**Civil Procedure Notes 11/09/2017**

See *Erie* flowchart: <http://michaelstevengreen.typepad.com/files/erie-flowchart-2.pdf>

federal procedural common law track

Say forum state has statute/constitutional provision regulating procedure that feds don’t use – that is common law track. What to do?

1). Determine if state rule is bound up with cause of action (*Byrd)* – if so, use state law

- this test normally won’t be implicated

2). If answer to #1 is no look to twin aims of *Erie*: does difference lead to forum shopping or inequitable administration of laws? Are there countervailing federal interests in favor of a uniform federal rule in federal court?

**Klaxon Company v. Stentor Electric Manufacturing Company (US 1941)**

When fed courts use choice of law rules in fed question cases, that is common law (not statute) so vertical integration will be important and fed court will use forum state law in diversity case.

Prof. Green thinks twin aims of Erie really come from a congressional mandate; federal courts do not have complete freedom in creating federal common law procedure in diversity cases because Congress has implicitly put a restriction on them in the diversity statute

* Everything depends upon the ***type*** of federal law potentially conflicting with state law. Try both analyses (eg FRCP and federal common law) if you are unsure whether the issue falls under one or another

**Walker v. Armco Steel Corp. (US 1980)**

Application of the *Hanna* analysis concerning FRCPs is premised on a “direct collision” between the FRCP and the state law.

* Which track is Twiqbal standard in? Everything depends upon the track you’re in. If FRCP track, Twiqbal applies even in diversity case; if fed common law track, fed courts have concluded it’s in FRCP track due to 8(a)
* FRCP track makes it easy to come to conclusion FRCPs will apply in diversity cases, but possible for them not to

Now we need to reconsider the FRCP track

* + There has not yet been any case in which Fed. R. Civ. P. has been struck down in a diversity case – though *Shady Grove* came close

The test for FRCP track

1). Is what it regulates arguably procedural? And

2). Does it abridge, enlarge, or modify substantive rights? We’ve seen in *Hanna* a generous interpretation of this, but *Shady Grove* pushes back

**Shady Grove Orthoped. Assoc. v. Allstate (US 2010)**

**Facts:** Patient injured in auto accident, facility that cared for her made claim to Allstate. D paid but late; then refused to pay the interest payment mandated under NY law. P attempts to bring this claim as a class action.

**Procedural history:** Claim is in fed court, FRCP 23 governs class actions. Competing state law is §901(b) which says there is bar on recovery in class actions for penalties or statutory damages (real damages are how much you were actually hurt).

* Policy purpose? Prevent companies from being unduly burdened with statutory damages/fines. NY probably wants this to follow cause of action into other courts so that Ds will not be overburdened no matter where they are sued under NY law.

**Holding:** another plurality opinion where the resulting law is unclear. Scalia (with Thomas, Roberts, Sotomayor) tries to argue there is direct collision between FRCP 23 and §901 to show we are in FRCP track.

Then Scalia adopts the Sibbach interpretation of the substantive rights provision of the rules enabling act. Under this interpretation of Federal rule of civil procedure is valid if it really regulates procedure.

Scalia worries that if we have to figure out state substantive rights to determine the validity of a Federal rule of civil procedure, it will be nightmare because you can’t tell whether or not a state rule is substantive! Scalia doesn’t think validity of FRCPs depends on whether they respect state substantive rights.

* 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…”
  + Green: But assume there is new FRCP that determines who has burden of proof for contributory negligence – wouldn’t that abridge/enlarge/modify substantive rights?
* Gist of Scalia: we must use the Sibbach approach or consequences will be disastrous.

Stevens concurs in judgment but agrees more with Ginsburg. Stevens thinks FRCP can be invalid if it is contrary to a state substantive right, and that varies depending on state right at issue.

* So one FRCP could be valid in one case and not in another, under Stevens’ reasoning.
* Stevens think NY rule in this case is procedural because it is in NY civil procedure code, so no need to speculate
* Stevens adopts an approach to determining whether a state rule is substantive or procedural that is easy to apply and, unlike Ginsburg’s approach, does not require that one engage in difficult speculations about the purposes of the state rule at issue
* Strongly disagrees with way Scalia reads the substantive rights provision, however – must respect state regulatory policies.

Ginsburg (with Kennedy, Breyer, Alito) argues NY rule is about substantive rights so it doesn’t interfere with FRCP at all – they’re addressing different issues!

* but if there were a direct conflict between FRCP 23 and NY’s rule 901, then Rule 23 would be invalid because it would violate the substantive rights provision in the rules enabling act

So which opinion is binding? Maybe the narrowest reading (Stevens) but he disagrees so much with Scalia that it seems weight of authority is on the side of the dissent, with which Stevens largely agrees

* Stevens has more formalistic approach to determining whether state rules are substantive, Ginsburg more searching, but all five of those justices think substantive rights mean substantive rights – the substantive rights provision of the rules enabling act can invalidate a Federal rule of civil procedure for certain state actions and not for others
* Prof. Green recommends interpreting cases like this under all three theories.
  + Aside: couldn’t they just certify the question of whether the New York rule 901 was substantive to the NY Court of Appeals?

