1. Read the test and spot issues

Fall 2011

Troy McKenzie – Civil Procedure – Attack Outline

1. Copy names and claims for parties before starting each problem
2. Copy checklist into problem
3. Make sure you answer the question
4. **RELAX**
5. Personal Jurisdiction

|  |  |
| --- | --- |
|  | Short cuts |
|  | General jurisdiction – Short contacts analysis |
|  | Specific statute – special cases? Use Analysis |
|  | Specific const contacts |
|  | Reasonableness – if contacts, likely reasonable! |

1. Notice
2. Opportunity – Prejudgment Attachment

|  |  |
| --- | --- |
|  | Private (Δ’s) Interest |
|  | Risk of erroneous deprivation |
|  | Interest of Π and state interest |

1. SMJ
   1. State Court
      1. Reverse Erie?
      2. Removal?
   2. Diversity

|  |  |
| --- | --- |
|  | Amt in Cont – Certainty –  Injunction/combining |
|  | Was removal proper? § 1441 |
|  | Citizenship – @ Time of removal |
|  | Challenges |
|  | Erie problem? |

* 1. Federal Question

|  |  |
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|  | Diversity? |
|  | Constitutional test |
|  | Statutory – Motley |
|  | Statutory – Smith |
|  | Merrel/Grable/Empire |

* + 1. Supplemental Jurisdiction?
       1. Erie?
  1. Supplemental

|  |  |
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|  | Is there federal SMJ? |
|  | Gibbs 1 |
|  | Diversity – Kroger |
|  | Gibbs 2 |
|  | Diversity – Erie? |

* 1. Removal

1. Venue – Page 9
2. Forum Non Conveniens

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| --- | --- |
|  | Threshold: Adequate alternate forum? |
|  | Factor #1: Deference to Π’s choice of forum |
|  | Factor #2: Public vs. Private interests |

1. Erie – Page 10

|  |  |
| --- | --- |
|  | Which state law? |
|  | Is there a conflict? Which side wants what? |
|  | RDA |
|  | REA – Statutory |
|  | REA – Constitutional |

1. Federal Common Law
   1. Erie?
2. Reverse Erie
3. Pleading

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|  | Apply Rule 8 |
|  | Cross off Conclusory |
|  | Apply Twombly |
|  | Extras – Pro se? heightened pleading? |

1. Answer
2. Counter Claim
3. Amending Pleading
   1. Relation back
4. Sanctions
5. Settlement
6. Discovery

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| --- | --- |
|  | Non-privilege, relevant, calculated? |
|  | AC – is/acting as attny? |
|  | AC – Waived? |
|  | WP – Prepared by lawyer for lit? |
|  | WP – Core WP? |

1. Summary Judgment

|  |  |
| --- | --- |
|  | No genuine dispute |
|  | Burden |
|  | Adickes – New facts |
|  | Celotex – Holes in facts |
|  | Shift burden – more facts |

1. Preclusion
   1. Claim Preclusion

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|  | Mutuality? |
|  | Same transaction/occurrence? |
|  | Final judgment on the merits? |
|  | Matter previously available? |

* 1. Issue Preclusion

|  |  |
| --- | --- |
|  | Claim preclusion? |
|  | Issue necessary? |
|  | * Run counter-factual |
|  | Final judgment on the merits? |
|  | Judgment in the alternative? |
|  | Non-mutual collateral? |

1. Joinder
   1. Rule 20
   2. Rule 19

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|  | Necessary? |
|  | Indispensable Harlan? |

1. Class Action

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|  | Prerequisites |
|  | Requirements of Class |
|  | Consider Settlement |

|  |  |
| --- | --- |
|  | Short cuts |
|  | General jurisdiction – Short contacts analysis |
|  | Specific statute – special cases? Use Analysis |
|  | Specific const contacts |
|  | Reasonableness – if contacts, likely reasonable! |

1. **Personal Jurisdiction**
   1. **Short Cuts** (General Jurisdiction)
      1. Served – *Burnham* – The fact that you’re present in the state implies that you can be served there (*Grace v. MacArthur* – tag on airplane) 🡪 presence implies reasonable expectation you’d be sued, demonstrates ability to defend in forum
      2. Resident – *Milliken* – state citizen in another state (*Blackmer* – US citizen overseas)
      3. Consent – *Hess* (Vehicle), *Bauxites* (Consent by Estoppel during Discovery), *Carnival* (Consent based on FSC on ticket)
      4. Agent – *Pennoyer*, *Hess*
   2. **General Jurisdiction** – *Shoe* – Continuous, substantial and systematic contacts
      1. “At Home” – *Perkins* – Philippine company, continuous/systematic administration of company duties 🡪 General granted – State doesn’t have to hear the suit
      2. *Helicopteros* – Pilot training, purchases, bank account 🡪 Not “at home”
         1. “Arising out of/Related to” – Specific
      3. *Goodyear* – Subsidiary has no actual contacts w/ forum 🡪 Not granted
         1. TMAC likes this one for “at home” argument
         2. Stream-of-commerce only gives general if continuous/systematic
         3. Could be at home in more than 1 jurisdiction
         4. General implies Asahi reasonableness is satisfied
   3. **Specific Jurisdiction** – *MUST SHOW STATUTE AND CONSITUTION*
      1. **Statute** – Authority
         1. State Long-Arm – State self-limitation below the constitutional limit
            1. Analysis

