CIVIL PROCEDURE NOTES

1. *Service (review)*

important distinction between the constitutionally acceptable scope of service under the 5thA due process and what federally courts have chosen as the method of service

who may serve, 4(c): party may not serve

* what counts as a party?
  + Employee of corporate plaintiff?
  + lawyer of party?

How to serve, 4(e):

* if relying on state law under 4(e)(1), Glannon's view is must satisfy state law on who may serve - MSG's view is that 4(c)(2) is still controlling
* Argument for Glannon’s approach - state laws may be more generous about how to serve because they are more restrictive about who may serve – state wants the two rules to be together
* Green: maybe, but state law does not apply in federal courts
  + Only reason state law is relevant is that 4(e)(1) says it is and maybe drafters of Rule 4 didn’t care if rules that state wanted to be together are torn apart
* The question is: how much did the writers of FRCP choose to incorporate state standards for service?

General Point

* It is not uncommon for federal law to borrow state law standards, mostly as a matter of convenience – this is very different from state law actually applying of its own force to the matter

The federal method allows service to individuals in several ways under (4)(e):

4(e) *Serving an Individual Within a Judicial District of the United States.* Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

What does it mean to deliver “personally”?

* We have been assuming in-hand service to a person
* What if defendant refuses to accept and physically take papers, papers are dropped at defendant’s feet, the server returns and the papers are gone? SERVED.
* What if defendant is aware that he is being served but does not answer the door; the server leaves the papers and when he returns they are gone? SERVED.
  + in both of these cases the function of in-hand service is being fulfilled – the defendant knows that he is being served...he has notice

The important skill for our purposes is to focus on statutory interpretation: *what it means to “deliver personally”*

See Slide 16: “5) P files an action...”

* subquestion – do you need a summons with a counterclaim? No.
* subquestion – does service of a counterclaim have to satisfy Rule 4? No. It is subject to the more generous Rule 5 approach.
* Why is the standard for counterclaims so loose? Because both parties have notice – the P naturally knows that a suit is afoot, as does the D if filing a counterclaim
* Bringing in a third party raises complications: any time a new party is brought in, Rule 4 must be satisfied. Any other paper that goes back and forth can satisfy Rule 5.

1. *Serving corporations or unincorporated associations*

* Corporations are legal entities, made of human beings but obviously not interchangeable with individuals. So what does it mean to give a corporation notice?
* The CLO or General Counsel is always the best person to serve when serving a corporation
* See Slide 19: “1) P files an action against the D Corp....”
  + subquestion: what is the specific role (not just title) and responsibilities of the individual served? Will he notify the appropriate people of the service and summons?
  + Even if the foreman is not a manager or general agent, (h)(1)(A) allows service in compliance with state law (of state where action is filed or where service is effected) so if the state standard approves and it is constitutional, service will be appropriate
* See Slide 20: “2) P files an action against the D Corp....”
  + subquestion: is it relevant at all that it is the CEO's usual place of abode or that his son is of sufficient age and discretion? NO.
  + setting aside whether state law may allow this service, what is the definition of “delivering” in (h)(1)(B) – is this “delivering”?
    - this section does not say “delivery personally”, just “deliver”, implying that in-hand service to the CEO when a corporation is the D may not be required
    - a secretary of an officer or agent can be reasonably expected to deliver the notice –
      * giving to the secretary at the officer’s offioce has been considered delivering to officer by courts

can you mail service to officer or managing agent? Would that count as delivering? It is not inconceivable that mailing would be considered “delivering”… MSG knows in his gut that it is not adequate, but does not know if it has ever been litigated

- the rule provides a good argument to exclude mailing from delivering since the term “mailing” is used in a different context in 4(h)(1)(B)...also, since we know that mailing is allowed in the more generous Rule 5, we have reason to believe that it may not be acceptable under the less generous Rule 4.

