Civil Procedure 11-15-17

Erie

It is power, because it’s likely the other side (or judge) will be intimidated by it

* Green’s example: invalid divorce ex parte divorce brought by wife in Dom. Rep, but she now wanted to claim she was still married to get her husband’s death benefits from . NY law had judicial estoppel-roughly, you can’t argue something in one proceeding and then something contrary in different proceedings. Forum was fed court in NY, Erie question was whether it should use this judge created rule. So intimidating, other side dropped the case.

No one has successfully argued that a FRCP is invalid. But with Stevens’s and Ginsburg’s opinions in Shady Grove that is more likely than before. And there are plenty of cases where a federal court has to use forum state law rather than a federal common law rule.

Erie problem- Scintilla of evidence approach in Alabama state court for directed verdict

facts of *Chamberlain* might have turned out differently using that standard

What happens in a diversity case in federal court in Alabama? Do you use federal standard or state?

*Chamberlain* case did not answer this Erie question because it involved a federal question case -

suit was under the Federal Employers Liability Act

Assume same as Chamberlain except a diversity case – suit is under Alabama law in federal court in Alabama

which Erie track?

Rule 50 deals with directed verdicts. Can we say that Alabama (Scintilla) standard is in direct collision with it? Federal courts have concluded there is a direct collision, putting us in the FRCP track, with the ultimate result that the FRCP should be used

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.…

This is odd – is it really true that “legally sufficient evidentiary basis” is in direct collision with the Alabama standard?

but there is a tendency to read a FRCP that has had a term interpreted in a certain way to directly collide with a state rule that is contrary to the interpretation

an example is Twiqbal

* the twiqbal standard is an interpretation of “showing” in FRCP 8(a) and Twiqbal has therefore been seen as falling in the FRCP track (such that it applies even in diversity cases)

After Trial, Jury Verdict

General Verdict- jury come to conclusions about facts and applies law to those facts without saying facts

 Special Verdict- Jury decides questions about facts, judge applies law to facts

General with interrogatories - questions given to jury to decide if they have accurately applied law. Flushes out cases where jury has misapplied law.

if you have jury verdict, there will often be a renewed motion for what is in effect a direct verdict (judgment notwithstanding the verdict – j. NOV) under FRCP 50

 Why allow this? – Assume there has been a motion directed verdict for the D and it has been denied and jury finds in favor a P – why then issue a judgment for D notwithstanding the verdict?

question of appeal- if judge grants j NOV, but Ct App disagrees, there will be a jury verdict to go back to

but if judge granted a directed verdict then there is no jury verdict, and must go back to a new trial

also if court is inclined to issue a directed verdict for D, that probably means that the jury will find for D anyway, since the jury is presumably rational - It is better to let the jury decide rather than taking the matter away from the jury

Motions for a new trial

Can be justified by procedural problem: evidentiary decision was wrong or jury instructions were wrong

or because verdict is against weight of evidence (which comes up primarily with damages)

Not saying D should win (which would be a judgment NOV), but the damages are too great given evidence (not within a reasonable area)

after verdict, court issues a judgment

Can the judgment be reassessed?

 sometimes it is possible to go before rending court and get relief from judgment under FRCP 60

 say because there was fraud or discovery abuse.

 but cannot just say> I found new evidence, so I need a new trial

* There are of very narrow circumstances where relief from a judgment is possible
* The most common example where one gets really from a judgment is when is a default judgment

also possible to *appeal* a judgment concerning legal errors

Now…

Consequences of judgment on the books that has not been set aside by the rendering court or overturned on appeal

Claim Preclusion

 Don’t use the terms res judicata or collateral estoppel

* The term res judicata is used inconsistently – sometimes it is used to mean only claim preclusion although properly it should be used to refer to all forms of preclusion, both claim and issue
* Collateral estoppel is sometimes used as equivalent to issue preclusion, but that isn’t the case – issue preclusion includes both collateral and direct estoppel

 Just use the term preclusion (whether claim or issue)

Claim preclusion-

P sues D and it comes to a final valid judgment on merits. Finality about particular judgment. P cannot seek to undue it in a subsequent lawsuit

* must instead –if it is possible – make a motion to set aside the judgment before the court that render the judgment or appeal from that court’s judgment
* Never try to challenge a previous judgment in a subsequent lawsuit – it will not work – you will be claim precluded

e.g. P sues D in California state court for negligence in connection with a car accident
P loses – the jury finds that D was not negligent
judgment for D
P sues D in California state court for negligence in connection with the same car accident, hoping the jury will get things right this time

* Claim precluded!