Need to examine if statute is satisfied – special cases 🡪 *quasi in rem*?

Then ask if exercise of jurisdiction violates due process (14th Amendment) 🡪 if yes, does not invalidate entire statute

* + - 1. Federal – *Rule 4*/5th Amendment Due Process 🡪 arguably not *Asahi*
         1. *Federal Rule 4*

*4(k)(1)(A)* – Federal court piggy-backs on state long-arm

*4(k)(1)(C)* – Permits service when authorized by federal statute

*4(k)(2)* – Service for Federal claim, when not amenable to suit in any state and not a state law issue

* + 1. **Constitution** – Does jurisdiction violate Due Process of the 5th/14th Amendments?
       1. Minimum Contacts – Does not offend traditional notions of fair play and substantial justice (*International Shoe*)
          1. Contacts – yes – focus on purposeful availment

*McGee* – Single life insurance policy – high sovereign interest of CA

*BK* – Contract – avail with negotiations and payments

Choice of law provision supports BUT doesn’t determine jurisdiction

*Gray* – stream-of-commerce – *situs* of the tort in forum

*Asahi* – Stream-of-commerce+

*Keaton v. Hustler* – only contacts of Δ count

*Burnham* (Brennan) – benefit from state law protection

*Asahi* (Dissent) – Δ availas itself of the benefits of American market, should expect to defend there

*J McIntyre* (Dissent) (*WW-VW*) – when aiming to sell in a region, amenable to suit anywhere in the region

*Calder* Effects Test (Π contacts may enhance)

Committed a tort (can be as simple as defamatory comments)

Aimed at forum (note where Π is)

Caused harm in forum

* + - * 1. Contacts – no

*Hansen v. Denckla* – No unilateral activity of 3rd party, Δ must purposefully avail

*WW-VW* – No unilateral action of Π or 3rd party

Chattel as agent – would lead to universal jurisdiction

Should Δ reasonably anticipate being hailed to the forum?

*Kulko/Pebble Beach* – Stale contacts

*McIntyre* – targeting a region but no specific place is insufficient contact

* + - 1. *Asahi* Reasonableness – Must insure that jurisdiction would not be unreasonable
         1. Burden on Δ
         2. Π’s interest in forum
         3. State’s interest in providing forum and subject matter of lawsuit
         4. Efficient resolution
         5. Federalism – another state with competing interest

Just because a state can assert jurisdiction doesn’t negate jurisdiction in the original forum

* 1. **Special Cases** – Power over Property
     1. *Quasi in rem 2* – If allowed by statute, can circumvent other statutory stipulations, need Constitutional minimum contacts – *Shaffer*
     2. *In rem* – must be a dispute over title to property
     3. *Quasi in rem 1* – Dispute arises out of that property
     4. Some disagreement over attachment of real property – *Rhoades v. Wright* – attached farm
  2. **Internet Contacts**
     1. *Zippo* Test
        1. Passive (info only, *Pebble Beach*) 🡪 interactive 🡪 Active (doing business, contact)
        2. Proxy for availment – conducting transactions and transferring products/services in forum, then you’ve availed of the forum
        3. Location of servers, % of traffic – Servers = bank *Helicopteros*, % is just awareness, insufficient to establish jurisdiction
  3. **Theory of jurisdiction WRT corporations**
     1. Consent – implied consent forced when opening business in forum, tag of CEO in forum on business
     2. Business in forum – Doing business – Foreign corp is getting the benefit of doing business in the state, so should be held to judgment – *International Shoe*
     3. Served in forum – Presence – physical presence in the state – general jurisdiction
  4. ***Federal Rule of Bankruptcy Procedure, Rule 7004*** (ERISA is similar)
     1. Nationwide service of process – need contacts with entire US – DPC 5th Amendment
     2. *McIntyre* – Avail of US – Hard to find unreasonable, change of venue is available

