Supplemental Jurisdiction

Art III §2 Focuses on Cases and Controversies as a Whole

that is why it is constitutional for an action that does not have its own source of SMJ to be in federal court with one that does

but there remains the question of whether SMJ for the actions is statutorily allowed

* after Finley….. the question is now answered by 28 U.S.C. §1367
	+ Supplemental jurisdiction
		- (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
		- (b) In any civil action of which the district courts have original jurisdiction founded **solely on section 1332 of this title**, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by **plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure**, or over **claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules**, when exercising supplemental jurisdiction over such claims would be **inconsistent with the jurisdictional requirements of section 1332**.
	+ **1367(b) is only a problem if original jurisdiction is *only* diversity case, and then only if it’s a claim by P, you might be in trouble because an exception to supplemental jurisdiction might apply**
		- *

Supplemental Jurisdiction Statute 28 U.S.C. § 1367 passed to override SCt decision in Finley, codified supplemental jurisdiction requirements

1st Step: Constitutional Analysis- is the action part of the same constitutional case or controversy as the action with original SMJ?

e.g. does it share have a **common core of operative fact?**

2nd Step (Only if Federal Action is based solely on Diversity): Statutory Analysis using §1367(b)

 (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

notice these exceptions are a problem only for actions brought by a **plaintiff**

Hypo - P1 (NY) sues D (NJ) under state law battery for $100k and joins with P2 (NY) who sues D for $25K.

 Supplemental Jurisdiction exists – P2 v. D does not fall under this language

**Claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure**, or over **claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules**,

* P2 v D is a claim by a person proposed to be joined as a plaintiff under **R 20**

This is what was held by the SCt in Allapattah

Hypo - P1 (NY) sues D (NJ) under state law battery for $100k. D makes a motion to join P2 (NY), who has a claim against D for $25K, as a *necessary* party

* No Supplemental Jurisdiction, it is a claim made by a person proposed to joined as a plaintiff under Rule 19

Hypo - P1(NY) sues D (NJ) for $100k and joins with P2 (NJ) who sues D for $100K

* No suppl jur – according to Allapattah
* To have Supplemental Jurisdiction, Court needs to have original jurisdiction over a claim and joining P2 infects the diversity of P1’s claims, so P1 v. D does not have original jurisdiction
	+ Amount in Controversy not being reached by one claim does NOT ‘infect’ an original claim’s amount in controversy threshold

Hypo - P(Cal) sues D(Cal) in state court in Cal under 42 U.S.C. § 1983 for violations of his civil right. Joined to the action is an unrelated state law breach of contract action against D.
May D successfully remove?

* No supplemental jurisdiction, state law contract action is not part of same constitutional case or controversy as the original claim
* Triggers 28 U.S.C. §1441(c), allows case to be removed to Federal Court and the Fed Court can sever the two claims, remanding the state law claim back to state court
1. U.S.C. §1441(c) Joinder of Federal law claims and State law claims.--(1) If a civil action includes—
(A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and
(B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute, the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).
(2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).

Discovery

Scope of Discovery: Unless otherwise limited by court order, Parties may obtain discovery regarding any **nonprivileged** matter that is **relevant to any party's claim or defense** and **proportional to the needs of the case**,

Proportionality considerations: (1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties’ relative access to relevant information, (4) the parties’ resources, (5) the importance of the discovery in resolving the issues, and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit.

* Information within this scope of discovery need not be admissible in evidence to be discoverable.

Privileges which bar discovery

1. Privilege against self-incrimination – Doesn’t apply in a civil action, can’t invoke privilege if statement would make you liable for damages, but DOES apply if statement would subject them to criminal liability
2. Attorney-Client Privilege – Restatement §68:
3. Protects the *communications* between a client and their attorney (also includes those people necessary to that relationship)
	1. May be invoked with respect to (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client
	2. Why does this privilege exist?
		1. To make sure client and lawyer’s discussions are honest and open, not worried about the other side/court getting your conversations
4. Eg your client tells you that he was looking the other way when he drove into the plaintiff

your client receives an interrogatory asking whether he *said to you* that he was looking the other way when he drove into the plaintiff

does your client have to answer the interrogatory? NO A-C priv applies
5. BUT if the interrogatory asks whether your client was looking the other way when he drove into the plaintiff does he have to answer?
6. YES – your client cannot refuse to answer a question relevant to the case simply because the answer was communicated in an A-C privileged communication
	1. This is sometime put as this way: the A-C privilege does not protect facts, only communications
	2. Notice things are different in a criminal case because your client can simply refuse to testify
7. what if your client says he was not looking the other way on the stand?
	1. You have to notify the ct that your client is lying
8. So what good is the AC priv? Clients will not be encouraged to speak freely even with the AC priv because they know that if they say something bad their lawyer will force them to be truthful about it in discovery or on the stand
9. Well, the AC priv does do something…
10. - your client tells you that he was looking the other way when he drove into the plaintiff