Claim preclusion also includes a doctrine of defendant preclusion, which keeps the defendant from bringing a new lawsuit seeking to undo a previous judgment

* This will not work – the defendant must either bring a motion to set aside the judgment before the rendering court or appeal the court’s judgment
* Challenge cannot occur in a subsequent lawsuit – the defendant will be claim precluded

e.g. P sues D in California state court for negligence in connection with a car accident
P wins – the jury finds that D was negligent and awards P $100,000
$100,000 in D’s bank account is attached by the court and given to P
D sues P in California state court to get the $100,000 wrongfully taken from him

- claim precluded!

Claim preclusion bars P from subsequently bringing suit on actions that P did bring or *should have brought* in the earlier suit.

If you sue someone you must bring all causes of action that are part of the same claim - under federal law and the law of many states the scope of a claim is a transaction

eg P sues D in California state court for breach of a contract to build D a house
P built the house but D won’t pay
P loses – the jury finds that there was no consideration and so no contract
judgment for D
P then sues D in California state court for quantum meruit – that is, for the fair market value of the work he performed

Under federal preclusion law it is barred because the new cause of action is about the same transaction and so about the same claim. P should have brought it in those earlier proceedings not in a subsequent law suit.

* Here claim preclusion functions as a compulsory joinder rule

defendant preclusion bars relitigation of defenses that were brought or that should have been brought

eg P sues D for under state law for violating a racially restrictive covenant
- D loses and P is given a judgment of $100,000, which is executed
- D then realizes that racially restrictive covenants are unconstitutional
- D brings suit against P for restitution of the $100,000

It does not matter that earlier proceedings went wrong, it does not allow for a subsequent law suit to undue judgment. Finality is finality. New suit cannot be brought by plaintiff or defendant. Does not matter how wrong it was, it is binding on the parties, unless a successful motion to set aside the judgment before the rendering court is brought or a successful appeal of the previous judgment occurs

Defendant preclusion is not the same thing as a compulsory counterclaim rule

All jurisdictions have defendant preclusion as part of their law of claim preclusion, but not all jurisdictions have a compulsory counterclaim rule

e.g. P sues D in California state court for negligence in connection with a car accident
P wins – the jury finds that D was negligent and awards P $100,000
D sues P in California state court for his damages in the accident

Is claim preclusion appropriate? – no D’s action concerns a difference claim - he is trying to bring a counterclaim, and compulsory counterclaim rule depends on jurisdiction.

Claim preclusion also needs to be distinguished from issue preclusion, which we will deal with later

e.g. P sues D for breaching a contract requiring D to give P coal every winter
- in the suit D challenges the validity of the contract
- the court determines the contract to be valid
- P wins damages from D
- the next winter, D breaches again
- P once again sues D for breach
- D once again challenges the validity of the contract
- anything P can do?

Does not fall under claim preclusion – this is a different claim

Indeed if claim preclusion did apply that would mean that P could not sue again

 what would apply here? – Issue preclusion could be used here. D may have new defenses that could be litigated. Cannot be precluded from litigating issues you did not bring up previously. But D is issue precluded from re-litigating validity of contract.

 For issue preclusion to apply, it must be the same issue (same contract being violated).

Issue preclusion - if a party fully and fairly litigated an issue in an earlier case he can (with certain exceptions) be barred from relitigating the same issue in subsequent proceedings

Back to claim preclusion

requirements for claim preclusion

A final judgment- you must have a judgment before claim preclusion can be triggered.

P sues D concerning personal injuries in connection with a car accident
- P loses, appeals
- while actions is on appeal, P sues D concerning property damage in connection with the accident

Would claim preclusion apply? Yes – judgment has claim preclusive effect even though it is on appeal

* But notice if the judgment is vacated on appeal, then claim preclusion will no longer apply

What happens if the plaintiff splits a claim in a number of lawsuits going on at the same time but none of them has come to a judgment?

Because there is no judgment, claim preclusion cannot apply. But…

The doctrine of claim splitting (also known as prior action pending) can

e.g. P sues D concerning personal injuries in connection with a car accident
- while P’s first suit is going on, P also sues D concerning property damage in connection with the accident

- D can bring up claim splitting in connection with the property damage action so that it can be

dismissed without prejudice and joined to the first.

