Lect 38

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

NOTE: a FRCP might still be invalid under the Rules Enabling Act even in a federal question case, e.g. because it abridges enlarges or modifies a federal substantive right

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 use its power over federal procedure 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 rule om the matter – it just doesn’t do what the forum state does  
  
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 in favor of using a federal common law rule that is uniform across all federal courts?

**Semtek**

**Scalia**

Plaintiff Semtek sues Lockheed in state ct in Cal under Cal law

D removes in diversity to fed ct

Dismissed by Dist. Ct due to statute of limitations

9th cir affirmed

under Cal law no claim preclusive effect in another jurisdiction

assumption is that under federal law there would be

Semtek then brings suit in Maryland state ct (longer statute of limitations there)

Lockheed tries to remove to fed ct, but fails

Md Cts held claim precluded by judgment in federal court in CA

* USSCt takes cert

reverses

Md Ct must give the previous judgment the preclusive effect under the rendering court’s law – but that court is a federal court in Ca sitting in diversity, so is it federal or Ca law? – this is the Erie question

There was an old case, Dupasseur v. Rochereau (US 1875), which held that the preclusive effect of a judgment of a federal court sitting in diversity is under forum state law  
  
but that was back when the Conformity Act existed (before the FRCPs) – it said that in actions at law federal courts were to use the forum state’s procedural rules

so that case isn’t relevant anymore

Is there an FRCP on preclusive effect of dismissals? – if so, we would be in the FRCP track

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.

Scalia argues that 41(b) is not about preclusive effect in other jurisdictions– it is solely about whether a dismissal will bar a P from suing again in the same district court

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 common law track

Scalia says a number of dumb things about why the preclusive effect of a judgment cannot be determined by FRCP 41(b)

Moreover, as so interpreted, the Rule would in many cases violate the federalism principle of *Erie*..., by engendering “ ‘substantial’ variations [in outcomes] between state and federal litigation” which would “[l]ikely … influence the choice of a forum,”.... Out-of-state defendants sued on stale claims in California and in other States adhering to this traditional rule would systematically remove state-law suits brought against them to federal court—where, unless otherwise specified, a statute-of-limitations dismissal would bar suit everywhere.

This assumes that vertical forum shopping is relevant to the validity of a FRCP, but we know from Hanna that that isn’t true. The only question about the validity of a FRCP is whether it is within Congress’s power and whether it is compatible with the Rules Enabling Act

How could Scalia make this simple mistake...? Was it because the SCt was deciding Bush v. Gore at the same time...?

Scalia also says this:

And even apart from the purely default character of Rule 41(b), it would be peculiar to find a rule governing the effect that must be accorded federal judgments by other courts ensconced in rules governing the internal procedures of the rendering court itself. Indeed, such a rule would arguably violate the jurisdictional limitation of the Rules Enabling Act: that the Rules "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b). In the present case, for example, if California law left petitioner free to sue on this claim in Maryland even after the California statute of limitations had expired, the federal court's extinguishment of that right (through Rule 41(b)'s mandated claim-preclusive effect of its judgment) would seem to violate this limitation.

This at least looks to the Rules Enabling Act to determine the validity of a FRCP. But it is a bizarre reading of the substantive right limitation in the REA. If Scalia is right, then it would appear that the compulsory counterclaim rule, which also determines preclusive effect, is invalid:

Rule 13. Counterclaim and Crossclaim  
(a) Compulsory Counterclaim.  
(1) *In General.* A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim:  
(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim...

but that’s crazy

Also – Scalia’s reading of the substantive right limitation here is contrary to his reading in Shady Grove

Let’s set aside these unforced errors

Now address Erie issue – we are in the federal common law track

first question

- will differing rules lead to forum shopping and the inequit admin of laws?

- forum shopping perhaps

- if you are a P you may sue in whatever ct has the least preclusive effect if dismissed

- if D, remove or not on basis of most preclusive effect

- Scalia mentions this

- any countervailing fed interests concerning preclusive effect of dismissal on statute of lims ground that would recommend using the federal common law approach anyway?

