Lect 37

***Guaranty Trust Co. v. York***

Fed ct in NY entertaining an action under NY law uses NY’s statute of limitations even though NY officials do not consider them substantive

- the reason is that it would significantly affect the result of litigation for a fed court to disregard forum state law

- this is the outcome-determinative test

policy of vertical uniformity between federal and forum state court

Cohen

A New Jersey statute requires small shareholders bringing derivative actions to post a bond. Federal courts have no such requirement. P, a small shareholder, brings a derivative action against D in federal court in New Jersey. P has not posted a bond. D moves to dismiss. What result?

- granted – New Jersey rule should be used whether or not NJ officials think it should be used in fed ct in NJ because difference is outcome determinative

outcome determinative = if you switch rules from federal to forum state law it will make a difference to how the case will turn out

Some pushback against York’s outcome determinative test

**Byrd** v. Blue Ridge Rural Electric Corp.

SCt 1958

- Negligence action by a lineman employed by a subcontractor – his suit is against the primary contractor

- diversity case in South Carolina

- D said that So Carolina workman’s compensation law applied because work P did was of same sort as that done by D’s own employees

- so the question was: was P a “statutory” employee and so governed by SC workman’s comp or could he sue under SC tort law?

- under SC law the issue of whether he was a statutory employee was decided by a judge

Federal common law rule is jury would decide this question

Holding: issue for jury (federal common law rule should be used)

Brennan divides his Erie inquiry into two parts –

- is using SC law constitutionally required under Erie

- is this bound up with state rights and obligations such that employment of fed law would be unconstitutional?

First. It was decided in Erie R. Co. v. Tompkins that the federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts. We must, therefore, first examine the rule in Adams v. Davison-Paxon Co. to determine whether it is bound up with these rights and obligations in such a way that its application in the federal court is required.

- answer?

- no

what is an example that was given of a procedural rule that was bound up with state-created rights and obligations ?

Dunlap- burden of proof for contributory negligence

2) 2nd consideration?

Second. But cases following Erie have evinced a broader policy to the effect that the federal courts should conform as near as may be--in the absence of other considerations--to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular local rule. E.g., Guaranty Trust Co. of New York v. York.

- broader policy in diversity

- conformity to state procedural rules important if outcome determinative

Notice that bound up test and policy of vertical uniformity can pull in different directions

P sues D is federal court in New York under Pennsylvania law  
Pennsylvania’s two year statute of limitations is bound up with the Pennsylvania cause of action  
New York has a three year statute of limitations.

Bound up test says respect Pa law

Policy of vertical uniformity says do what a NY state court does

- is difference between SC judge and federal common law jury rules outcome determinative?

- maybe

- but policy of vertical uniformity is not the only question

- also relevant is countervailing federal policies in favor of uniform federal common law rule

But there are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence--if not the command--of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. The policy of uniform enforcement of state-created rights and obligations, see, e.g., Guaranty Trust Co. of New York v. York, supra, cannot in every case exact compliance with a state rule --not bound up with rights and obligations--which disrupts the federal system of allocating functions between judge and jury. Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.

- Did 7th A mandate a jury in fed ct?

- not answered, assumed not

- what if it had?

- would have to apply

After Byrd:   
P sues D under SC law in federal court in SC.  
1) If US Constitution requires a procedural rule in federal court, it must be used (e.g. 7th Amendment)  
2) if SC rule is substantive in horizontal choice-of-law sense, federal court must use SC rule instead of federal common law rule  
3) but there is also a policy of vertical uniformity with SC state courts  
 (if difference is outcome determinative)  
4) BUT there may also be countervailing federal interests in favor uniform federal common law rule

Now, what about FRCP?

Hanna

- Hanna sued Plumer, Osgood’s executor, for Osgood’s negligence in auto accident.

- left summons and complaint with Osgood’s executor’s wife at place of residence in accordance with 4(e) (4(d) at the time)

- Mass statute required in hand delivery to an executor or administrator

- DCt granted motion for sum j

- Ct App aff’d

- saying it was substantive rather than procedural

- outcome determinative

- SCt reversed

Policy of vertical uniformity is not an issue for FRCPs (or federal statutes)

“When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.”

