federal procedural common law track

Say forum state has statute/constitutional provision regulating procedure that feds don’t use – that is common law track. What to do?

1). Determine if state rule is bound up with cause of action (*Byrd)* – if so, use state law

- this test normally won’t be implicated

2). If answer to #1 is no look to twin aims of *Erie*: does difference lead to forum shopping or inequitable administration of laws? Are there countervailing federal interests in favor of a uniform federal rule in federal court?

**Klaxon Company v. Stentor Electric Manufacturing Company (US 1941)**

When fed courts use choice of law rules in fed question cases, that is common law (not statute) so vertical integration will be important and fed court will use forum state law in diversity case.

Prof. Green thinks twin aims of Erie really come from a congressional mandate; federal courts do not have complete freedom in creating federal common law procedure in diversity cases because Congress has implicitly put a restriction on them in the diversity statute

* Everything depends upon the ***type*** of federal law potentially conflicting with state law. Try both analyses (eg FRCP and federal common law) if you are unsure whether the issue falls under one or another

**Walker v. Armco Steel Corp. (US 1980)**

Application of the *Hanna* analysis concerning FRCPs is premised on a “direct collision” between the FRCP and the state law.

* Which track is Twiqbal standard in? Everything depends upon the track you’re in. If FRCP track, Twiqbal applies even in diversity case; if fed common law track, fed courts have concluded it’s in FRCP track due to 8(a)
* FRCP track makes it easy to come to conclusion FRCPs will apply in diversity cases, but possible for them not to

Now we need to reconsider the FRCP track

* + There has not yet been any case in which Fed. R. Civ. P. has been struck down in a diversity case – though *Shady Grove* came close

The test for FRCP track

1). Is what it regulates arguably procedural? And

2). Does it abridge, enlarge, or modify substantive rights? We’ve seen in *Hanna* a generous interpretation of this, but *Shady Grove* pushes back

**Shady Grove Orthoped. Assoc. v. Allstate (US 2010)**

**Facts:** Patient injured in auto accident, facility that cared for her made claim to Allstate. D paid but late; then refused to pay the interest payment mandated under NY law. P attempts to bring this claim as a class action.

**Procedural history:** Claim is in fed court, FRCP 23 governs class actions. Competing state law is §901(b) which says there is bar on recovery in class actions for penalties or statutory damages (real damages are how much you were actually hurt).

* Policy purpose? Prevent companies from being unduly burdened with statutory damages/fines. NY probably wants this to follow cause of action into other courts so that Ds will not be overburdened no matter where they are sued under NY law.

**Holding:** another plurality opinion where the resulting law is unclear. Scalia (with Thomas, Roberts, Sotomayor) tries to argue there is direct collision between FRCP 23 and §901 to show we are in FRCP track.

Then Scalia adopts the Sibbach interpretation of the substantive rights provision of the rules enabling act. Under this interpretation of Federal rule of civil procedure is valid if it really regulates procedure.

Scalia worries that if we have to figure out state substantive rights to determine the validity of a Federal rule of civil procedure, it will be nightmare because you can’t tell whether or not a state rule is substantive! Scalia doesn’t think validity of FRCPs depends on whether they respect state substantive rights.

* Scalia: “In sum, it is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule. We have held since Sibbach, and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure. If it does, it is authorized by §2072 and is valid in all jurisdictions…”
  + Green: But assume there is new FRCP that determines who has burden of proof for contributory negligence – wouldn’t that abridge/enlarge/modify substantive rights?
* Gist of Scalia: we must use the Sibbach approach or consequences will be disastrous.

Stevens concurs in judgment but agrees more with Ginsburg. Stevens thinks FRCP can be invalid if it is contrary to a state substantive right, and that varies depending on state right at issue.

* So one FRCP could be valid in one case and not in another, under Stevens’ reasoning.
* Stevens think NY rule in this case is procedural because it is in NY civil procedure code, so no need to speculate
* Stevens adopts an approach to determining whether a state rule is substantive or procedural that is easy to apply and, unlike Ginsburg’s approach, does not require that one engage in difficult speculations about the purposes of the state rule at issue
* Strongly disagrees with way Scalia reads the substantive rights provision, however – must respect state regulatory policies.

Ginsburg (with Kennedy, Breyer, Alito) argues NY rule is about substantive rights so it doesn’t interfere with FRCP at all – they’re addressing different issues!

