**Lect 7**

* - review sessions start this week
* Really have been dealing with the problem of frivolous actions
* Use pleading rules to screen out action pre-discovery or sanction under R 11, which is usually brought only after discovery
* Why not have a mini-R 11 proceeding at the initiation of the pleading period – if P fails, action is dismissed without sanctions
  + Like Twiqbal, it would allow an action to be screened out pre discovery
  + But like R 11, it would use informal proceedings, not pleading standards

alternative and even inconsistent pleading is allowed (can plead two inconsistent causes of action or defenses). They are subject to R 11, of course. Alternative and inconsistent pleading is in keeping with the view of the Federal Rules that greater information about the case will be revealed in discovery.

**Rule 2. One Form of Action  
  
There is one form of action — the civil action.**

what does this mean? Merger of law and equity. In some states there are still separate courts – law courts (with judges) and equity courts (with chancellors). Pre Federal Rules of Civil Procedure, there was only one federal trial court (as now) that handled both law and equity cases. But law and equity cases had different rules. Rule 2 makes it clear that that is no longer the case. The two cases are covered by the same set of rules. We will rarely be concerned about the distinction between law and equity, but it does occasionally come up.

action commences with filing with court

**Rule 3.  Commencement of Action**

A civil action is commenced by filing a complaint with the court.

2) Why might it matter when an action commences?

- race to the courthouse – generally first to start lawsuit will get his forum.

- statute of limitations – tolled on filing

- this is the rule that federal courts use for federal causes of action – how they deal with state causes of action is different – we will discuss

- time to determine citizenship for diversity

**Summons**

1) Need summons and complaint

- requirements for summons are in R 4(a)

what is summons for??

signed by clerk

drafted by P or his atty though

bears seal of ct, identifies ct and parties

states time in which defendant must answer

and makes it clear no answer will result in default

- see Form 3

- lets D know this is a real lawsuit

Now move on to constitutional restrictions on notice

**service**

* Way of providing notice and opportunity to respond
  + Due process limits
  + 5th A for fed cts
  + 14th A for state cts
* What is due process as far as giving notice is concerned
* Facts of Mennonite Board of Missions
  + Suit by purchaser from gov’t to quiet title
  + Government attached and sold due to original owner’s nonpayment of taxes
  + Mortgagee (the lender, which had a security interest in property) challenged title in the quiet title action brought by purchaser
  + mortgagee claimed lack of notice under due process in earlier proceeding
  + Indiana cts upheld method of notice
  + SCt reversed

What was notice?

* + Notice posted on court house, published a couple of times
  + Sent notice by certified mail to owner, but not to mortgagee
  + SCt said notice insufficient
  + Test is in Mullane
    - need notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”
  + What is relevant in determining what is reasonable
    - What does SCt look to
      * Fact that mortgagee has substantial property interest
        + When you have less of an interest (eg class action of very small claims), you may get less
      * Easy to get identify and address of mortgagee
        + Title records record interest
      * On the other hand, if can’t find D at all, publication might be enough
      * Debate about sophistication of mortgagee
        + But even though sophisticated, not enough to absolve gov’t of simple expedient of sending notice to an address that can be easily found

An example where lack of sophistication might mean more work is needed to satisfy due process –

Green v. Lindsey

Needed more than posting on door of apartment in public housing project for eviction proceedings, because of lack of sophistication of tenant

* + - Note that in class actions it can be relevant that those who know about suit (eg named plaintiffs) will adequately represent the interests of those who did not get actual notice – makes it easier to accept publication
* question of due process as far as notice is concerned is:
  + fact intensive
  + tends to ask what a cost-sensitive person who really wanted to apprise the defendant of the suit would do

Now (subconstitutional) law on service in federal court

**Service**

What happens if service is improper? – how to enforce rules?

Two scenarios

* 1) assume because service is inadequate you don’t find out about the suit and so don’t respond at all - default judgment is issued against you
  + could go to rendering court and make a motion to set aside the judgment R 60(b)
  + but say you don’t make motion to set aside
    - P brings an action on the default judgment
    - Basically a suit to collect debt
    - D can collaterally attack on ground that default j was not valid

P sues D in Oregon state court for negligence, asking for $100,000  
- P serves D by putting a copy of the summons and complaint down a sewer drain  
- this is acceptable service under Oregon law  
- D does not find out about the suit  
- P gets a default judgment of $100,000 against D  
- the Oregon court attaches property owned by D in Oregon worth $100,000 and transfers it to P  
- D later finds out about it and sues P in ejectment

* 2) If you get notice even though service was inadequate you can attack in the action itself
  + - can put in answer the defense of insufficient service of process
    - or can bring pre-answer motion
    - this is allowed at least in fed court

- might seem weird that you challenge service if you got notice

- why allow? After all, if the action is dismissed for insufficient service, the P will simply file the suit again and serve you adequately

- why go through this meaningless gesture?

- if you don’t allow someone who got actual notice to challenge service, people will ignore service rules if they think there will be actual notice

- also sometimes dismissal will stop the suit (eg if statute of limitations has run)

3) waiver of service of summons

* Plaintiff sends two copies of a notice (see form 5) complaint, and waiver (form 6) through 1st class mail or other reliable means
* Prepaid return mail envelope provided
* Defendant must submit waiver within 30 days
* If he does he gets 60 rather than merely 21 days to answer
* If he doesn’t, then he has to pay costs of service, unless he shows good cause
* Green has never seen this used - big firms tend not to use it

4) When serving, must file proof of service (affidavit by server),

If waiver of service is used you file waiver