? Why or why not?

**Class 33. Supplemental Jurisdiction**

*Read RST 572-578 (stop before note 6 on p. 577) (UMW; pay special attention to note 5, p. 576-77 (Owen))*

What we now call “supplemental jurisdiction” was previously covered by three different terms, depending on what kind of jurisdiction was being exercised. Courts could exercise “pendent jurisdiction,” “pendent party jurisdiction,” and “ancillary jurisdiction.” Just keep in mind that when you see one of these terms, the court is talking about supplemental jurisdiction.

Why did courts allow supplemental jurisdiction in the absence of a statute authorizing it?

What important consequence did the UMW’s organizational structure have on the UMW case?

Would a Nebraska state court have jurisdiction over the parties in Owen? An Iowa state court?

Assuming no federal question in the case, does the impleaded third-party have to be diverse with the third-party plaintiff? With the original plaintiff?

Why was it a mistake for Cheeseman to implead Unifirst in A CIVIL ACTION?

**Class 34. Supplemental Jurisdiction continued**

*Read RST (578-589) (start with note 6 on p. 577) (Exxon); 28 U.S.C. § 1367*

Congress codified the judge-made rules of supplemental jurisdiction in 28 U.S.C. § 1367. Did Congress exactly replicate UMW and Owen? What is different?

Pay careful attention to the way 28 U.S.C. § 1367 differentiates between federal-question jurisdiction and diversity jurisdiction. Why is this distinction so important?

Why is the tuna-can case even in federal court in the first place? Ignoring for the moment the problems with the other plaintiffs, how does little Beatriz meet the amount-in-controversy requirement of the diversity statute?

The language of 28 U.S.C. § 1367 is muddled, and before Exxon there was a circuit split over whether parties like Beatriz’s parents could get into federal court. Do you agree with the Exxon majority that supplemental jurisdiction should apply to Beatriz’s parents? Or should they have to meet the AIC requirement themselves?

Does Exxon produce the same result as Owen? Apply the Exxon standard to Owen to see.

The poor drafting of 28 U.S.C. § 1367 also means that cases that seem essentially identical will be treated differently. Reread Notes 3 and 6 on page 588 and think through the party structures given as examples there. Which are examples of permissible supplemental jurisdiction? Which are impermissible?

Can you think of an example where a counterclaim might be valid under the joinder Rules but cannot be raised because of jurisdictional constraints?

Why does § 1367(d) give the federal courts discretion to decline supplemental jurisdiction? Federal courts are almost always required to exercise SMJ if they have it (you can learn about the rare exceptions to this rule in the upper-division course Federal Jurisdiction), so why allow this discretion under § 1367??
CLASS DATES AND TIMES

Our class is scheduled to meet Tuesday, Thursday, and Friday from 2:00 to 3:15 p.m. in Room A225. As I have stated on the Syllabus, my father is very ill. I will be canceling some Friday classes to visit him. I may also need to cancel class unexpectedly. Therefore, in consultation with the Dean and the Associate Dean of Academic Affairs, I have added extra class time early in the semester so that we need not hold makeup classes later, when you will be busier.

We will make up time by having **makeup classes on two Mondays** when your Legal Research and Writing classes will not meet and **adding minutes to six Thursday classes**. On the days that class is extended, we will take a 10 minute break in the middle of class.

There is also a schedule change during the last week of classes due to the Legal Research and Writing final examination.

All classes, regardless of the day, meet in Room A225 starting at 2 p.m.

Here is the full schedule of classes, with changed classes highlighted. For your convenience, I have also highlighted the dates of the mandatory practice examinations described in the syllabus:

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