Why no concern about vertical uniformity when a FRCP is at issue? Why does vertical uniformity matter only when federal courts are creating federal procedural common law?

Green: The idea is that the policy of vertical uniformity is a congressional command to federal courts when making federal procedural common law

It is tied to the purposes of diversity jurisdiction

Congress gave federal courts jurisdiction over diversity cases to solve a problem with state courts, namely bias

It would frustrate that purpose if federal courts created procedural common law that differed substantially from forum state law – e.g.

P(NY) sues D(Cal.) in state court in NY under NY law 2 ½ years after an accident.  
D is worried about state-court bias against him.  
NY has a 3-year statute of limitations.  
What would happen if federal courts had a common law 2 year limitation period?

The D would not remove despite being worried about state court bias – diversity jurisdiction would not be working

Or…

P(NY) sues D(Cal.) in state court in NY under NY law 2 ½ years after an accident.  
D is *not* worried about state-court bias against him.  
NY has a 2-year statute of limitations.  
What would happen if federal courts had a common law 3 year limitation period?

D would remove solely to get the longer limitations period – federal resources would be wasted on a case unrelated to the purpose of diversity

On the other hand, assume

P(NY) sues D(Cal.) in state court in NY under NY law 2 ½ years after an accident.  
D is worried about state-court bias against him.  
NY has a 3-year statute of limitations.  
What would happen if Congress passed a statutory 2 year limitation period for all diversity actions in state court?

The D would not remove and the original purposes of diversity would be frustrated, but since the original purposes of diversity had their source in Congress anyway, Congress can choose to frustrate them through subsequent legislation

OK, so in Hanna we are in the FRCP track – how do we solve that?

What gives SCt the power to create FRCPs? The Rules Enabling Act

**28 U.S.C. § 2072. - Rules of procedure and evidence; power to prescribe**   
(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.   
(b) Such rules shall not abridge, enlarge or modify any substantive right. . . .

1st Question – is the FRCP within Congress’s power (since Congress cannot delegate to the SCt power it doesn’t have)

What is Congress’s power over federal procedure?

[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

- Congress has power to regulate what is arguably procedural

- whether federal statute causes vertical forum shopping in diversity cases does not matter

- Congress passes a uniform statute of limitations applicable for all actions in federal court, including state law actions  
- is the statute valid?  
- even if a shorter state statute of limitations is bound up with the state cause of action?

Apparently Yes

Green is a bit skeptical – this appears to give Congress greater power over federal procedure for state law actions than state courts have over their own procedure when entertaining sister state actions

EG A New York state court is entertaining a Pennsylvania action with a 2-year statute of limitation bound up with it.   
May the NY legislature command the NY court to use a NY 3-year statute of limitation for the action?

We said no (although maybe NY has the constitutional power to do so and simply chooses not to – the USSCt has not answered this question)

2nd Q is whether the FRCP is within the limit in the Rules Enabling Act

Such rules shall not abridge, enlarge or modify any substantive right

* we will discuss this later

But 4(e) clearly satisfies both tests so it applies, not Mass law

Now – assume that the federal service rule had been common law

Hanna ct reinterprets the outcome determinative rule in York

The [Erie] decision was also in part a reaction to the practice of 'forum-shopping' which had grown up in response to the rule of Swift v. Tyson. That the York test was an attempt to effectuate these policies is demonstrated by the fact that the opinion framed the inquiry in terms of 'substantial' variations between state and federal litigation. Not only are nonsubstantial, or trivial, variations not likely to raise the sort of equal protection problems which troubled the Court in Erie; they are also unlikely to influence the choice of a forum. The 'outcome-determination' test therefore cannot be read without reference to the twin aims of the Erie rule: **discouragement of forum-shopping and avoidance of inequitable administration of the laws.**

- question is whether difference would influence choice of forum ex ante (not whether it would determine outcome in context of actual litigation)

- what about limitations period in York

- would that influence choice of forum

- Yes, so York still comes out the same under Hanna’s revision of the York test

- Ragan? Tolling rule?

