**Erie Flow Chart**

[**Flowchart**](http://michaelstevengreen.typepad.com/files/erie-flowchart-2.pdf)

* a bit more on Erie
  + notice that on the Erie flow chart, if a Federal statute or Federal rule of civil procedure is invalid, the arrow moves on to the Federal common law track
    - That is because even if the Federal statute or Federal rule of civil procedure is invalid and so is out, in its absence a federal court might still create a federal common law rule and that could be valid
      * Because it’s the difference between that Federal common law rule and state law would not lead to forum shopping or inequitable application of the law
* Also a bit more on Stevens’s approach in Shady Grove: it’s a high bar to show that a state rule is substantive, such that a Federal rule of civil procedure would violate the substantive right limitation in the rules enabling act
  + The mere possibility that it is substantive is not enough, has to be little doubt that it’s substantive
    - Shady Grove – the New York rule was in the state’s procedural code
    - The fact that there might be good arguments for treating it as substantive given its underlying purpose, as Ginsburg argued, is Not enough for Stevens
* Under Ginsburg’s approach, by contrast, the court must be more searching in determining whether a state rule is substantive are not
  + **Green thinks this probably right in theory but it’s hard to put it into action**
  + must Speculate on purposes of state rule in Ginsburg’s approach to see whether state officials would think it’s substantive or not
* Like PJ on that there are lots of things up in the air in an Erie case-
* just figure out the relevant arguments and the relevant considerations – coming to the right answer is not as important
* Also a bit more on about the federal common law track
  + First question is whether the state rule is bound up with a cause of action
    - *Byrd* says it’s unconstitutional to not apply the state rule if it is
    - This is a similar inquiry to determining whether the state rule is substantive in connection with the substantive rights limitation of the rules enabling act for Stevens and Ginsburg
  + If it isn’t bound up there is still a reason to use forum state law if it is recommended by the twin aims
    - Avoiding forum shopping and inequitable administration of the laws
    - If the twin aims are not implicated, then you can use the Federal common law rule without any worry
  + If the twin aims are implicated however, there is still a reason to use the Federal common law rule rather than the forum state’s rule if countervailing Federal interests recommend it
    - Determining Countervailing Federal interests involves a lot of speculation on why a federal court would want a uniform rule in Federal Court even for diversity cases
    - It will vary depending upon the case
    - An example where countervailing Federal interests were strong is the Erie question of whether a Federal Court sitting in diversity or alienage should use Federal rules of forum non conveniens or the forum state’s approach
* Claim and issue preclusion is common law
  + If a Federal Court issues a judgment sitting in diversity, what determines the preclusive effect? State or federal? We will deal with this Erie question later

**Terminating litigation before trial**

* Motion for judgment on the pleadings
  + This is a way of disposing of the case in favor of the defendant or the plaintiff solely by looking at the pleadings and reasoning legally
  + One example is a determination that the plaintiff fails to state a claim
    - If it’s outside of the 12(b)(6) period, this will be in the form of a motion for judgment on the pleadings under 12(c)
  + But other ways of getting a motion for judgment on the pleadings are possible
* Looking at the complaint and the answer, for example, one might determine that a motion for a judgment on the pleadings in favor of the plaintiff is appropriate, because the defendant has admitted all of the plaintiff’s allegations that are necessary to state a claim, and the defendant has offered only an affirmative defense that is legally insufficient
  + Can’t have negative defenses – where the defendant denies an element of cause of action - and get a motion for judgment on the pleadings

