Conflicts Lect 21

**Const’l Restrictions on choice of law**

two concerns

Reasonable expectations of parties

Legitimate state interest

due process takes into account both

* applying an unanticipated law is a violation of due process
* but so is the application of the law of a sovereign that does not have power over you

FF&C takes into account only state interests

There will always be due process protection for anyone before the ct – but FF&C is an issue only if sister state law is at issue

What does FF&C add?

- not waivable

- it protects the sister state, not the parties

rare to have it really be unconstional to apply forum law –

if there is so little connection with the forum it will usually dismissed on forum non conveniens grounds

but does happen with nationwide state law class actions

1. Phillips Petr v Shutts
   1. Q of whether Phillips should pay interest on tentative rate hikes to royalty owners of wells when it was not clear that hike would be approved
   2. Class of royalty owners from all over US
   3. Kansas cts allowed use of Kansas law to all claims
   4. Only 1% of leases and 3% of Ps in Kansas
   5. USSCt held unconstitutional under Allstate standard
      1. common fund in Kansas allows application of KS law to all claims…?
         1. Not really there – there only by virtue of litigation
      2. Ps consented to Kansas law?
         1. Not enough –D didn’t consent
         2. We also give little credence to the idea that Kansas law should apply to all claims because the plaintiffs, by failing to opt out, evinced their desire to be bound by Kansas law. Even if one could say that the plaintiffs "consented" to the application of Kansas law by not opting out, plaintiff's desire for forum law is rarely, if ever controlling. In most cases, the plaintiff shows his obvious wish for forum law by filing there.
         3. notice that it could be understood as an election of remedies if the Ps chose a law more favorable to the D
         4. how far can the parties go in consenting to law
            1. distinguish:
            2. P and D consent to the law of a state that has a legitimate interest

that seems OK – no due process worries because the parties consented

and no FF&C worries because the state chosen has a legitimate interest

P and D consent to the law of a state that has no legitimate interest

that could violate FF&C

But could it be understood as a settlement or election of remedies if they are simply consenting to law under which the P gets less?

likewise when the P alone chooses the law of a state that is more favorable to the D and that state lacks a legitimate interest that might be understood as the election of remedies

1. Subseq case – Sun Oil v Wortman
   1. Can ct use Kansas SOL
   2. Ct upheld
      1. Makes sense
         1. What about party expectations?

Everyone knows SOL of forum might be applied

* + - 1. What about state interests
         1. procedural interest
  1. But Scalia – looks at it historically - SOLs were treated as procedural at time adoption of FF&C Clause
     + 1. Book says questionable decision
          1. KS would not be interested in giving greater amount of time to non-Kansans
          2. Green: Why not? – if tied to views about evidence
       2. In any event the sister state SOLs were not substantive
       3. “Although in certain circumstances standard conflicts law considers a statute of limitations to bar the right, and not just the remedy, petitioner concedes, that (apart from the fact that Kansas does not so regard the out-of-state statutes of limitations at issue here) Texas, Oklahoma, and Louisiana view their own statutes as procedural for choice-of-law purposes, see”
          1. So what is the reason to apply them?
          2. do Kramer & Roosevelt think that TX’s SOL must be applied instead of KS’s even though KS wants its SOL to be applied and TX does not care…?

BUT KS ct also presumed the sister state laws were the same as Kansas law, allowing certification

there was no direct cases in sister states on point

is that a violation of FF&C?

SCt said it is OK

* “To constitute a violation of the Full Faith and Credit Clause or the Due Process Clause, it is not enough that a state court misconstrue the law of another State. Rather, our cases make plain that the misconstruction must contradict law of the other State that is clearly established and that has been brought to the court's attention.”
* Green – this is a mistake
* Think of Erie
* federal courts have an obligation to predict what the relevant state SCt would say
  + they cannot presume that state law is like fed law
* sister state courts have the same obligation under FF&C (assuming that they have a FF&C obligation to apply sister state law)
  + they must predict what sister state SCt would decide

the standard that the SCt spelled out is really about when a state ct’s decision will be entertained by the USSCt as a violation of FF&C – the standard of appellate review

– that is different from the question of what a state ct’s obligation is

compare Erie

a fed ct has the duty to predict what a state SCt would say

but the US SCt will not entertain a case simply because a party says that the fed ct violated its Erie obligation

otherwise the USSCt would be flooded with cases

it will take a case only when the fed ct’s decision ignores clearly established state law that is brought to the fed ct’s attention…

the same distinction should be used for state cts interpreting sister state law