A similar lesson applied in connection with a compulsory counterclaim rule. If P sues D in a jurisdiction that has the compulsory counterclaim rule and the action comes to a judgment, D is precluded from bringing that compulsory counterclaim in subsequent litigation – any action on the compulsory counterclaim would be dismissed with prejudice. But if P sues D in a jurisdiction that has the compulsory counterclaim rule and while that first action is going on D brings an action against P in a separate lawsuit for the compulsory counterclaim, P can use the fact that it is a compulsory counterclaim to get it dismissed without prejudice, so that it can be brought with the earlier action

What happens if the defendant in the second action does not bring up claim splitting? The modern view is that acquiescence in claim splitting by failing to bring it up means that subsequently claim preclusion cannot be invoked when one of the actions comes to a judgment

Claim preclusion as possible in the following

e.g. P sues D concerning a transaction
- it comes to a judgment
- P then sues D concerning the same action
- claim precluded

But not in the following

- P sues D concerning an action.
- while the first action is going, P sues D concerning the same transaction
- one of them comes to judgment, without D having brought up claim splitting
- result?

- modern view is cannot use claim preclusion

Claim preclusion also requires a valid judgment, but the validity of the judgment generally cannot be collaterally attacked

P sues D in federal court in NY
D appears
there is no PJ over D but no one notices this fact
judgment for P
P then brings a separate suit in state court in Cal. to enforce the judgment
can D challenge the earlier judgment on the grounds that there was no PJ?

No - he consented to PJ because he failed to bring it up in a timely fashion

P sues D in federal court in NY
D appears
there is no SMJ, but no one notices this fact
P then brings a separate suit in state court in Cal. to enforce the judgment
can D challenge the earlier judgment on the grounds that there was no SMJ?

- no – the modern view is that collateral attack on a judgment for lack of SMJ is not possible if D appeared.

What about default judgments?

P sues D in federal court in connection with an accident
there is no SMJ or PJ
D defaults
P then tries to sue D on the judgment in state court
can D challenge the judgment as invalid?

Yes, on PJ.

But curiously the majority view is that the D cannot challenge on SMJ

why? – Courts already have their own duty to determine this even when issuing a default judgment, so there had been litigation on whether there was SMJ by the earlier court.

* Green finds this troubling

For claim preclusion the judgment also has to be

On the Merits

This is a term of art that simply means that the judgment will have preclusive effect

Trying to figure out whether the judgment really was on the merits or not often will not be helpful

P sues D for *intentional* infliction of emotional distress
- D gets the action dismissed for failure to state a claim (P did not allege requisite intent)
- P then sues D for *negligent* infliction of emotional distress concerning the same transaction

Yes, Barred – (under the transactional view of a claim)

* if there is a dismissal for failure to state a claim the assumption in Federal Court is that there is preclusive effect, unless the court says is without prejudice
* You will never be able to bring a cause of action concerning the transaction again unless court says the dismissal for failure to state a claim is without prejudice. Catastrophic for P and lawyer. End of all litigation - get court to dismiss for failure to state a claim without prejudice if you can, including appealing on the matter

Is a default judgment on the merits? ABSOLUTELY.

e.g. P sues D for negligence asking for compensation for bodily injuries
D defaults and P is issued a default judgment for $100K
P then sues D for property damages concerning the same accident

- claim precluded!
D brings an action against P for restitution of the $100K

- claim precluded!

* Claim and issue preclusion are affirmative defenses and must be pleaded by a party invoking them
* What happens if they forget to bring him up in the pleading period?
* The question of how late they can bring it up is covered in Federal Court by FRCP 15 amendment – this is a generous standard –freely as justice so requires
* Generally because claim and issue preclusion limit or end discovery, the court will be even more likely to grant them late in the game
* There is unlikely to be prejudice to the other party

Not on the merits: dismissal for lack of SMJ, PJ, Venue

Why claim preclusion? –

* It leads to consistency - if there were Duplicative litigation on the same claim, issues could be decided differently.
* It leads to efficiency - if there were duplicative litigation, everyone has to do double work
	+ The more expensive litigation has become, the broader the scope of claim
	+ The Federal transactional standard, which is broad, is a consequence of the extra cost of discovery in litigation in Federal Court

Scope of Claim

* Remember not all states have the transactional standard

*River Park, Inc. v. City of Highland Park*

P alleges that D (a city) waited on approval of permit for improvements on property so bank would foreclose on P so that D could purchase the property.