- subsequently he credibly tells you that he was not actually looking the other way at the time of the accident – when he said that he was he was feeling guilty because he looked the other way about 20 seconds before the accident

- your client receives an interrogatory asking whether he said to you that he was looking the other way when he drove into the plaintiff

- does your client have to answer the interrogatory? NO – because of AC priv

- your client receives an interrogatory asking whether he was looking the other way when he drove into the plaintiff – what can your client say? He wasn’t

so the AC priv does keep prejudicial communications from getting to the other side

* + - Who controls AC priv?
			* Client
	+ Corporate attorney-client privilege
		- Disagreement on this
		- Common law AC privilege varies from state to state
		- Fed approach (Upjohn)
			* Comprehensive – any communication of corporate atty with an employee of corp is within the corp AC privilege (assuming that other requirements are satisfied) – basically, all employees are privileged parties
		- alternative way to think about it is client is control group – only officers, directors – not all employees

Work-product privilege

* + - Hickman v. Taylor (U.S. 1947)
			* Defendants attorney requested all of plaintiffs notes from interviews with witnesses
			* Not under attorney-client privilege because not communication between privileged parties
			* District court held not privileged
				+ Overturned by 3rd circuit (affirmed by Sup Court)
			* Why have work-product privilege
				+ Witnesses don’t control privilege

So it does not encourage them to speak freely

* + - * + Client’s privilege

Some circumstances, possibly attorney’s privilege

* + - * + Encourages careful lawyering

Without this, lawyers wouldn’t write things down

* + - * + Also obvious that you need to protect Trial strategies and Legal conclusions
				+ But why protect fact work product, eg witness statements?
				+ Prevents free rider problem

Opposing counsel won’t get such statements because they know they can get the other side’s

Green: Sounds unrealistic

Other side won’t ask the questions you want

* + - * + Lawyer would turn into a witness

The witness statement will inevitably vary from what the witness says on the stand

That discrepancy will be very useful for impeachment purposes

And then the person who created the WP will be asked to defend the version in the WP against the word of the friendly witness

* + - Originally Hickman was a common law privilege but now some of it is in R 26(b)(3)
		- Ordinarily, a party may not discover documents and tangible things that are ***prepared in anticipation of litigation or for trial by or for another party or its representative*** (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).
			* Not just lawyers can create WP
			* Clients can do it all alone
			* also other agents
			* Fact intensive to figure out whether something is work-product
				+ Particularly when compared to attorney-client privilege
				+ Have to know history and motivation behind document
				+ Not necessarily identifiable by who produced It or for whom it was produced
		- Can be overcome a
		- subject to Rule 26(b)(4), those materials may be discovered if:
		 (i) they are otherwise discoverable under Rule 26(b)(1); and
		 (ii) the party shows that it has ***substantial need*** for the materials to prepare its case and ***cannot, without undue hardship, obtain their substantial equivalent*** by other means. prepared in anticipation of litigation or for trial by or for another party or its representative [
		- Opinion work-product treated differently than fact work-product
		- 26(b)(3)(B) Protection Against Disclosure. If the court orders discovery of those materials, it must ***protect against disclosure of the mental impressions, conclusions, opinions, or legal theories*** of a party’s attorney or other representative concerning the litigation.
			* Really hard to discover opinion work-product compared to fact work-product – maybe cannot be overcome at all
		- Existence of work-product is not itself work-product
			* If this weren’t true you would never be able to overcome privilege
				+ Wouldn’t know material exists
		- Can’t use work-product privilege to refuse to answer truthfully about a fact
			* Similar to point about AC privilege
		- Question about how much you have to anticipate litigation – does not have to be a suit yet, but
			* Normal documents generated in the course of business not work product
				+ Good example is insurance

Normal documents that an adjuster generates not work product

Only if genuine worry that you’re going to be sued

* + - * Unsolicited letter from witness?
				+ Is it prepared in anticipation of litigation?
				+ Is it by or for another party?

If witness did it for you then it could be described as work-product

* + - One way to overcome privilege: if one party interviewed witnesses shortly after the events in question and the other party doesn’t have the opportunity to do so until substantial time has passed
			* Witnesses may not recall everything that happened later
			* Would put the discovering party at a disadvantage if they didn’t have access to this info
		- Sometimes you can overcome work-product privilege in order to impeach witness
			* Don’t want to make it impossible to do this
			* But also don’t want to allow someone to simply say “I want access to WP because it might have stuff that would impeach the witnesses”
				+ That would eviscerate the WP priv
			* To overcome privilege, you have to have some non-privileged info that you can show to the court that will then justify access to privileged material