Notes 11/14

1. Midterm should be in our folders today. See email for attachments with more info about good answers and grading. Any questions? See MSG in office hours.
2. Scope of discovery.
* Atty client privilege
* Work product privilege partially codified in 26b3
* Documents and tangible things—can’t ask about the content of the documents either
* Opinion work product is unqualified—it probablycan’t be overcome
* Fact work product can be overcome by showing substantial need for material and inability to otherwise get substantial equivalent without undue hardship
* Impeachment evidence
* Non work product impeachment evidence other side has against their own witnesses (ex. prior convictions) are discoverable
* Work product impeachment evidence other side has against their own witnesses only discoverable if the WP privilege can be overcome—must have a prima facie showing, on the basis of non privileged stuff, that you can overcome privilege (you have substantial need for the materials to prepare your case and cannot, without undue hardship, obtain their substantial equivalent by other means)—then you ask the court to look at the material and judge whether privilege should be overcome
* Non WP impeachment evidence other side has against your own witnesses is discoverable, but other side can ask that your witness be deposed before turning over evidence (a way to sort of pre-impeach the impeachment evidence)
* WP impeachment evidence other side has against your own witnesses is discoverable if WP privilege can be overcome (often just the fact that they are going to use this evidence at trial to impeach your witness is enough to overcome privilege), and other side will usually ask to depose witness before turning it over

HYPO: witness, X, on D’s side, was interviewed by P and a statement was drawn up. Can D get statement without having to overcome the WP privilege? 26(b)(3)(C): any party or witness has a right to their own statements. So just get X to ask for it and P has to give it to them. But they will depose him before they turn it over.

* Waiver: introducing privileged material is dangerous because the whole context in which that material is made can be opened up for discovery by the other side.
* Experts. Testifying
	+ For your testifying experts you have a disclosure obligation under 26(a)(2)(B)
	+ The report must contain:
	        (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
	        (ii) ***the data or other information considered by the witness in forming them***;
* That means that otherwise privileged material can become subject to disclosure if the material is considered by a testifying expert witness in forming his opinion
* Due to abuse, there have been some changes in FRCPs
	+ R 26(b)(4)(B) – do not have to disclose drafts of expert reports
	+ R 26(b)(4)(C) Rules 26(b)(3)(A) and (B) protect communications between the party’s attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:
	…(ii) ***identify facts or data*** that the party’s attorney provided and ***that the expert considered*** in forming the opinions to be expressed; or
	(iii) ***identify assumptions that the party’s attorney provided*** and that ***the expert relied*** on in forming the opinions to be expressed.
		- Disclose only facts and data that expert used to *form* opinions—not other (privileged) work product
* Experts. Non testifying, basically not discoverable unless there is a strange circumstance of extreme need
* Motions to compel, sanctions
* Rule 11 certification to punish frivolous discovery requests etc
* Rule 37a: motion to compel
* If motion is granted and other side still doesn’t turn over info, then there are sanctions
* Since disclosure is an affirmative obligation, you can make a motion to compel disclosure and if granted, they will be sanctioned immediately
1. Terminating litigation before trial
* 12(b)(6) failure to state a claim—D’s preanswer motion
	+ Can also be in answer
* failure to state a claim can also be brought later in discovery or even mid trial motion under 12(c) judgment on the pleadings.
* How can P get a judgment on the pleadings?
	+ Look at complaint and answer. If D’s answer admits to all allegations in the complaint, and there are no affirmative defenses, then P can move for a judgment on the pleadings
	+ If D introduces a negative defense, you can’t get a judgment on the pleading
	+ If D introduces facts purported to be an affirmative defense that do not actually add up to an affirmative defense, then P can move for judgment on pleading
* Summary judgment
* Happens before trial
* No reasonable jury could find for the non-movant on the basis of the evidence
* Rule 56
* Directed verdict/ Judgment notwithstanding the verdict (Rule 50: judgment as a matter of law)
* Happens during trial
* No reasonable jury could find for the non-movant on the basis of the evidence
* Burden of pleading: P’s burden to allege facts that add up to a COA. D’s burden to allege facts that add up to affirmative defenses/ defenses
* Burden of production: generally party that has burden of pleading also has burden to produce evidence. P must provide sufficient evidence that *could* convince a reasonable jury to find with him. If he fails, D can move for a directed verdict.
* Burden of persuasion: If jury is on the fence about whether the standard of proof has been satisfied (preponderance of evidence), then they must find against the party that has the burden of persuasion

HYPO. P satisfied all COA’s burdens of production. D does nothing. Can there be a directed verdict for P? NO. A jury COULD find for P, but won’t necessarily, so we can’t take this power away from them

P🡪D for negligence with evidence of negligence and damages, but not of causation. D offers no evidence. Could a reasonable jury find causation based on zero evidence of causation? NO. summary judgment/directed verdict for D: no reasonably jury could find for P w/r/t causation element. Summary judgment to D only requires that jury necessarily would find for D concerned ONE element