2 lawsuits:

1st one brought in federal court - Cause of Action- civil rights action §1983.

2nd one brought in Ill. State Court - Cause of Action- Breach of implied contract, tortious interference with contract, abuse of government power.

Was there SMJ for state law actions in previous lawsuit in fed court? Yes, supplemental.

Real problem- claim preclusion

Is this an action they should have brought in earlier proceedings?

The Illinois supreme court tries to answer the question of the scope of a claim under Illinois law

But this is a mistake –

interjurisdictional claim preclusion…

P sues D in state court in Georgia for breach of contract
- Georgia preclusion law allows separate suits in law and equity
- judgment for D, there was no contract
- P then sues D in state court in California for quantum meruit
- California preclusion law does not allow separate suits in law and equity

Choice of law- whose preclusion do we use? – Use the preclusion law rendering court (the court that rendered the judgment, that is Georgia) –

this is required here by full faith and credit clause. Give same preclusive effect as rendering state court.

P sues D in federal court in Illinois under federal civil rights law
- federal law uses the transaction approach
- judgment for D
- P then sues D in state court in Illinois under Illinois law
- which preclusion law applies?

Federal preclusion law applies – this probably follows from the Supremacy Clause

* This is the River Park case, so the Illinois supreme court was wrong to think the matter was determined by Illinois law

P sues D in federal court in Georgia under Georgia state law for breach of contract
- Georgia preclusion law allows separate suits in law and equity
- judgment for D, there was no contract
- P then sues D in state court in California for quantum meruit
- California uses the evidence approach
- which preclusion law to use? federal? Georgia? California?

We know the California law does not apply, because one must look to the law of the rendering court

But the rendering court was a Federal Court sitting in diversity

That brings up an Erie problem, which we will discuss later: Is the preclusive effect of the judgment of a Federal Court sitting in diversity determined by Federal preclusion law or the preclusion law of the forum state (in this case Georgia)?

Notice that there is no Erie problem in the River Park case, because the earlier judgment was of a Federal Court entertaining a Federal question action

But let us return to the River Park case

* The Illinois supreme court tries to determine whether to use the transactional test or the evidence test

Evidence Test – the scope of the claim includes only causes of action that would involve the same evidence

Using the transactional test what isthe relevant transaction?

– application for permit and delay in providing it, bank foreclosure and city buying property

* Notice that under the transactional test one looks to a common core of operative fact
* So one can say that under the transactional test any state law action that would have supplemental jurisdiction concerning a Federal action would also be part of the same transaction and so precluded if it was not brought

Is it possible that we would not have preclusion if we used evidence test? – the evidence might not be the same for the Federal and state law actions – e.g. for the Federal action you have to show there is a due process right being violated that is not necessary for state law actions.

Green: If there is any doubt “is this within scope of claim or not?” – Just BRING IT IN.

 Then you ask can court what they think, and they can dismiss it without prejudice if they think it is not part of the same claim

* Don’t wait to have the court in the second lawsuit determine whether it should have been brought in the first
* Claim preclusion is the scariest thing because it completely bars action going forward.

Primary Rights Test

* This is an even more narrow understanding of a claim – where a claim is tied to a particular cause of action, allowing multiple lawsuits concerning the same transaction
* Green is not even sure that any state still has this approach

Claim preclusion in a jurisdiction is common law, made up by courts. There is a restatement on it. The restatement (2d) of judgments – which adopts the transactional standard

Rest. (2d) of Judgments
§ 24. Dimensions Of “Claim” For Purposes Of Merger Or Bar—General Rule Concerning “Splitting”
(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
(2) What factual grouping constitutes a “transaction”, and what groupings constitute a “series”, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

P sues D for breach of contract – the product sent to P was defective
P asks for damages and gets a judgment
may P sue later for the amount that D overcharged P for the product?

No. part of the same transaction. It must be brought with the first or will be lost.

P sues D Railroad alleging that the conductor was negligent in starting the car while P was disembarking and that as a result P broke his arm
after judgment for P, P brings a new action against D alleging that after disembarking from the car he fell into a trench negligently left by D beside the road and broke his leg.

These are connected in time and space and motivation. It is an example of being the same transaction/claim.