- Yes – comes out the same

* Wood rule about appointment of agent for service of process?
* - yes – comes out the same

- Cohen post security before derivative action?

Yes – comes out the same

What does inequitable administration of the laws mean?

* First of all, courts rarely find that one aims is not implicated without the other
* - if the difference will lead to forum shopping courts find it will also lead to the inequitable administration of the laws

BUT the idea of inequity is that there is something unfair about different procedure being applied to two cases solely because of the accident that the parties are diverse on one and are not in another

Erie flow chart...

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

Assume now that a federal court entertains a state law action (or an action under the law of another nation)

1) is the relevant federal procedural law mandated by the U.S. Constitution? E.g. 7th A  
  
 if yes it applies

2) Is the relevant federal procedural law a federal statute?  
  
 if yes it applies if it is arguably procedural  
  
 - Green wonders about the power of Congress to preempt state rules bound up with the state’s cause of action...

3) Is the relevant federal procedural law a Fed. R. Civ. P.?  
  
if yes only questions are   
  
- is it arguably procedural and   
- does it abridge enlarge or modify substantive rights (will discuss later)

4) is the relevant federal procedural law federal procedural common law?  
 - remember, includes cases in which the federal court simply doesn’t have anything  
  
if so first determine if  
1) state rule is bound up with the cause of action (Byrd) – if so, use state law

- Green wonders whether a state can bind up trivial procedural law with its cause of action – he thinks that in such a case a federal court could ignore the bound up rule and use federal procedural common law…

2) if not look to  
 twin aims of Erie  
 difference leads to forum shopping and ineq. admin. of laws?  
 plus countervailing federal interests

Walker v. Armco Steel Corp.  
(US 1980)  
  
- according to forum state law, the statute of limitations tolls upon service  
- federal rule (inspired by Fed. R. Civ. P. 3) is that it tolls upon filing  
  
- Ragan said use forum state rule  
- but does Hanna make a difference?

* Is this in an FRCP track or a federal common law track?
* Federal common law, so case comes out the same

“Application of the *Hanna* analysis [that is FRCP track] is premised on a ‘direct collision’ between the Federal Rule and the state law.”

There is no direct collision between the FRCP 3 and the state tolling rule:

**Rule 3.  Commencement of Action**A civil action is commenced by filing a complaint with the court.

- 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.  
- What result?

- which track?

FRCP because Twiqbal are supposedly about FRCP 8(a) language of a “showing”

* Thus can apply in diversity case
* If it was in the common law track the argument that Twiqbal should not apply in a diversity case would be strong (e.g. forum shopping concerns)

**Semtek**

- Semtek sues Lockheed in state court in Ca. under Ca. law  
-the action is removed under diversity  
- then dismissed on statute of limitations grounds  
- Semtek then brings an action in state court in Maryland (where there is a longer statute of limitations)  
- claim precluded?  
- assume that under federal law a dismissal under statute of limitations grounds has claim preclusive effect  
- under California law it does not

Which law on preclusion should the MD ct look to – Cal. Law or federal law?

There was an old case, Dupasseur v. Rochereau (US 1875), that said forum state law governed but that was under the Conformity Act – in actions at law federal courts were to use the forum state’s procedural rules

Conformity Act does not exist anymore, so Dupasseur is irrelevant

There was also an FRCP that appeared to apply

Rule 41. Dismissal of Actions  
. . .  
(b) Involuntary Dismissal; Effect.  If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule — except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 — operates as an adjudication on the merits.

But Scalia concluded that 41(b) was not about preclusive effect in another jurisdiction, but only in the same jurisdiction

We think, then, that the effect of the “adjudication upon the merits” default provision of Rule 41(b)...is simply that, unlike a dismissal “without prejudice,” the dismissal in the present case barred refiling of the same claim in the United States District Court for the Central District of California.

So… we are in the federal procedural common law track…