P sues D under German law in fed court in LA concerning accident in Germany. LA state courts have no doctrine of forum non conveniens, federal FNC doctrine is laid out in *Piper*. D moves to dismiss on FNC grounds.

* Common law track
* The difference between Federal and forum state law would indeed lead to forum shopping
* But there are countervailing Federal interests in favor of a Federal Court using the Federal law of FNC in a diversity and alienage case
* Countervailing federal interests here are the difficulty of Federal Court would have determining the content of foreign law, unavailability of witnesses, and Federal interests in foreign relations
* So countervailing federal interest can be strong enough to override the inherent forum shopping problems!
* All Federal courts that have dealt with this issue have said that Federal law on FNC applies

CO passes Certificate of Review Statute that mandates anyone suing a licensed professional for malpractice must provide certificate claiming an expert in same area of practice has examined the claim and determined it has substantial jurisdiction.

* P (NY) sues D (CO) in fed court in CO for malpractice under NY law concerning operation D performed upon P in NY; no Certificate of Review filed, D motions to dismiss.
* Which track are we in?
* FRCP track…?
* FRCP 8(a) conflicts with this – you just need short and plain statement etc. Also maybe conflict with Rule 11!
* Those Federal courts that have concluded that state statutes directly conflict with 8(a) have gone on to conclude that they do not apply in a diversity, alienage, or supplemental jurisdiction action
* Those Federal courts that have concluded that 8(a) and R 11 are compatible with these state laws, putting the case in the Federal procedural common law track, have concluded that the state statutes must be applied in Federal Court – the forum shopping problems are sufficiently significant and there do not appear to be strong countervailing Federal interests in favor of a uniform Federal approach in Federal Court

P (TX) sues D Corp. (English corp. with PPB in England) for injury on D Corp. cruise ship. Cruise contract contained choice-of-forum provision saying all suits arising from cruise must be brought in England. P sues in TX court under TX negligence law, D removes to Eastern District of TX. D then moves to dismiss based on choice-of-forum clause, but TX state court do not enforce those. Federal law common law, as shown in Federal question and Admiralty cases, conflicts on this point. Should federal court uphold clause and dismiss?

* This is clearly in the Federal procedural common law track
* Federal courts are conflicted on how this airy question should be answered
* One might argue that this is an example of the state rule being substantive, obligating a federal court to apply it under Byrd
  + TX common law is a state substantive right, so it would be used in place of federal common law
* But some Federal courts treat the matter as independent of state contract law – the question is more of a procedural one for Federal courts
* So the issue is whether the twin aims of Erie recommend using forum state law, or whether there are sufficiently strong countervailing Federal interests in favor of using the Federal rule
* Green thinks that the forum shopping problem is sufficiently strong to recommend using state law
* Notice that the countervailing Federal interests are nowhere near a strong here are as they are in a forum non conveniens context

**Terminating litigation before trial**

Ways actions can be dismissed before trial : 12(b)(6) failure to state a claim, 12(c) motion for judgment on the pleadings

* 12(c) motion does not look to the evidence but comes to a conclusion that a judgment for the plaintiff for defendant is possible simply by looking to the pleadings, the complaint and the answer
* A motion to dismiss for failure to state a claim brought after the period allowed under 12(b) will be in the form of a motion for judgment on the pleadings under 12(c)
* But plaintiffs can also bring motions for a judgment on the pleadings under 12(c)- for example the defendant may admit all of the plaintiff’s allegations and rely on a affirmative defense that is legally insufficient

Federal rules also create possibility that you can avoid trial due to evidentiary insufficiency

summary judgment

* Summary judgment generally happens at end of discovery period, because then you have all the evidence that would be presented trial. The standard for summary judgment is “No reasonable person could rule in favor of the non-movant”
* Directed verdict and judgment notwithstanding the verdict are same general idea as summary judgment, but happen at trial.

Burden of production: burden to get the ball rolling during trial by presenting sufficient evidence to show that a reasonable jury could find in your favor. P has this burden for cause of actions, D has it for affirmative defenses.

P satisfied his burden of production at trial concerning every element of the cause of action  
D offers no evidence  
directed verdict for P?

No – P has only offered enough evidence such that it is possible for reasonable jury to find in his favor, not of such that a reasonable jury must find in his favor

* The case goes to trial even though the defendant has no contrary evidence

- P sues D for negligence  
- P offers evidence that at trial would satisfy the burden of production concerning negligence and damages but nothing concerning causation  
- D offers no evidence and moves for summary judgment

- must be granted to D

summary judgment for defendant concerning a cause of action is appropriate when  
no reasonable jury could find for the plaintiff with respect to at least *one* element of the cause of action

* Just one element is all that is needed
* That is why it is easier for the defendant to get summary judgment in his favor and the plaintiff

summary judgment for plaintiff concerning a cause of action is appropriate when  
no reasonable jury could find for the defendant with respect to *each* element of the cause of action

- P sues D for negligence  
- P offers sufficient evidence concerning negligence, causation and damages such that a reasonable jury *would have* to find in his favor   
- D offers rebutting evidence concerning causation

- in this case partial summary judgment would be appropriate

P get summary judgment on negligence and damages, but the matter of causation goes to trial