**Three themes of Civil Procedure**.

FIRST Structure of American legal system

* Relationship between the state legal systems and the federal legal system.

SECOND Statutory interpretation.

* Green will use the term “statutory” broadly to refer to language created by lawmakers that is not in a case-law – eg FRCPs, constitutional provisions, in addition to statutes

 THIRD – in rules for procedure, balancing…

1.Accuracy – find out what actually happened and accurately apply law

2.Autonomy – respect parties right to have their say

and

3.Efficiency-Not making things too expensive

See this balancing in rules governing service

**Notice and Service of Process**

**Due process restriction on notice**

* is the method of notice is constitutional under 14th A (in state court) or 5th A (in fed ct)
* Whether the attempts made by the P to notify the D of the lawsuit that’s been filed.

If it’s not constitutional then the judgment will be void.

Hypothetical systems of notice:

System 1

* No service on defendant ever.

Very cheap, but creates many problems. It disregards interests of the Defendant. Results in many default judgments which is problematic because autonomy of the Defendant is violated. Defendant has no opportunity to participate in the lawsuit. Also, we’re always left with judgments for the Plaintiff, so the judgments are not accurate. The law is inadequately applied.

System 2

* No service on defendant ever.
* A guardian is appointed to represent the defendant’s interests.

This system is more accurate than the first system, but the autonomy interests of the defendant are still not respected under this system. D has no chance to participate

System 3.

* No judgment is binding on a party unless there is actual notice of the suit. So no binding judgment possible if D cannot be found.

This respects autonomy of the D. But in many cases P won’t get his say because D cannot be informed. Also is not very accurate, b/c it essentially amounts to a judgment for the D, even though the P may have a right to relief. This system is not required by due process, and is arguably forbidden by Due process, based on its inaccuracy, and its being contrary to the autonomy interests of the P – P never gets his day in court if the D cannot be found

Mullane v. Central Hanover Bank

What happened in this case?

* Mullane is about a common trust created by the central Hannover bank. There were 113 smaller trusts consolidated into a common trust. There were around 5,000 people who had an interest of one kind or another in the common trust.
* A common trust is like a pension plan. A bank consolidates several smaller trusts in the interest of efficiency.
* There are beneficiaries who have varying interests in the trust. Some have a contingent interest. Some have a future interest.

Proceeding

* The proceeding involved in this case allowed all objections to the way the bank ran the trust for a certain time to be brought up – once it was over the beneficiaries lost their power to challenge bank’s actions as trustee. After judgment they were denied the ability to challenge the trustee’s actions because the beneficiaries were party to a lawsuit and they had a chance to challenge the proceedings. This is like an in-rem action, in the sense that it is a definitive determination with respect to all people in the world about whether or not the proceedings were proper.
* By determining that the proceedings regarding the trust were proper or not, it serves the purpose of ensuring efficiency due to its finality. Also, it means that the executors of the trust don’t have to worry that people will challenge the distribution of the trust to the beneficiaries. If people could challenge after the proceedings it would be problematic because the money in the trust would have already been distributed.
* There is a discussion about whether this is a proceeding in rem or in personam. Thinking in terms of Pennoyer v. Neff it seems like an in rem proceeding. The court says it simply doesn’t matter how you characterize this action because the Due process analysis concerning notice does not depend on which way you characterize it.
* “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”

What conclusion does the court come to?

* For those with contingent and future interests, the publication of notice is sufficient.
* For those with beneficiaries whose whereabouts couldn’t be found through due diligence, publication is also sufficient.
* But notice through publication is not sufficient with respect to known beneficiaries. For known beneficiaries, mailed notice is sufficient notice.
* This process of determining sufficiency of notice is a very fact intensive process.

What do you take into account?

