Civil Procedure Notes

9/4/17

**REVIEW SESSION EVERY MONDAY FROM NOW ON**

What statutory materials are you responsible for?

* If a statutory provision is quoted in the book, the language is in the book
	+ Then we are responsible
* If it is on the syllabus
	+ We are responsible for it
* Only on the screen/slides
	+ Not responsible

Removal

* Someone lowballing the amount in controversy to keep the case in state court
	+ There are diverse parties
	+ No in state defendants
* By asking for less than the minimum you may not be able to get more than what you ask for.
	+ This varies by state
	+ Some states will allow you get more than what you ask, in this case if there is a possibility that the amount could be higher than AIC - it may be removable
		- St. Paul Mercury Test is not the standard for removal
		- 1446(c)(2)(b)
			* If the defendant can show by a preponderance of the evidence shows that the amount in controversy exceeds $75,000
			* Tougher standard than the St. Paul Mercury Test
			* Preponderance of the evidence is a slightly confusing and ambiguous term
				+ usually evidence is not considered to determine AIC – one looks to the pleadings

Devices Defeating Diversity/Alienage

* Adding diversity-destroying plaintiffs to defeat diversity
	+ Or plaintiffs who are asking for the less than the minimum
	+ You can assign a fraction of your contract to another party to defeat diversity
	+ Much less common to assign part of your lawsuit
		- Much more likely find another Plaintiff who was affected by defendant’s action
* Adding defendants to defeat diversity
	+ Find another defendant that they can add (co-defendant) who is below the minimum or is diversity-destroying
	+ Often used when you sue a corporation and then you also include an individual employee in the suit to defeat diversity

Joining defendants to defeat diversity often works, but keep in mind…Fraudulent Joinder

* Rose v. Giamatti
	+ Pete Rose from Ohio sues Giamatti (MLB Commissioner) – joins Cincinnati Reds as defendants to attempt to defeat diversity and keep the case in Ohio state court
		- The Reds were fraudulently joined so the case can be removed
		- “In fraudulent joinder cases the underlying reason for removal is that there is no factual basis upon which it can be claimed that the resident [!] defendant is jointly liable or where there is such liability there is no purpose to prosecute the action against the resident defendant in good faith….”
		- Green: the issue is not just that Rose failed to state a claim against the Reds
			* the plaintiff’s claim against the fraudulently joined party has to be even worse than that e.g.
			* defendant cannot provider the relief requested at all
			* or the claim is not even colorable – there is no possibility that you state a claim

1446(b)(2)(A)

* You need *all* defendants to agree to remove the case to federal court
* You can defeat removal if you add a defendant who does not want to be removed

Counterclaims are not grounds for removal (same as affirmative defenses) – will discuss later

1441(f)

* The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the state court from which such civil action is removed did not have jurisdiction over that claim
* If you tried to remove a case from state court that had exclusive subject matter jurisdiction in federal court (e.g. patent claim), the feds can accept the federal claim
* before 1441(f) that was not so

Avitts v. Amoco Production

* Avitts was suing multiple companies in texas state court due to property damage from oil companies on their real property
* Removed to federal court - the original claim vaguely mentioned federal law
	+ They stated that state and federal law were applicable
		- But they didn’t state how federal law was violated
* After removal, defendants asked for a more definite statement
	+ Denied, but
	+ Plaintiffs rewrote the complaint anyway, this time excluding language referencing federal cause of action
* Federal court issued preliminary injunction for the plaintiffs, requiring environmental study
	+ Preliminary injunction is initial command to defendant so that if the plaintiff is entitled to relief it will be possible to provide it
* Now the Ds ask for remand and the Ps challenge it
* District court denied remand
* Preliminary injunction goes to court of appeals which decides that there’s no SMJ and therefore the case has to be remanded back to state court.

