Horizontal substance/procedure problems discussed last time

OK – Now

Substance/procedure problems in federal court

A federal court entertains an action under non-federal (eg state) law

How much state law concerning court administration should the federal court use?

Concerning Federal constitutional law (such is the Seventh Amendment) the governs procedure in Federal courts, the answer is easy

* No matter how much it might lead to forum shopping, federal constitutional law just applies in federal court – forum shopping is irrelevant
* Also irrelevant that Federal constitutional law is trumping state court administration rules that the state wants applied in federal court – the Constitution is supreme

OK now let us turn to Federal procedural common law (judge-made law)

We’re going to discuss the law *historically* first showing how we got into the current situation, which is primarily articulated in Hanna

* Federal procedure common law cases –
* P sues D in federal court in New York under New York negligence law  
    
  New York law puts the burden of proof on the plaintiff to show his lack of contributory negligence   
    
  can the federal court use a federal common law rule making contributory negligence an affirmative defense instead?
* NO - Palmer v. Hoffman (US 1943)  
    
  also Cities Service Oil Co. v. Dunlap (US 1939)
* this it is like the horizontal situation - sister state burdens of proof are a presumptively substantive and forum state procedural law should yield to them
* *But then… Guaranty Trust*
* A Federal Court in New York entertaining New York causes of action had to use New York’s statute of limitations, even though that statute of limitations wasn’t bound up with the NY causes of actions
  + Nevertheless, SCOTUS says NY statute of limitations has to be used anyway
  + This is a policy of Vertical uniformity
  + How it turns out in federal court has to be the same as forum state court (if outcome determinative)
* Same use of forum state law rather than Federal common law for tolling rules in Ragan
  + - Once again about vertical uniformity
  + a Mississippi statute requires a corporation doing business within the state to designate an agent for the service of process before bringing suit in Mississippi state court  
    - This is to ensure that there will be personal jurisdiction over the corporation if a suit is brought against it in Mississippi State court in the future
    - there is no such requirement under federal law  
        
      P (a Tennessee corporation doing business in Mississippi) is suing D in federal court in Mississippi under Mississippi law  
        
      P has designated no agent for service of process in Miss.   
        
      D moves for summary judgment on this ground  
        
      what result?
* *Woods* 🡪 a federal court has to use the same rule
  + This is true even though the fifth circuit had concluded that Mississippi did not care whether the rule to applied in Federal Court
  + Not about respect for state substantive law - it has to be used by federal court in the state due to policy of vertical uniformity
* Federal law the incorporates state law standards
* We’ve seen this before 🡪 Rule 4(e) incorporates state law standards – the reason is a federal purpose, not about state regulatory interests
  + a New Jersey statute requires small shareholders bringing derivative actions to post a bond
    - why have such a rule? What’s the problem with derivative actions? (*Schaffer*)
      * They are brought on behalf of a corporation by a shareholder, with the recovery going to the corporation
      * They can often be frivolous
      * Requiring a small shareholder to post a bond can help ensure that they are not
  + federal courts have no such requirement  
    P, a small shareholder, brings a derivative action under Delaware law against D in federal court in New Jersey  
      
    P has not posted a bond  
      
    D moves to dismiss  
      
    What result?
  + Cohen v. Beneficial Indus. Loan Corp. (US 1949) – the Federal Court must use the New Jersey rule
  + Again the reason is not that the New Jersey rule is part of the cause of action (indeed the cause of action is under Delaware law)
  + The reason is a policy in favor of vertical uniformity
* Notice that the test at this time (Guar Trust, Ragan, Woods, Cohen) in determining whether vertical uniformity is implicated is the *outcome determinative test*
  + Whether the difference between Federal and forum state procedure would make a difference to how the case turned out at the moment of choice
* *Byrd* changes things a little bit
* I will not discuss the facts of the Byrd case but it introduces two new considerations in connection with the Federal procedural common law Erie cases
* First. It was decided in Erie R. Co. v. Tompkins that the federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts. We must, therefore, first examine the [S.C.] rule...to determine whether it is bound up with these rights and obligations in such a way that its application in the federal court is required.
  + In other words, Erie says it is unconstitutional for a federal court to create a common law rule that trumps state substance (when in a diversity case)
    - Green not sure if this is always true
  + Which state’s definition of state-created rights and obligations is at issue 🡪 the state that created the cause of action
    - *Palmer* as an example 🡪 burden of proof following the cause of action
  + Green: Not likely that every single substantive right that a state has to be applied by the federal court
    - At a certain point, federal procedural common law might trumps state substance
    - P sues D in federal court under California law for wrongful death  
        