- NOTE – Green checked – it has been litigated and rejected – mailing to the officer or managing agent is not delivering

1. *Constitutional restrictions on service*

* Reference Amendments V and XIV: individuals cannot have property taken way without due process
  + V applying to federal government, courts
  + XIV applying to state government, courts
* 14thA due process clause also understood to incorporate most of the Bill of Rights and apply them to the states (since the Bill of Rights are not alone applicable to the states)
* The due process clause of 14th Amend. limits state courts, as shown in *Mennonite Board of Missions v. Adams*:

(for clarification, the lender in a mortgage relationship is the mortgagee – the borrower is the mortgagor)

* Moore owned property but had not paid taxes. The state of Indiana held a tax sale. This procedure cuts off any liens someone might have on the property. The mortgagee must appear and assert interest or it is cut off. Adams, bought property in a tax sale. After sale, he discovered that Mennonite claimed that it had a mortgage interest in property. Adams brought suit to quiet title (basically a suit to show that he owned the property free of encumbrances)
  + Side Note: we don’t know whether this quiet title action was brought only against Mennonite – but they are often brought in a way that they literally bind everyone
    - notice under due process for such cases is highly important
* The mortgage company argued that they had not been given adequate notice regarding the tax sale – notice had been posted in the local newspaper, at the county courthouse, and via certify mail to the owner in accordance with Indiana law.
* The Indiana court ruled that notice was adequate, but the US SCt reversed - using the *Mullane* standard:
  + “ An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections
  + Some of the factors relevant in determining whether notice was reasonably calculated to apprise party
    - what is the level/amount of interest determined? Under class action it could be very little per person and that would mean not much expense on notice (otherwise cost of notice would swamp the value of the interest being litigated)
      * here the interest was large
    - how readily and cheaply can party and its address be determined?
      * Here was easy to see that Mennonite was a mortgagee and what its address was – public records
    - How sophisticated is the party in terms of being able find out about the lawsuit?
      * Here Mennonite was sophisticated, but that was not enough to rid the state of duty to mail notice to Mennonite’s address, since its address was so easy to discover
      * Sometimes lack of sophistication means that extra efforts are needed
* Due process does not require actual notice – it requires only that Mullane standards is satisfied!
* KEY POINT: just because state or federal notice laws may be satisfied, the *Mullane* standard may not yet be met...the constitution must be satisfied regarding due process per *Mullane*!

1. *Federal Subject Matter Jurisdiction*

The US Court system is truly unique – federal and state courts are often in the same physical location, and each can take causes of action under the other’s law.

Dual Court System --> the same cause of action can be brought in two different courts (concurrent jurisdiction)

Two questions:

1. is it constitutional for this case to be sent to federal court? Answer through Article III
2. Did in fact Congress choose to send this type of case to federal court? Look to statute

Both must be satisfied

Federal Question (or “Arising Under”) Jurisdiction

ARTICLE III, Section 2:

*The judicial power shall extend to all cases, in law and equity,* ***arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--****to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.*

28 U.S.C. §1331:

*The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.*

*Louisville & Nashville RR Co. v. Mottley*

* Mottleys had previously been in a train accident and were given free passes for life as part of a settlement agreement. The railroad did not renew their passes in 1907 in compliance with a Congressional act that forbade free passes or free transportation. Mottleys claimed that the bill applied only to future passes, and that any such prohibition of their passes violated the 5thA, depriving them of property without compensation.
* Mottleys sue in federal court under breach of contract. The RR argued that they could not satisfy since Congress prohibited free passes. Judgment for Mottleys – appeal to USSCt, which dismisses for lack of SMJ – not a federal question case under 1331

Subject Matter Jurisdiction cannot be waived by the parties – it is there to protect the *states*

So – SMJ can be brought up at any time in proceedings – even on appeal and courts have duty to bring it up even if parties do not

See Slide 31: P sues D in fed court. D appears. There is no federal SMJ, but no one notices. P gets judgment (100k) in his favor; there is no appeal. P then sues on the judgment in state court to garnish D’s wages. D collaterally attacks the judgment for lack of SMJ. Will the collateral attack succeed?

* No. Needs some finality. So, in a sense, SMJ CAN IN FACT BE WAIVED
* SMJ can be brought up in proceedings, on appeal, etc. But when the judgment is done and in context of other law suits then it cannot be attacked (unless defendant defaulted in first proceedings).