**But a case can be terminated before trial also due to Evidentiary Insufficiency**

* Rule 56: Summary Judgment
* (c)(2) The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.
  + “no genuine issue as to any material fact” makes it sound as if there is No disagreement between the plaintiff and defendant about the facts
    - But that’s not true – if that were true a motion for judgment on the pleadings would be possible
    - There is no genuine issue is to any material fact for summary judgment purposes only because NO REASONABLE JURY could find in an opposite way
  + The language that the Movant is entitled to judgment as a matter of law is also misleading
    - It does not mean that one simply has to reason about the law to determine that the movant wins, as in a motion for judgment on the pleadings
    - One must consider the evidence that each side has
    - But on the basis of that evidence no reasonable jury could find in favor of the non movant
    - The term Matter of law is a Term of art (basically identifying that there is no right to jury trial)
* Defendant can get summary judgment if they can show that no reasonable jury could find in favor of the plaintiff with respect to only one element, because all must be satisfied
* Plaintiff can get summary judgment only if a reasonable jury would have to find in favor of the plaintiff with respect to all elements of the cause of action
  + Damages are really hard to fit this standard
    - Usually the exact amount of damages is a jury issue
  + There could be partial summary judgment, for the plaintiff however
    - Could be for liability but damages would go to the jury
* Materials to prove Summary Judgment
* 56(c) Procedures.  
  (1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:  
  (A) ***citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials***; or  
  (B) ***showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact***.  
  (2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.  
  (3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.  
  (4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, ***set out facts that would be admissible in evidence***, and show that the affiant or declarant is competent to testify on the matters stated.
  + Affidavit is not admissible in trial because it is technically hearsay
  + Hearsay is bad because opposing counsel can’t cross examine an affidavit
  + Deposition is more like cross exam but not exactly because judge isn’t there and jury can’t see the demeanor of the person there
  + These are both good for Summary Judgment though!
    - Summary judgment has to be on the basis of pieces of paper that show what will be presented at trial, even if the pieces of paper themselves could not be presented at trial
    - If a court had to consider the actual testimony that would be presented at trial, what is separating that from the full trial?
    - What is testified in the affidavit or in the deposition has to be admissible however if it were said by that person on the stand
      * the content cannot be hearsay, even if the affidavit is
* *Slaven v. City of Salem*
  + Decedent hanged himself with his belt in his jail cell
  + The sister of the decedent sued the city
  + A REASONABLE JURY COULD NOT FIND:
    - That the city knew or should have known that he was a suicide risk
    - The evidence against the knowledge: the officers say that they didn’t know that he was a suicide risk
      * Aren’t they self-interested?
      * Isn’t something going wrong here to let self interested witnesses keep the case from going to trial?
      * The jury might not believe them so isn’t this a problem?
        + No
        + Say they don’t believe the officers
        + In this case, there’s still no evidence offered by the plaintiff that they knew or should have known that he was a suicide risk
    - If there’s no evidence one way or another, then it could still be a motion for summary judgment because no reasonable jury could find for the plaintiff
    - Evidence that the plaintiff could have used to avoid summary judgment…
      * Janitor who he told he was going to kill himself, and the janitor told the police
      * Evidence is controlled by the defendant though, so this is a real problem in getting beyond summary judgment in such a case
* Where do pleadings come in here?
  + There were allegations that the defendants knew or should have known about the suicide risk
  + Isn’t this enough??
  + These are not evidence so you can’t count the allegations
    - It is true that they have to satisfy Rule 11 in Federal Court (and its equivalent in state court):
    - But rule 11 does not demand that the evidentiary support be admissible
    - And it does not demand that the evidentiary support even if admissible be sufficient to overcome a motion for summary judgment
    - Indeed it is not even necessary that there’s any evidentiary support at all, provided one specifically identifies the allegation as lacking evidentiary support and one has a reasonable belief that it’s likely to have evidentiary support in discovery

What about that fact that there was evidence for and against his having a belt?

The belt doesn’t matter if no reasonable jury could find that they knew or should have known that he was a suicide risk

**Hypothetical**

- P is suing D for age discrimination

- P alleges in his complaint that D promoted X rather than P

and that D did so because X was younger than P, not because X had performed better on the job than P

- D makes a motion for summary judgment

- In opposition to motion, P introduces an affidavit by P stating that D said to P at a meeting that D “did not want to promote old people”

- D introduces 10 affidavits from the other 10 people at that meeting stating that D said no such thing

- If P’s affidavit is the only evidence that he has that D’s motive for not promoting P was age, should D win on his summary judgment motion?

THIS HAS TO GO TO THE JURY. DOES NOT MATTER HOW SELF INTERESTED ONE witness IS or even that the witness is a party.

It also does not matter how many witnesses there are in the other side.

Summary judgment is not about deciding between dueling witnesses.

It is not about weighing evidence, as a jury would at trial

* the movant has the burden of showing that summary judgment is appropriate.
  + They have to show why they’re entitled to summary judgment
  + Does that mean that a defendant being sued for negligence cannot successfully move for summary judgment unless she offers some evidence against the plaintiff’s allegations?
    - NO, because you can show that Plaintiff’s stuff is insufficient
    - If you can show the plaintiff won’t meet the burden of production at trial, then summary judgment
    - You can offer your own evidence, but not necessary
    - But you the defendant have the Burden of argument for summary judgment
    - You cannot simply its move for summary judgment and then demand that the plaintiff show why his evidence is sufficient
      * You must show why the evidence is insufficient
    - If you satisfy this burden, then Plaintiff has to do something to negate the defendant’s argument
      * Green Mentioned something similar to this in conjunction with failure to state a claim
      * The burden is on the defendant to justify failure to state a claim
      * That usually means identifying various possible causes of action and showing that the facts alleged by the plaintiff would not satisfy them
* Amendment VII: right to a jury trial
* tendency in federal court to be more aggressive about granting summary judgment in connection with certain disfavored actions, the types of actions that motivated Twiqbal,
* really arguable that the 7th amendment may be violated

**Trial**

**Jury Selection**

**Presentation of the evidence**

* Quite common at the end of the plaintiff’s evidence for the defendant to move for directed verdict on what has been presented at trial
* Rule 50: Judgment as a Matter of law

Rule 50: Judgment as a Matter of Law

(a) Judgment as a Matter of Law.

