**Erie flow chart -**

* Is there a state law action (or action of another nation’s law) or is it just a federal question action?
	+ If the latter, there are no *Erie* problems; just use federal procedure
		- There’s no policy of vertical uniformity with respect to federal common law procedure in a federal question case
	+ If the former, then Erie may apply
	+ But the answer depends on the nature of the Federal procedural law at issue
	+ Is it Federal constitutional law (e.g. 7th amendment)?
		- then it applies
		- It does not matter how much forum shopping is created or how much state substantive rights are overridden
	+ Is the relevant federal procedural law a federal statute?
		- 🡪 if yes, it applies if what it regulates is rationally capable of classification as procedural
		- It does not matter how much forum shopping is created or how much state substantive rights are overridden
		- although there are some Green/Harlan worries here
	+ Is the relevant federal procedure law a FRCP?
		- If yes, then two questions
		- 1st is what it regulates arguably procedural? That is, is it within Congress is power?
		- 2nd – is it within the substantive right limitation of the REA
			* Does it abridge, enlarge, or modify substantive rights?
			* What this means it is still an open question – it will be discussed further in Shady Grove
	+ Is the relevant federal procedural law common law?
		- 1st Question is the Byrd bound-up test
			* Is the state rule bound up in the cause of action? If so, have to use state law
			* again Green questions whether this is always true
		- If state rule is not bound up with the cause of action, you still have a reason to use the forum state’s law if failure to do so would violate the twin aims of *Erie* (forum shopping and inequitable administration of law)
		- BUT even if the twin aims are implicated, there still may be a reason to use the Federal procedural common law rule, if there are countervailing Federal interests in favor of that rule

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 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
* Work product covered by Rule 26 🡪 FRCP track
* Work product not covered by Rule 26 🡪 common law track (because covered by *Hickman*)…?
* Have to Erie-fy everything we learned about Federal procedure to ask if it’s applicable in a diversity case

*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

federal procedural common law track

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

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 because that follows from the rule’s purposes

* so 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
* but she argues you can read FRCP 23 such that it does not conflict with NY substantive rights
	+ basic idea is that R 23 only allows for class actions if state substantive law can be brought as a class and the NY actions can’t in this case, so there is nothing to be brought as a class action

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