12/5/13

Flow chart Erie

* Is the federal court sitting in diversity/alienage/supplemental?
	+ If no then no Erie
		- But might still worry if FRCP or federal statute at issue might still be valid
			* E.g. FRCP might abridge, enlarge, or modify substantive federal right
	+ If yes...
* Is the relevant federal procedural law mandated by US Constitution?
	+ If yes, then it trumps
		- E.g. 7th Amendment
* Is the relevant federal procedural law a federal statute?
	+ If yes, it applies if arguably procedural
		- Does not matter if it leads to forum shopping
* Is the relevant federal procedural law a FRCP?
	+ If yes questions are:
		- Is it arguably procedural; and
		- Does it abridge, enlarge, or modify substantive rights?
			* (Sibbach? Shady Grove?)
			* This language comes from 28 USC § 2072
	+ How do you know if in FRCP track?
		- Walker case
			* Application of the Hanna analysis [FRCP analysis] is premised on “direct collision” between the Federal Rule and the state law
			* In this case, ruled that Rule 3 did not directly hit on the issue of tolling
		- Courts have universally held Twiqbal applies in diversity actions
			* Supreme Court has interpreted “showing” in 8(a)
				+ Thus this is interpreted to all be inside federal rule, that’s why there is a conflict between Twiqbal standard and a state that would have notice pleading
* Is relevant federal procedural law common law?
	+ Remember, includes cases in which federal court simply doesn’t have anything on point, but doesn’t do what the forum state does
	+ First question:
		- Is state rule bound up with cause of action? (Byrd)
			* If so, use state law
			* Examples:
				+ SOL folded into statutory COA
				+ Burden of proof for contributory negligence
			* Is this actually the case? Could state compel federal courts to limit page length of briefs by folding up a rule into the COA?
				+ Must actually be a limit to bound up test but don’t know what it is yet
	+ If not bound up, then look to twin aims of Erie:
		- Would having a federal common law rule different from forum state rule lead to:
			* Vertical forum shopping?
				+ Means forum shopping in general, not in particular case
			* Inequitable administration of the laws?
				+ Does not mean that any particular rule is inequitable
				+ Idea is that there is some inequity as a result of there being different procedures between federal and state courts, thus, the person who happens to be diverse gets the advantage from that difference but the non-diverse person doesn’t
				+ Example:

P(NY) – D(NY) in state court in NY concerning a car accident in NY. Action gets dismissed due to NY SOL of 2 years

P(NY) – D(PA) in federal court in NY concerning car accident in NY. Federal court applies a common law time limit and lets the action proceed

* + - If no problem of forum shopping/inequitable administration, then use uniform federal common law rule
		- If there is a problem with forum shopping/inequitable administration, then use forum state rule
			* UNLESS, sufficiently strong countervailing federal interests in favor of the uniform common law rule
		- Choice of law rules are federal common law in federal court, therefore, must use choice of law rules of the forum state (Klaxon)
* Example
	+ Colorado passed Certificate of Review Statute
		- Anyone suing a licensed professional for malpractice must provide, with the complaint, a certificate stating that an expert licensed in professional’s area of practice has examined the claim and determined it to be justified
		- P(NY) – D(COL) in Federal District Court for District of Colorado for medical malpractice under New York law
		- P’s suit concerns operation D performed upon P in NY. P does not file Certificate of Review with her complaint. D asks for dismissal for failure to file Certificate of Review
			* Answer:
				+ Under FRCP track

First, would say could be 8(a) issue or could be rule 11 (evidentiary issue)

Courts are split on this

Some say contrary to 8(a)

* + - * + Under federal common law track

Not bound up in COA because NY COA

Would probably lead to forum shopping because onerous restriction to put this in the complaint

Countervailing federal interests:

More than likely none but could be the idea that P should get to discovery

Courts that have put it in common law track say that you must use state law

* Semtek
	+ Claim preclusive effect of dismissal on SOL grounds of federal court sitting in diversity in Cali
		- Assume that under federal law a dismissal under SOL has claim preclusive effect and Cali law does not
	+ FRCP 41(b) was arguably relevant but really wasn’t about claim preclusion so unimportant
		- The fact 41(b) is irrelevant important because puts the case in common law track
	+ Common law track analysis:
		- Is CA’s preclusion law bound up with CA COA?
			* Sounds bizarre, not really entertained in action
		- Will difference between federal and state law lead to forum shopping?
			* Yes
		- Countervailing federal interests?
			* Cali’s SOL and sitting in diversity in Cali on Cali COA so not really much federal interest
		- Thus, forum state preclusion law should be used
* Example
	+ P – D in federal court in diversity in Nebraska
		- First case, action at law on statute of frauds of lease and loses
		- Then sues, in state court in Nebraska for quantum meruit (action at equity)
			* Nebraska law of claim preclusion, action at law may be followed by action at equity concerning same transaction
		- Does the Nebraska or federal rule concerning scope of P’s claim apply?
			* Shows Semtek doesn’t always mean forum state preclusion law should apply
			* Would have a problem with forum shopping
			* Strong countervailing federal interests however:
				+ FRCP 13(a) binding on D (compulsory counterclaim rule) that has transactional standard

Would be bizarre to have that transactional rule that applies to D in first case and P using state standard that would allow for two suits

* + - * + Also, efficiency issue
* Shady Grove v. Allstate
	+ Allstate refused to pay NY statutory interest on late payment of claims
		- Class action against Allstate for the interest
		- NOTE: “substantive right” in abridge, modify, enlarge substantive right language means the COA of the P
	+ N.Y. had its own rule which means you can’t use class actions for penalties or statutory minimum damages
		- Wanted to encourage P’s to sue individually – would over deter Ds if class actions were allowed
	+ FRCP 23 doesn’t say anything about this
		- Walker case would say falls in FRCP track
	+ Scalia – stuck to Sibbach test (& 3 other Justices)
		- FRCP rules as long as really regulates procedural and does not matter if trumping NY substantive law
		- Good about this approach is it leads to consistency
			* If depended on state law then whether a FRCP could be used could be dependent on state law at issue
		- Another good thing about approach is that it is virtually impossible to determine whether a state thinks its rule is substantive
		- Argument against this approach is that the language of abridging, enlarging, or modifying substantive right was meant to ensure respect of state substantive law
		- Seems like Scalia would probably say if there was FRCP that determined burden of proof for contributory negligence that would be valid
	+ Stevens & Ginsburg (& 3 other Justices)
		- Validity of FRCP depends upon it respecting state substantive law
			* Abridge, enlarge, and modify substantive right really means something
			* If state law is substantive then you have to honor that state law
		- Difference between Ginsburg and Stevens is that Stevens thought there was insufficient evidence that the NY rule was substantive (that is, bound up with the NY statutory damages actions)

Stevens says you need real evidence of it being substantive

* + - * Would only invalidate the FRCP for that state law
* Redo of FRCP track
	+ Two questions
		- Is it arguably procedural; and
		- Does it abridge, enlarge, modify substantive right
			* Must consider state substantive policies