      California has rule about the maximum number of pages in a brief that it considers bound up with its wrongful death statute  
        
      must federal procedural common law yield to it? Probably not
  + But in general it makes sense that Federal procedural common law should yield to state law rules that are substantive in the sense that the state wants them to follow the state’s cause of action into Federal Court

Byrd also introduces another important consideration in connection with the policy of vertical uniformity

* Second. But cases following *Erie* have evinced a broader policy to the effect that the federal courts should conform as near as may be--in the absence of other considerations--to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular local rule. E.g., Guaranty Trust Co. of New York v. York.
* But there are ***affirmative countervailing considerations*** at work here....
* This means that even if there is of vertical uniformity, but there can be affirmative countervailing considerations that can recommend a uniform federal common law rule
  + - Important!
* After *Byrd*:
  + Vertical uniformity must be balanced against countervailing federal interests in favor of uniform federal common law rule in Federal Court, no matter what state it is brought in

Here we are talking about the Federal procedural common law track

* Examples:
  + Claim/issue preclusion
  + Rules of tolling of statute of limitations
  + Anything that federal courts simply don’t do that a state does (whether by state constitution, statute, or common law)
    - Which track you re in is determined by the federal procedural law at issue
    - Not by the competing state law

What about federal rules of civil procedure or federal statute regulating procedure?

Hanna finally deals with them, in addition to reinterpreting the policy of vertical uniformity for the Federal procedural common law track

* *Hanna*
  + Suit under Massachusetts law in Federal Court in Massachusetts
  + Summons and complaint left in accordance with Rule 4(e) with a person of suitable age and discretion at the home
  + Mass. statute said it had to be in hand
  + The US supreme court concluded that the Federal rule of civil procedure applies
  + You don’t care about vertical uniformity if it comes to Federal Rules of Civil Procedure
    - Why? 🡪 Congress is the one that created the goal of vertical uniformity, and it can take away that goal;
    - Policy is created by Congress, policy can be taken away by Congress (by Rules Enabling Act)
  + Vertical uniformity only matters with Federal procedural common law
  + The only issue in connection with FRCPs is whether they are valid
  + This encompasses two questions
  + “Is it within Congress’s power? If yes, is it within other limitations of the Rules Enabling Act?”
  + Where does policy in favor of vertical uniformity come from in Federal procedural common law cases? This is not a constitutional requirement, because a can be taken away by Congress by statute (for example in the Rules Enabling Act)
  + So what is the statutory source of this policy of vertical uniformity?
  + Green: the source of the policy in connection with diversity cases is the diversity statute
    - Policy in favor of uniformity to serve purpose of diversity statute – allowing for a form free of state court bias
    - We want people who are worried about bias to get protection of the federal court if there’s diversity; won’t be able to go to federal court if they’ll be disadvantaged by federal procedure
    - Likewise, we want people in diversity cases to choose Federal Court only if they are worried about bias, not in order to get favorable Federal procedure
    - So uniformity of procedure between Federal and forum state court aides in the purposes of the diversity statute
    - There’s also a comparable argument for a policy of vertical uniformity in connection with supplemental jurisdiction, that Green won’t give here

OK – so now we know that in connection with FRCPs the only questions are whether they are within Congress’s power and whether they satisfy the requirements of the REA

Let’s start with Congress’s power over the procedure in Federal courts  
This will determine whether federal statutes regulating procedure are valid

* What is Congress’s power over federal procedure (including in diversity cases)? How intrusive can it get?
  + Standard: federal statutes regulating procedure in federal courts are valid if what they regulate is rationally capable as classification as procedural
  + statute applies if what it regulates is arguably procedural
    - No matter how much it trumps state substantive rights or leads to forum shopping, Congress can do it as long as what it regulates is arguably procedural
    - Green (and Justice Harlan) questions whether this is always true
    - Congress passes a statute stating that the burden of proof for contributory negligence is on the defendant in federal court, including when the plaintiff brings state law actions  
      - is the statute valid?  
      - even if a state has a contrary rule bound up with its cause of action?
    - Under this standard articulated in Hanna it is valid
    - But this seems implausible
* Examples of federal statutes regulating procedure: 1441, 1331, 1332, etc.