(1) *In General.* If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.…

* Green Has not heard of rule 11 sanctions for someone who makes this motion because it’s so common
* Why a directed verdict rather than summary judgment?
  + Isn’t the point of summary judgment avoiding a trial where a directed verdict will be granted?
  + Yes but sometimes what goes on a trial will be different from what was indicated in the materials presented in connection with summary judgment
    - When you see how it is said and presented at trial, all of the sudden you realize no reasonable jury could find in favor of the nonmovant
  + Also could have been that there was not a lot of discovery to go off of in the beginning – some cases don’t have a lot of discovery
* burden of production: burden of providing evidence such that a reasonable jury could find in your favor
  + burden of getting the ball rolling
  + The plaintiff has the burden of production concerning the elements of a cause of action
  + If the plaintiff fails to satisfy this burden a directed verdict for the defendant is appropriate
* *Pennsylvania RR Co v. Chamberlain (US 1933)*
  + Action was brought against the RR company for the death of a brakeman
  + Because of negligence of the RR company
  + One big issue of fact: whether he was thrown from the car due to a collision or due to his own falling
  + Trial court gave directed verdict, Ct Appeals reversed, Supreme Court reversed again
  + If you have witnesses on either side, you can’t say directed verdict
    - For defendant: There were many witnesses that looked and did not see a collision
    - For the Plaintiff: the witness did not see but he heard a crash and saw that the brakeman was no longer on the train. Also said that at first, the trains were going at different speeds and then after the noise, they were going at the same speed after which could have shown that they were locked after the collision
  + So why isn’t this an example of a court inappropriately giving a directed verdict after weighing the evidence?
  + The Supreme Court suggests that the plaintiff’s evidence is such that a reasonable jury looking at it would be in equipoise about whether the crash occurred
  + “There is no direct evidence that in fact the crash was occasioned by a collision of the two strings in question; and it is perfectly clear that no such fact was brought to Bainbridge’s attention as a perception of the physical sense of sight or of hearing. At most there was an inference to that effect drawn from observed facts which gave equal support to the opposite inference that the crash was occasioned by the coming together of other strings of cars entirely away from the scene of the accident, or of the two-car string ridden by deceased and the seven-car string immediately ahead of it. . . .”
  + that would make a jury looking at the P’s evidence similar to the following:
  + - two cars, driven by A and B, enter an intersection at right angles and strike one another killing both A and B   
    - there are no eyewitnesses to the accident  
    - the only evidence available is that there was a working traffic light; thus one of the drivers, but only one, had to go through the red light  
    - the family of A sues the estate of B for negligence  
    - the estate of B moves for a directed verdict – it should be granted
* **NEITHER SIDE CAN convince a reasonable jury BECAUSE NEITHER SIDE CAN GET OVER 50%**
  + but in general if there is evidence on both sides a directed verdict is inappropriate… Here is an example
  + - X must take a certain pill once a day to remain alive. The pill is highly toxic - to take two within 24 hours is fatal  
    - X is found dead in his bedroom and the evidence is clear that he took two pills that day  
    - the uncontradicted evidence at trial shows that several hours before his death, X made out a new will, substantially different from the one previously in force  
    - it also shows that at about the same time, X made plans to accompany several friends on a fishing trip on the following day  
    - X’s family sues Insurance Co. for insurance proceeds on the ground that X’s death was an accident  
    - Insurance Co. moves for a directed verdict on the ground that no reasonable jury could find that the death was an accident and not suicide –
    - Here a directed verdict would not be correct
* **THERE’S EVIDENCE ON BOTH SIDES**
* **THIS NEEDS TO GO TO THE JURY**

so, to repeat, was there inappropriate weighing of the evidence in this case?

* + - one way of putting it is that there is *some* weighing of evidence that goes on in determining whether a directed verdict is appropriate
    - It is very rare that the nonmovant has absolutely no evidence in their favor
    - The evidence might be so weak that it is insufficient to make it possible for reasonable jury to find in favor of the plaintiff
    - consider…
    - P sues Ds for violation of the federal antitrust law (Sherman Act)  
      P offers as evidence of an agreement in restraint of trade the Ds’ parallel conduct   
       - for example, that they do not cut in on each other’s territory
    - Here summary judgment for the defendant would be appropriate, even though the plaintiff has some evidence of an agreement
      * It is more probable that there is an agreement given the evidence of parallel conduct then that it would be without the evidence
    - This is like Twombly, except Twombly was not about summary judgment or a directed verdict, but was about the evidence, as revealed in the complaint, that would be necessary to get to the discovery period

**The scintilla of evidence standard**: more generous to plaintiffs to get to trial

* If the plaintiff has something than it’s something for the jury
  + Alabama uses this standard
  + That brings up an Erie problem