* but if there were a direct conflict between FRCP 23 and NY’s rule 901, then Rule 23 would be invalid because it would violate the substantive rights provision in the rules enabling act

So which opinion is binding? Maybe the narrowest reading (Stevens) but he disagrees so much with Scalia that it seems weight of authority is on the side of the dissent, with which Stevens largely agrees

* Stevens has more formalistic approach to determining whether state rules are substantive, Ginsburg more searching, but all five of those justices think substantive rights mean substantive rights – the substantive rights provision of the rules enabling act can invalidate a Federal rule of civil procedure for certain state actions and not for others
* Prof. Green recommends interpreting cases like this under all three theories.
  + Aside: couldn’t they just certify the question of whether the New York rule 901 was substantive to the NY Court of Appeals?

P sues D under German law in fed court in LA concerning accident in Germany. LA state courts have no doctrine of forum non conveniens, federal FNC doctrine is laid out in *Piper*. D moves to dismiss on FNC grounds.

* Common law track
* The difference between Federal and forum state law would indeed lead to forum shopping
* But there are countervailing Federal interests in favor of a Federal Court using the Federal law of FNC in a diversity and alienage case
* Countervailing federal interests here are the difficulty of Federal Court would have determining the content of foreign law, unavailability of witnesses, and Federal interests in foreign relations
* So countervailing federal interest can be strong enough to override the inherent forum shopping problems!
* All Federal courts that have dealt with this issue have said that Federal law on FNC applies

CO passes Certificate of Review Statute that mandates anyone suing a licensed professional for malpractice must provide certificate claiming an expert in same area of practice has examined the claim and determined it has substantial jurisdiction.

* P (NY) sues D (CO) in fed court in CO for malpractice under NY law concerning operation D performed upon P in NY; no Certificate of Review filed, D motions to dismiss.
* Which track are we in?
* FRCP track…?
* FRCP 8(a) conflicts with this – you just need short and plain statement etc. Also maybe conflict with Rule 11!
* Those Federal courts that have concluded that state statutes directly conflict with 8(a) have gone on to conclude that they do not apply in a diversity, alienage, or supplemental jurisdiction action
* Those Federal courts that have concluded that 8(a) and R 11 are compatible with these state laws, putting the case in the Federal procedural common law track, have concluded that the state statutes must be applied in Federal Court – the forum shopping problems are sufficiently significant and there do not appear to be strong countervailing Federal interests in favor of a uniform Federal approach in Federal Court

*Semtek v. Lockheed Martin*

* Semtek sues Lockheed Martin in CA state court; Lockheed Martin removes to CA federal district court; District court dismisses on statute of limitations grounds
* Under California law, there is no claim preclusive effect on statute of limitations dismissals
* Assume that under federal law a dismissal under statute of limitations grounds has claim-preclusive effect
* Semtek then brings suit in MD state court; MD state court must answer Erie question
  + Two possible laws at issue: federal law and CA state law; MD state law is not at issue -
* In the federal common law track of *Erie*;
  + No FRCP or Federal Statute
* Is CA’s preclusion law bound up with the CA cause of action?
  + Let’s say it is not (Scalia did not address this)
* So, would the difference between federal and state law lead to forum shopping?
  + Yes, it most certainly will lead to forum shopping
    - A plaintiff will seek a forum where a dismissal on statute limitations grounds would not have preclusive effect
* Are there countervailing federal interests recommending a unified federal rule?
  + Probably not; you are already using different state statutes of limitations
* Therefore, forum state preclusion law on this issue should be used
  + The federal law absorbs or copies forum state law

Therefore, we know forum state preclusive law will govern when dismissed on statute of limitations grounds in diversity case

Other examples

HYPO:

* - P sues D in federal court in diversity in California  
  - P's suit is personal injury due to a defective hot water heater  
  - judgment for P  
  - P subsequently sues D in state court in California for property damages due to the water heater   
  - under California's law of claim preclusion, an action for personal injury and for property damages concern different primary rights  
  - does the California or the federal (transactional) rule concerning the scope of P's claim against D apply?
* ANSWER: Prof. Green doesn’t think California’s forum law will apply because of countervailing federal interests recommending the federal transactional rule
  + There probably are forum shopping issues, but countervailing federal interests in favor of federal transaction rule
  + Interests include efficiency (keep multiple litigation from occurring) of judgments; but even more so, the Federal transactional standard expresses itself in lots of Federal rules of civil procedure, in particular the compulsory counterclaim rule FRCP 13(a)
    - Defendant bound by FRCP 13 Counterclaim rule
    - It is weird to say that the plaintiff suing the defendant in Federal Court in diversity is not bound by a transactional standard for claim preclusion, but the defendant is bound by the transactional standard because of the compulsory counterclaim rule

There is much more state-to-state diversity with regard to issue preclusion than claim preclusion

* Some states still have the mutuality requirement, some states allow only defensive nonmutual issue preclusion, and some states and Federal law allow offensive non-mutual issue preclusion