Now FRCP track

* Here there are two questions
* 1st - Is the FRCP within Congress’s power? (Congress delegated its power to regulate procedure in Federal District courts to the Supreme Court in the REA and Congress cannot delegate power that it does not have
  + This is the arguably procedural test
* 2nd – Is the FRCP within the limits that Congress imposed upon the supreme court in the REA - 28 U.S.C. 2072 🡪
* **28 U.S.C. § 2072. - Rules of procedure and evidence; power to prescribe**   
  (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.   
  (b) **Such rules shall not abridge, enlarge or modify any substantive right. . . .**
* This is the big question - how to read the substantive right limitation in the REA
* *Hanna* 🡪
  + “The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.” Sibbach v. Wilson & Co. (U.S. 1939)
  + If As long as it really regulates procedure, then it doesn’t abridge, enlarge, or modify a substantive right
* We shall return to the substantive right limitation in the REA in Shady Grove…

But Hanna also as new stuff to say about the Federal procedural common law track

* *Hanna* 🡪 Even if the Federal Service rule at issue were Federal procedural common law rather than a FRCP, it would still apply
* “Not only are nonsubstantial, or trivial, variations not likely to raise the sort of equal protection problems which troubled the Court in *Erie*; they are also unlikely to influence the choice of a forum. The ‘outcome-determination’ test therefore cannot be read without reference to the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.”
* In effect, the outcome determinative test in Guar Trust is rejected
  + The question is no longer whether the difference between Federal and forum state procedure would determine the outcome of the case at the time of the choice
  + Now the question is whether the difference between the federal common law rule and the state’s rule leads to ex ante forum shopping or inequitable administration of laws
    - Think primarily of forum shopping
    - When you’re thinking about where to sue, would you (litigants generally) say “I want to sue here” because of the difference between federal common law rule and forum state rule?
* Hanna does not mention Byrd’s countervailing Federal interests, but they also come into play in later cases

Let’s look back at old cases in light of Hanna’s rejection of the outcome determinative test...

* Could a federal court sitting in diversity create a common law limitations period different from that of the forum state? 🡪 No
  + Why not?
    - It would lead to forum shopping
    - And there do not seem to be sufficient countervailing Federal interests in favor of a Federal common law limitations period
    - This is true even if the state statute of limitations is not bound up with the state’s cause of action
    - So the conclusion of Guar Trust is still good law after Hanna
* Should a federal court sitting in diversity use a forum state rule requiring any out of state corporation doing business in the state to appoint an agent for service of process before bringing suit? 🡪 YES
  + Not bound up in the cause of action
  + But if federal court didn’t would still lead to forum shopping
  + *Woods* is still good law post-*Hanna*
* Tolling rules?
  + *Ragan* is still good law
  + Which track are we in? 🡪 Federal Rule of Civ Pro or common law?
    - If the former, don’t have to worry about Erie/twin aims
    - SCOTUS says common law track; Walker
    - FRCP 2 doesn’t say anything about tolling
    - No direct collision with federal rule, so we’re not talking about FRCP track
  + Therefore, have to take forum shopping into account
  + *Ragan* rightly decided
* *Twombly* and *Iqbal* were both federal question case, so they didn’t talk about *Erie* problem of whether they apply in diversity
* Does *Twiqbal* apply in a diversity case? 🡪 Yes
  + What track are we in? 🡪 FRCP
    - *Twiqbal* comes from “showing” in (Rule 8(a))
      * Rule 8(a) is valid in diversity cases
      * because Rule 8(a) regulates something arguably procedural; (pleading standards) and does not abridge enlarge or modify a substantive right
  + If federal common law track, *Twiqbal* would probably be gone in diversity cases

*Klaxon*

* Rules about choice of law, in federal court, come from **common law**
  + So we’re in the common law track
* Whether difference between federal choice of rules and state choice of rules would lead to forum shopping
  + Yes
* *Klaxon* rightly decided
* Makes sense in diversity cases that you’d want vertical uniformity in choice of law