P🡪d negligence. Offers evidence of negligence, causation, damages so that jury would hAVE to find in his favor. D offers no evidence. Summary judgment to P? yes. Reasonable jury would have to find for P w/r/t all elements of the COA

P🡪D negligence with all elemental evidence. D offers rebutting evidence re: causation. Jury only needs to decide on causation because that is the only element with divergent evidence. Partial summary judgment would be awarded to P for the other elements (D can’t get partial summary judgment because if there is summary judgment for D w/r/t any element of the COA, D wins the whole thing—see two hypos ago)

* 56(c)Materials submitted to support/rebut summary judgment
* Affidavit signed saying how you would testify at trial
* But these are hearsay: an out of court statement offered to jury in favor of truth of matter asserted. Can’t be cross examined.
* But the statements made by the witness IN the affidavit/deposition/etc, must be admissible if offered at trial—can’t be hearsay.
* Depositions, documentary evidence also used

HYPO. P🡪d for age discrimination saying X got promoted because he was younger. D moves for summary judgment. In opposition of motion, P intros affidavit of himself saying D told P explicitly he doesn’t like olds. D offers 10 affidavits from others saying this is blatantly untrue. 10 vs. 1. Could a reasonable jury find in favor of P? If jury believes the 1 vs. the 10, then yes it is possible. Summary judgment isn’t about weighing evidence—that is what the jury is for, not the court in a summary judgment motion.

HYPO, twombly themed. P🡪Ds for federal Sherman act. P offers evidence of an agreement via D’s parallel conduct. Is this evidence sufficient to withstand sum j for D? No. summary judgment for D is appropriate. No reasonable jury could find an agreement based on parallel conduct

HYPO. Drivers ram into each other. Everyone dies, no witnesses. All we know is that someone ran a red light. P sues D. D moves for directed verdict. 50/50 chance it was P or D, so directed verdict is granted.

HYPO. Guy takes two pills, no one knows why, he dies. He made out a new will (suicide evidence) but he also made fishing plans (fun evidence). Family sues insurance co for life insurance, they move for summary judgment saying no reasonable jury could find the death was an accident and not a suicide. SJ not granted.

* The movant has the burden to show that SJ is appropriate. So does that mean a D has to offer evidence against P’s allegations in order to have SJ granted? NO. Just have to show that P’s “evidence” isn’t good enough such that a reasonable jury could find for P
* The 7th amendment: you have the right to a trial by jury for actions in federal court at law (not equity (injuctive relief)) asking for more than $20. So is throwing out cases before trial through summary judgment compatible with the 7th amendment? TO BE DETERMINED…

Rule 12: defenses and objections

Rule 56: summary judgment

Rule 50(a): motion for judgment as a matter of law – directed verdict

Rule 50(b): motion for judgment as a matter of law – motion for a judgment notwithstanding the verdict

Rule 59(a)(1): motion for a new trial

Rule 69: enforcement of judgment

12( c): motion for judgment on the pleadings.

* Post pleading, when pleadings are insufficient matters of law
* Can work in tandem with 12(f) motions to strike affirmative defenses

56: summary judgment

* Is there really a genuine issue of material fact? If not- i.e. no reasonable jury would be able to find for a party- then opposing party can move for summary judgment
* Available up to 30 days after close of discovery
* Can be granted on entire case or just part

50(a): motion for judgment as a matter of law

* This withdraws the case from the jury
* Appropriate if on basis of evidence at trial no reasonable jury could find for a party
* Commonly denied even if court thinks that directed verdict is appropriate, to wait to hear jury verdict. If jury verdict turns out to be unreasonable, court will then grant motion for judgment notwithstanding the verdict

50(b): judgment notwithstanding the verdict

* If you lost your motion for judgment as a matter of law from 50(a), move for the judgment notwithstanding a verdict
* Do it within 28 days of judgment on verdict
* Can be coupled with a notion for a new trial

59(a)(1): motion for a new trial

* If verdict is “against the weight of the evidence”—not enough that court thinks that verdict was wrong
	+ Usually brought when damages are excessive given the evidence
* If jury failed to follow judge’s instructions, or if judge decides his instructions were no good
* If new evidence comes out
* Do it within 28 days of judgment on original verdict

69: enforcement of judgment

* Injunction is a court order for compliance, with jailtime or fines as a consequence for failure to comply
* Legal judgment for damages is just a statement that X owes Y. Not an order, so it has to be collected as a debt by the winning party – debtor can bring up new defenses (e.g. bankruptcy)
* If you continue the federal suit to enforce the judgment R 69 applies
* 69(a)(2): discover the source of D’s assets
* Submit a writ of execution to the local federal marshal, who will then seize property
* State law governs supplementary proceedings