Civil Procedure Notes

*Swift v. Tyson* – For a long time, federal courts sitting in diversity could come to their own conclusions about state common law. They justified this by saying that the state, by adopting a common law system, wanted the federal court to come to its own judgment.

* This caused a problem of vertical forum shopping, because you can have a different law apply just by getting diversity.

Now, with *Erie,* if it is a state law action you now need to follow whatever the state sc would say.

* State trial courts are bound to state sc decision even if they believe state sc would now decide differently, because it can be appealed to the state sc and overturned. This is not possible in federal courts, so federal trial courts are not bound to old state sc decisions. They are allowed to act like the state sc and predict how they would rule now.
	+ Some plaintiffs may want to go to federal court because they could get the new rule right away instead of waiting for appeal.

What is the procedural power of a state court entertaining a sister state action?

Hypo:

 Pa Ps get into an accident in Pa, sue in Va. Can the Va court use Va’s:

rule of duty of care? No, substantive.

Rule on who has burden of proof for contributor negligence? No, bound up with state cause of action.

Statute of limitations? Yes because it is procedural but there are circumstances where forum state would use the sister state’s SOL anyway:

* If sister state drafted statute because they wanted SOL (or other procedural law) to be bound into the substantive law.
* If forum state wanted to use sister state’s procedural law for its own purposes. Borrowing statute – to avoid forum shopping and stop plaintiff’s from flocking to your state for like wrongs (like a longer SOL).

What is the procedural power a federal court has when entertaining a state action?

Only consider choices between state law (of any form) and federal **common law** right now. Not FRCP, statute, or constitution.

*Palmer v. Hoffman* : federal court entertaining a state cause of action must use state’s burden of proof.

*Guaranty Trust v. York*: Federal court in NY entertaining NY causes of action must use NY’s statute of limitations instead of a federal common law limitations period, even though NY does not consider its statute of limitation substantive.

Hypo:

P (NY) sues D (PA) in federal court in VA under PA tort law concerning an accident in PA. Under *York* the VA court must use the statute of limitations that would be used by a VA state court. This is not necessarily the statute of limitations of VA, VA might think PA’s limitation period is substantive and in that case the federal court would have to use PA’s.

* Under *York* – Must follow if it is **outcome determinative**: if you switch rules from federal to forum state law it will make a difference to how the case will turn out.

**Pushback against *York* Ruling:**

*Byrd* lessons:

Assume P sues D in federal court in SC on SC cause of action

1. If a procedural issue in federal court is governed by the US Constitution, don’t worry about vertical forum shopping. Must follow Constitution anyway, even if it is outcome determinative (example 7th amendment). Doesn’t look like this was applicable in *Byrd*, but useful to mention this fact.
2. If South Carolina rule is substantive in horizontal choice of law sense (bound-up), federal court must use South Carolina rule.

Otherwise, worried about **balance**

1. Policy of vertical uniformity with SC state courts (outcome determinative test under York), and
2. Countervailing federal interests in favor of uniform federal common law rule. If you have uniform federal common law rule, every federal court will treat it the same way no matter what the forum state, so will lose vertical uniformity in some states.

*Hanna v. Plumer*: Hanna sued Plumer, Osgood’s executor, for Osgood’s negligence in auto accident. He left summons and complaint with Osgood’s executor’s wife at a place of residence in accordance with 4(e). Mass had statute requiring in hand delivery to an executor or administrator. District Ct granted motion for summary judgment. Ct App affirmed, because it is outcome determinative; if you shift back and forth between rules it will make a difference if case succeeds or not.

SCt reverses

The FRCP 4(e) applies. How to determine its validity?

Congress delegated its power to regulate procedure of federal courts to the Supreme Court, and the Supreme Court made FRCP. However, must make sure the FRCP are valid (within Congress’s power). Congress cannot give Supreme Court power it never had to begin with.

* Congress can regulate anything that’s arguably procedural **by statute**. You may be able to say it’s substantive but if there is also an argument for procedural, it can be regulated even if it causes vertical forum shopping.

If Congress passes a uniform statute of limitations applicable for all actions in federal court, including state law actions, would it be valid? Yes, congress can regulate procedure any way it wants.

* Green questions this. There is a worry that Congress is overstepping its powers by creating a SOL that trumps a state SOL bound up with state law. Sounds like it is trumping state substantive law.

BUT when Congress gave SCt the power to create FRCPs in Rules Enabling Act, it put some limits one SCT’s power

* According to the Rule Enabling Act, the SCt is **not allowed to abridge, enlarge, or modify a substantive right** by FRCP. As long as rule does not do this, it is valid.
* In Hanna the **abridge, enlarge, or modify a substantive right** test is whether the FRCP “really regulates procedure”(taken from Sibbach) – that seems like the same thing as the arguably procedural test. No real limit on the validity of an FRCP.
* This will change in Shady Grove

Is FRCP 4(e) valid – Yes – arguably procedural and does not abridge, enlarge, or modify a substantive right

Does not matter if the difference between a FRCP and forum state law leads to forum shopping

Pretend that service in *Hanna* is now federal common law - Hanna court reinterprets the outcome-determinative test

* It doesn’t matter if it is outcome determinative; question is whether the difference encourages forum shopping. Difference in service rules would not motivate forum shopping, even though it could be outcome determinative. Even if this had been a federal common law rule it could be used in a diversity case.