* no – the stat lims was itself forum state law – there will be some disuniformity between federal courts in different states no matter what
* no real reason to have uniformity among federal courts

So – use CA law

OK but compare

P sues D in federal court in diversity in Nebraska. P's suit is for rent due. Judgment for D - the lease is held to be in violation of the statute of frauds (it should have been in writing). P subsequently sues D in state court in Nebraska state court for quantum meruit (that is, for the fair value of the use of P's apartment). Under Nebraska's law of claim preclusion, an action at law concerning a transaction may be followed by an action at equity concerning that same transaction. Does the Nebraska or the federal (transactional) rule concerning the scope of P's claim against D?

This is about whether a federal court in diversity uses the transactional rule of the scope of a claim or a forum state rule

will the difference lead to forum shopping?

* perhaps – D will remove to fed ct to get all causes of action together
* P will avoid fed ct
* But strong countervailing federal interests in favor of the federal transactional rule exist
  + efficiency: with the forum state rule there will be duplicative litigation and some of that will be in federal court
  + and more importantly the transactional standard is used in the FRCP joinder rules, especially 13(a) compulsory counterclaim rule
    - it would be bizarre if a P didn’t have to bring all causes of action against the D concerning the same transaction but, under 13(a) a D did have to abide by the transactional rule concerning the P
* Green thinks that if this matter were addressed by a federal court they would hold that the federal common law on the scope of a claim would apply

choice of substantive law

let’s start with choice of substantive law in state courts

we have already discussed when state courts entertaining an action under the substantive law of a sister state can use their own procedural rules or when they must respect the procedural rules that are bound up with the sister state causes of action

Here is an example of that

P and D (both Pennsylvanians) get into a car accident in Pennsylvania  
P sues D in state court in Virginia under Pennsylvania law  
Can the Virginia court use Virginia’s:  
 rule on D’s duty of care?  
 rule on who has the burden of proof for contributory negligence?  
 statute of limitations?  
 service rule?  
 pleading standard?

BUT this is a different issue

Wife (a NY domiciliary) is driving Husband (a NY domiciliary) in Pa when she gets into an accident.  
Husband sues Wife for negligence in Va state court.   
Under Va and Pa state law husbands cannot sue their wives for negligence   
Under NY law, they can.   
Which law should the Va state court use?

Not a procedural issue, so Va law would not apply, but should the Va ct use NY or Pa law?

Different states have different approaches to this issue

old fashioned approach is used in Va state courts: lex loci delicti for torts (law of the place of the wrong)

So a Va state court would use Pa law

But other state courts (e.g. Ca) would use more modern interest analysis approach: look to the purposes of the law at issue to see if the state would want its law to apply. Pa has spousal immunity arguably to encourage marital harmony – but it doesn’t care about the marital harmony of New York couples

NY thinks that marital harmony does not justify keeping spouses from suing one another. NY is interested and so NY law applies.

NOW...

Wife (a NY domiciliary) is driving Husband (a NY domiciliary) in Pa when she gets into an accident.  
Husband sues Wife for negligence in federal court in Va.   
Under Va and Pa state law husbands cannot sue their wives for negligence   
Under NY law, they can.   
Which law should the federal court use?

Federal courts have common law choice of law principles for federal question and admiralty cases that are based on interest analysis

should they use these in diversity cases?

This is an Erie problem (common law track)

* Byrd bound up test is irrelevant here...

would the difference between Va and federal law on choice of law lead to forum shopping?

definitely Yes

are there countervailing federal interests – not clear there are

SO: use forum state’s choice of substantive law rules

The federal court in Va should use Va lex loci delicti approach and choose Pa law

That was the conclusion of Klaxon Company v. Stentor Electric Manufacturing Company (1941)

NOW: what about the validity of Fed. R. Civ. P.s in diversity cases?

This is not a question of forum shopping

all that matters is whether what the FRCP regulates is arguably procedural (and so within Congress’s power) and then whether it violates:

**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. . . .

what does the substantive right limitation mean?