Procedure for removal

* Defendant has 30 days from service (or otherwise being aware of complaint) to remove a case to federal court
* if a later served defendant wants to remove (within 30 days of receiving complaint), earlier served defendants can consent even though their own 30 days are up
* if a case’s removability is only ascertainable later, the defendant has 30 days from that point to remove
	+ you cannot remove a case under 1332 (diversity or alienage) after 1 year from filing however unless the reason that the case’s removability was not known by the defendant until then was due to the plaintiff’s bad faith

Waiving Objections to non-removability

* after removal a plaintiff can waive certain objections to non-removability if he fails to mention them within 30 days of removal – eg that the defendant removed more than 30 days after receiving the complaint or that not all defendants consented to removal
	+ but waiver cannot apply to objections that the removed action lacks SMJ

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**Personal Jurisdiction in State Court**

PJ is about the Relationship between Sovereigns

* The states are being conceived here as nations with respect to one another and with respect to foreign countries
	+ If a California court asserts adjudicative authority over a New Yorker who has no connection with Cal., that is akin to an Iranian court asserting adjudicative authority over a New Yorker who has no connection with Iran
* The point is not just that it would be very inconvenient for the New Yorker to go to Iran – the Iranian court is acting beyond its sovereign authority
* The relationship between states is very similar to principles of international law

 Distinguish PJ from Choice of Law

- P and D are New Yorkers who get in a brawl in New York
- D is in Oregon on business trip
- P sues D in Oregon state court
- D is served in Oregon with summons and complaint

* There is PJ over D in Ore, but that does not mean that the Ore ct can use Ore law
	+ It must use NY battery law

Personal Jurisdiction v. Subject Matter Jurisdiction

- P (NY) slips and falls in D’s (Germany) store in Germany
- D has no connection with US
- P sues D in in federal court in New York asking for $100,000
- D is served in Germany with the summons and complaint

There is SMJ (alienage), but no PJ

Personal Jurisdiction and. Service

- P and D are New Yorkers who get in a brawl in New York
- P sues D in Oregon state court
- D is served in New York with summons and complaint

There is adequate notice under due process, but no PJ over D

Pennoyer v. Neff

Mitchell v. Neff

* Issue over legal fees
* Neff owed Mitchell $300 for legal fees over a suit that took place in OR while Neff still lived there
* Neff moved to CA, Mitchell sued for the legal fees in OR state court
* Because Mitchell could not serve Neff directly Mitchell published a notice in a state wide newspaper for 6 weeks
* Neff never found out and so never showed up to the suit
	+ There was default judgement against him
* Neff’s land was attached and sold at auction
	+ It was sold to Mitchell
* Mitchell then sold it to Penoyer at a high profit

Neff v. Pennoyer

- Neff finds out about judgment sues Pennoyer in ejectment in federal court in Ore.
- diversity case
- Pennoyer claims it is his, because it was Mitchell’s, who got it pursuant to the enforcement of a valid Ore. state ct judgment
- so Neff is collateral attacking the validity of the judgment in Mitchell v. Neff
- was there PJ in Mitchell v. Neff?
- federal trial court says no
- US SCt affirms (for different reasons) – no attachment of the property at the initiation of the suit

* + - They attached it only after there was a judgment for Mitchell
	+ SCOTUS says there was not personal jurisdiction because Neff was not served within the state and Neff’s property was not attached at the beginning of the suit
		- Attachment is necessary if property is to be the source of PJ
* The SCt held that the judgment was not entitled to enforcement in federal court because it violated principles of international law
* It also said in dicta that the matter going forward will be governed by the 14th A.

- but not in the present case, because the 14th A. had not been ratified when Mitchell v. Neff occurred

Is attachment really necessary?
* PJ v. Preliminary Relief
	+ Attach property when you are worried that the Defendant will sell it before the suit is over.
	+ The court takes possession, in effect, of property – the defendant cannot sell it
	+ Green: subsequent cases (by courts below SCt) held that attachment is not necessary, but identification of the property at the initiation of the suit (incl address) is necessary if the property is to be the source of PJ
		- Property was not identified at beginning of suit in Mitchell v. Neff
	+ Green: it makes sense that attachment should not be necessary, because attachment is so intrusive and not necessary if you don’t think the defendant is a deadbeat