**DON’T TALK ABOUT OUTCOME DETERMINATIVE ON EXAMS/OUTLINES**

* Talk about the **Twin Aims of Erie**. Can’t use federal common law procedural that differs forum state law in a way that encourages forum shopping. If it doesn’t make a difference in forum shopping, it can be used. (Don’t worry much about the second aim, it is difficult and usually satisfied if forum shopping is.)

Purpose of Diversity

* One way of thinking about this is effectuating the purposes of diversity. Diversity exists to reduce prejudice in state court. So, we don’t want any federal common law to be used that will discourage a party from bringing a diversity action even if they are worried about prejudice in state court. Likewise, we don’t want a party who isn’t worried about prejudice to try to go to federal court to get a more advantageous procedure.
* Congress is limiting what federal courts can do when creating procedural common law for diversity cases, because otherwise purpose of diversity would be frustrated.

**Remember that when federal courts DON’T DO something that state courts may do, it is a federal common law.**

**ERIE FLOW CHART**. Diversity, alienage, or supplemental jurisdiction actions

1. Is the federal court sitting in diversity/alienage (or is there a cause of action with supplemental jurisdiction)?

* If no – no Erie problem. Just use federal procedure for federal question cases

Example: P sues D in federal court in New York under federal securities law

2. Is the relevant federal procedural law mandated by Constitution?

* If yes – use federal law

3. Is the relevant federal procedural law a federal statute?

* If yes – yes federal law if it is arguably procedural

Green wonders about the power of congress to preempt state rules bound with state’s cause of action.

4. If the relevant federal procedural law a FRCP?

* If yes – consider whether (1) is it arguably procedural, and (2) does it abridge, enlarge, or modify substantive rights?
	+ As long as it is arguably procedural and it does not abridge, enlarge, or modify substantive rights, it is a valid FRCP and should be used.

5. Is the relevant federal procedural law federal procedural common law? (Remember, includes cases where federal law simply doesn’t say anything about matter but federal practice is to not do what the state does.)

* If yes – determine if (1) the state rules is bound up with cause of action (*Byrd*). If so, use state law. If not (2) look to twin aims of Erie. Does difference lead to forum shopping and inequitable administration of laws?
	+ If it does not lead to forum shopping, and is not bound with cause of action, use federal common law.
	+ But even if it difference leads to forum shopping can still use federal rule if there are sufficiently strong countervailing federal interests

*Walker v. Armco Steel Corp* (1980) – According to forum state law, the statute of limitations tolls upon service. Federal rule *inspired* by FRCP says tolls upon filing.

* *Ragan* told us to use forum state rule on basis of outcome determinative test, but does *Hanna* make a difference? Must decide if tolling rule in federal court is part of a FRCP or federal common law.
* This is just a judge made rule inspired by rule saying, “a civil action is commenced with filing of an action.” This rule does not directly talk about tolling, so this is a question of federal common law. Make sure using federal law would not create forum shopping.

If it was a federal question action, then you would toll upon filing, following the federal common law rule.

Hypos:

P(NC) sues D(VA) in federal court in VA concerning breach of an oral contract entered into in NY with performance in VA.

Under VA choice of law rules, the law of the place of contracting governs the validity of the contract. This is state common law. (in VA, would apply NY law)

Federal courts use interest analysis in federal question cases (federal common law).

Can the federal court in diversity case use interest analysis here too? No – must use forum state’s choice of law rules- KLAXON

Choice of law rules are not bound up with state cause of action

BUT difference would lead to forum shopping and there are not suff countervailing federal interests

Can Congress pass a uniform choice of law statute for federal courts? Like “use interest analysis.” Yes they can, and they probably should. It is arguably procedural.

D Airlines Flight 257 from Bogota, Columbia to Rio de Janiero, Brazil . . . (Hypo on slide)

* This is an alienage case, and the cause of action arose abroad. Forum non-conveniens is common law. LA has no forum non-conveniens doctrine but there is a federal non-conveniens doctrine used in federal question cases.
	+ In this case, let’s say it would allow for dismissal if we used forum non-convenience. Is there a difference between federal and state outcomes that would lead to forum shopping? Big time. Party would use whatever court would keep the action. Looks like federal court has to use the forum states (lack of) forum non-convenience.

HOWEVER. Are there any **countervailing federal interests** that would allow federal court to use the uniform federal common law rule? Yes, docket clearing, difficult to entertain actions under forum law, fact that federal courts are there to entertain alienage cases (if the state and federal laws were the other way around and federal court would dismiss). Also federal interests in foreign relations.

* It’s not all just forum shopping, also balance.

On exam make an effort to look at countervailing federal interests and whether it would lead to forum shopping and then just decide whatever you want about which one is more important. Won’t get points off for weighing them incorrectly.

Hypo:

Assume there is no FRCP 4(k)(1)(A).

* P sues D in federal court in NY. There is no PJ over D in NY state court, but there is PJ over D in the US.

D makes a motion to dismiss for lack of PJ. What result?

* Because we don’t have 4(k)(1)(A) we move to common law track. Would the difference lead to forum shopping? Yes. Countervailing interests? Doesn’t seem like there are any. Even in absence of 4(k)(1)(A), rule would probably follow under *Erie* analysis anyway because of forum shopping analysis.

Twombly and Iqbal were federal question cases . . .

* P sues D in federal court in NY under NY law for negligence. NY state courts have notice pleading.
* D makes a motion for a more definite statement on the ground that Twiqbal has not been satisfied. P argues that NY’s rule should be used.

Everything depends if Twiqbal is common law or FRCP. Concluded that Twombly and Iqbal do apply in diversity cases by saying it is not common law it is really about FRCP 8a or maybe 12b so it applies even though it encourages forum shopping.