Sibbach v. Wilson Co. (1941)

- Diversity personal injury suit in federal court  
- D got an order for a physical examination of P under Fed. R. Civ. P. 35  
- P refused and was sanctioned under Fed. R. Civ. P. 37  
- P claimed Rs 35 and 37 were in violation of the Rules Enabling Act, because they abridged her substantive rights (under state law) not to be submitted to an exam

The SCt rejected Sibbach’s view of substantive rights

She insists…that by the prohibition against abridging substantive rights, Congress has banned the rules here challenged. In order to reach this result she translates "substantive" into "important" or "substantial" rights.

A substantive right instead refers to a right that is part of the cause of action sued upon

BUT the Sibbach court also said that a FRCP does not violate the REA if it really regulates procedure:

If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded. The test must be whether a rule really regulates procedure, — the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. That the rules in question are such is admitted.

OK – now Shady Grove Orthoped. Assoc. V. Allstate (U.S. 2010)

Allstate refused to pay NY statutory interest on late payment of claims  
  
- class action against Allstate for the interest in federal court in NY

there was a NY state statute N. Y. Civ. Prac. Law Ann. §901 (no class actions for penalties or statutory minimum damages)

under the relevant FRCP for class actions (R 23) there is no such limitation

Scalia (with Thomas, Roberts & Sotomayor)

uses the Sibbach test

FRCP is valid if it really regulates procedure – it does not matter if it preempts state law that the state’s officials want to follow the state’s cause of action into federal or sister state courts

easy test for the validity of FRCPs

Scalia: “The fundamental difficulty with …these arguments is that the substantive nature of New York’s law, or its substantive purpose, makes no difference. A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes). That could not be clearer in Sibbach…”

Scalia:   
“In sum, it is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule. We have held since Sibbach , and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure. If it does, it is authorized by §2072 and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights.”

Assume there is a new FRCP that determines who has the burden of proof for contributory negligence – is it valid acc’d to Scalia? YES

Stevens – the REA substantive right limitation is meant to protect state interests in their law applying in federal and sister state courts

BUT Stevens thinks that the NY law at issue is not substantive in that sense, so FRCP 23 is valid

The New York law at issue, N. Y. Civ. Prac. Law Ann. (CPLR) §901(b) (West 2006), is a procedural rule that is not part of New York’s substantive law. Accordingly, I agree with Justice Scalia that Federal Rule of Civil Procedure 23 must apply in this case and join Parts I and II–A of the Court’s opinion. But I also agree with Justice Ginsburg that there are some state procedural rules that federal courts must apply in diversity cases because they function as a part of the State’s definition of substantive rights and remedies.

“Justice Scalia believes that the sole Enabling Act question is whether the federal rule “really regulates procedure,”which means, apparently, whether it regulates “the manner and the means by which the litigants’ rights are enforced”…. I respectfully disagree. This interpretation of the Enabling Act is consonant with the Act’s first limitation to “general rules of practice and procedure,”§2072(a). But it ignores the second limitation that such rules also“not abridge, enlarge or modify any substantive right,” §2072(b) (emphasis added), and in so doing ignores the balance that Congress struck between uniform rules of federal procedure and respect for a State’s construction of its own rights and remedies. It also ignores the separation-of-powers presumption, and federalism presumption that counsel against judicially created rules displacing state substantive law.”

In deciding that 901(b) was not substantive, it was important for Stevens that its language applied in NY state courts to causes of action under any jurisdiction’s law – it did not appear to be bound up with NY statutory damages actions

Imagine that a class action for statutory penalties under Pennsylvania law had been brought in state court in New York. Would section 901(b) have applied? – according to the language of 901(b). YES

So Scalia and Stevens agree that the class action can proceed, even though they do so for different reasons

Ginsburg (with Kennedy, Breyer, & Alito)

she thinks the class action cannot proceed

She basically agrees with Stevens that FRCPs must be read in the light of state interests

BUT she also thinks that in this case NY is interested in its rule applying in federal court

* unlike Stevens she answers the question of whether the NY law is substantive by looking at NY’s purposes in enacting the law

Ginsburg:  
  
“The Court today approves Shady Grove’s attempt to transform a $500 case into a $5,000,000 award, although the State creating the right to recover has proscribed this alchemy. If Shady Grove had filed suit in New York state court, the 2% interest payment authorized by New York Ins. Law Ann. §5106(a) (West 2009) as a penalty for overdue benefits would, by Shady Grove’s own measure, amount to no more than $500.”