* The value of the interest the beneficiaries would lose out on if they were not notified.
* So, if it’s a large amount of money the due process clause requires a more accurate type of notice.
* If it’s small, publication is likely ok.
* The cost of finding a better method of notice is relevant.
* Also, if the beneficiaries have a common interest, it may be sufficient to notify some but not all beneficiaries because each beneficiary has a relatively small interest in the suit, and the interests of one defendant are shared by other beneficiaries, so the interests of those who are not actually notified, are still defended by those who have received notice.

**Fed Rules of Civil Procedure**

**Rule 3. Commencement of Action**

* Civil action is commenced by filing a complaint with the court.

**Rule 4. Summons**

* The summons is separate from the complaint, it shows that a court is claiming power over a defendant.

Waiver of service of summons

* Send to D
* D must return within 30 days
* If defendant doesn’t submit the waiver, then has to pay for actual service
* If defendant does submit, gets 60 days to answer vs. usual 21 days.
* Waiver can serve as proof of service. When you get it back and file it, that counts as time of service.
	+ Danger to doing waivers: statute of limitations often depends on time of service. Defendant could take his time.

**Methods of service**

What if the method of service is improper?

* + If you default you can
	+ go before that court and make a motion to set aside judgment
	+ Or make a collateral attack
		- If you default, and the plaintiff sues on the judgment. The D can collaterally challenge the judgment in those second proceedings

If you find out about the suit despite the inadequate service?

* You can make a motion to dismiss for inadequate service

A court will usually allow challenges of insufficient service by those who got notice.

Why allow the D to challenge service if they received notice?

Because if you didn’t allow this, the plaintiff would not have much of an incentive to adhere to the rules of service.

**Questions about rules for service for actions filed in federal court concerning individuals, corporations and unincorporated associations when service is done in the US:**

P files action against D in Va. For violation of federal law.

* D resides in Mass.
* P drives to D’s home in Mass and delivers complaint
* D appears in fed court in Va. and makes a motion to dismiss for insufficiency of process.

What results?

Dismissed b/c plaintiff cannot serve process b/c he is a party to the suit.

* Also inadequate process because no summons

What if Mass. or Va. law had said that a party may serve notice?

After all, there is

4(e) Serving an Individual Within a Judicial District of the United States.
Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served in a judicial district of the United States by:

1. following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or…

BUT this concerns how to serve, not who may serve – who may serve is in

4(c) Service.
…
 (2) By Whom. Any person who is at least 18 years old and not a party may serve a summons and complaint.

Does Mass. Law on how to serve actually apply in federal courts in Massachusetts?

In other words, what’s going on here with the state law in 4(e)(1)?

* Not applied to federal court, state court does not have power over federal procedure - it is just incorporated into federal law.
* The language about state law in Federal rules of Civil Procedure is incorporating state laws to a federal rule, for federal purposes.

So why does rule 4(e)(1) make reference to state laws?

* So people aren’t confused about which set of rules to follow. In other words, the federal rules allow process servers to follow state laws to avoid confusion. This does not mean that state laws regulate federal procedure. The federal rules are simply allowing plaintiffs to follow state laws.

**Hypo:**

1.D is aware he’s being served but will not answer door, so process server lets the copy of Summons and complaint fall at the D’s feet. Server returns a little later to find that the papers are gone.

Is this ok?

The question is whether this satisfies:

4(e)(2)

 doing any of the following:
    (A) ***delivering*** a copy of the summons and of the complaint to the individual ***personally***;

Some courts say this is OK if the server knows that D is present. Server would have to say that this falls under provision of delivering summons and Complaint personally.

2.P files action against D in E.D. of Va. For violation of fed law.

* D resides in Boston. But has a summer home in Martha’s Vineyard.
* P waits 3 months after filing complaint to serve summons and complaint to D at his summer home.
* D appears in E.D. for Va. And makes a motion to dismiss for insufficiency of service of process.

What result?

 Won’t be dismissed as long as the three months are no longer than 90 days.

4(m) Time Limit for Service.
If a defendant is not served within 90 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.. . . .

It doesn’t matter if D is served at his summer home, because he was served personally.