“In sum, both before and after Hanna , the above-described decisions show, federal courts have been cautioned by this Court to ‘interpre[t] the Federal Rules … with sensitivity to important state interests,’ and a will ‘to avoid conflict with important state regulatory policies.’ The Court veers away from that approach…in favor of a mechanical reading of Federal Rules, insensitive to state interests and productive of discord.”

Green: Why didn’t they certify the question of whether 901(b) was substantive to the NY Court of Appeals (the highest court of appeals in the NY state court system)?? There is all this speculation among the Justices about the scope of NY law – why not ask NY courts?

SO what if you have an FRCP track case?

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

* for this substantive right test, you need to consider the approaches in Shady Grove
  + it is arguably true that the Stevens and Ginsburg opinions together mean that one must look to state interests to determine whether an FRCP is valid or applicable
  + although there are different approaches in Stevens and Ginsburg in deciding whether there are state interests at issue
  + it would be advisable also however to look at Scalia’s approach too

More Erie questions

- Colorado passed a Certificate of Review Statute  
 - anyone suing a licensed professional for malpractice must provide, with the complaint filed, a certificate stating that an expert in the licensed professional’s area of practice has examined the claim and has determined that it has substantial justification.    
- P (a citizen of New York) sues D (a citizen of Colorado) in the Federal District Court for the District of Colorado for medical malpractice under New York law.    
- P’s suit concerns an operation that D performed upon P in New York City.  P does not file a Certificate of Review with her complaint.  In his answer, D asks that the action be dismissed for failure to file a Certificate of Review.  What result and why?

what track are we in?

FRCP?

* what FRCP’s are directly contrary to the Colorado statute?
* R8(a)(2)? R 11?
* if you use this approach then the Colo. statute would not be used in federal court
  + notice that there is no worry about the subst right limitation in the REA – the Colo statute cannot be bound up with the cause of action because that is under NY, not Colo. law
* but perhaps it is under the fed common law track
  + would the difference lead to forum shopping?
  + arguably yes
  + and countervailing fed interests in favor of the federal com mon law rule (namely no affidavit)?
    - not clear
  + that would suggest using the Colo. statute
* federal courts have disagreed on this issue (lots of states have an affidavit of merit statute)
  + how they decide the matter largely depends upon which track they use

- P sues D in federal court in New York under 42 USC 1983 for civil rights violations.   
- 1983 does not have its own statute of limitations, so federal courts borrow from analogous state statutes.   
- New York's statute of limitations ran out between the time that P filed in federal court and the time P served D.   
- Under the federal rule, statute of limitations are tolled at filing.   
- Under the New York state rule they are tolled at service. Is P's action barred?

This is not an Erie case at all

the action is under federal law

The SCt in this case held that the federal tolling rule applied

- federal courts have developed a judge-made doctrine of forum non conveniens  
- P(NY) sues D(Germany) in federal court in NY for a tort committed in Germany  
- the source of PJ is tagging  
- NY has rejected the doctrine of forum non conveniens  
- D moves to dismiss under forum non conveniens   
- what result?

we are in the common law track

* will the difference lead to forum shopping?
* clearly yes
* any countervailing federal interests?
  + YES – federal interests in foreign relations (it might offend a foreign sovereign to take a case)
  + also the inconvenience of taking a case when the witnesses are abroad and the law to be applied is foreign law
* in all cases in which this issue has been addressed by a federal court they have held that the federal common law on forum non conveniens should be used