1. **Notice** – Service of Process
   1. Analysis
      1. **Constitutional** – Is notice reasonably calculated *ex ante* to apprise the interested parties of the proceedings from the perspective of someone who desires to inform the absentee. – **Does not require** heroic efforts (*Mullane*)
         1. Notice must reasonably convey the required info and give reasonable time to appear (*Aguchack*)
         2. Did sender receive affirmative notice that notice has failed? Did sender take reasonable extra steps from the “perspective of someone desirous of giving notice” (*Flowers*) – If no notice of failure, no need to do more (*Dusenbery*)
         3. Does sender know *ex ante* it is unlikely to succeed? (*Green*)
      2. **Statutory** – Does notice comply with statute? (*Chaves*)
      3. ***Federal Rule 4*** – Party can choose to serve by rules of the state of the court, where service is made, or by the Federal Rules
         1. Waiver of Service – request to Δ to waive service formality in exchange for additional time to respond. If not waiving, liable for costs of service
            1. Cannot unilaterally waive
            2. Parties can’t serve process themselves
         2. *4(f)(3)* – allows any means approved by the court is all available methods are exhausted – distaste for default judgments policy
   2. *Mullane v. Central Hanover Bank and Trust Co*. – Constitutional minimum
      1. Notice must reasonably convey the required info and give reasonable time to appear
         1. *Aguchak* – summons did not inform of right to appear in writing or change of venue request
      2. Needs to be reasonably calculated *ex ante* to be received
         1. *Green v. Lindsay* – posting on door inadequate when kids usually take them down
      3. Beneficiaries of the trust as a class – only need to contact enough that interests are represented
   3. *Jones v. Flowers* – Additional obligations in light of failed certified mail attempt
      1. “Perspective of someone desirous of giving notice” – resend by reg mail, publish, something more… (when certified failed)
   4. *Dusenbery* – no indication notice was not received
      1. Letter was not returned, no indication notice was not received, certified mail OK
   5. *Maryland State Firemens Assn v. Chaves* – follow the rules
      1. 1st class mail is inadequate when certified is required, even if successfully received
   6. Policy

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|  | Private (Δ’s) Interest |
|  | Risk of erroneous deprivation |
|  | Interest of Π and state interest |

* + 1. Reasonable notice – allow creditors to work out debts, allow debtors to make sure their rights are not violated

1. **Opportunity to be heard**
   1. Due Process challenge to pre-judgment attachment
   2. Analysis – General balancing factors – *Doehr/Matthews Balancing*
      1. Private (Δ) interest effected
         1. Π’s interest/Δ’s interest in the property (*Di-Chem* – Bank account garnished)
      2. Risk of erroneous deprivation
         1. Was the post-deprivation hearing immediate? (*Di-Chem* – no hearing; *Doehr* – Immediate)
         2. Did Π have to present evidence? Is evidence presented of sufficient quality? (*Di-Chem* – Filing party not knowing facts; *Mitchel*l – Debt evidence)
         3. Clerk/judicial officer? (*Di-Chem* – Clerk; *Mitchell* – Judge)
         4. Bond/security? (*Mitchell* – Bond)
      3. Interest of Π with due regard for interest gov may have for safeguards
         1. Exigent Circumstances? (*Fuentes* – need important Gov/Pub interest, or need for prompt action)
         2. Other facts that show attachment is unnecessary or could be done in a better way?
   3. Attachment – NO
      1. *Fuentes v. Shevin* – Policies against pre-hearing attachment
         1. Δ is deprived of property without notice or opportunity to be heard
            1. No notice
            2. Temporary deprivation of property is still deprivation
         2. Exceptions
            1. Necessary to secure important government or public interest
            2. Special need for prompt action
            3. State keeps a monopoly over these exceptions
      2. *Di-Chem* – Garnishment of bank account
         1. Only conclusory allegations – poor documentation
         2. Issuable by clerk
         3. No protection against initial error
         4. No hearing for Π to show probable cause
         5. Π has no specific interest in account
      3. *Connecticut v. Doehr* – Attached house after fist fight
         1. Adapted Matthews balancing test
            1. Private interest affected
            2. Risk of erroneous deprivation and value of added safeguards
            3. Interest of the party seeking the remedy and due regard for the interest the gov. may have in additional safeguards
   4. Attachment – YES
      1. *Mitchel v. WT Grant Co.* – Requirements for legal pre-hearing attachment statute
         1. Acceptable *ex parte* attachment in debtor/creditor relationship
            1. Showing before judge
            2. Δ can seek immediate dissolution via post-deprivation hearing
            3. Π must post bond for value of goods
            4. What showing at pre-judgment?

Evidence?

Does the party seeking attachment have an interest in the attached property?

* + 1. *Federal Rule 65(b)(1)* – Temporary restraining orders
       1. *65(b)(2)* – TRO for 10d during which a hearing to grant preliminary injunction takes place; P.I. can last til final judgment.

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| --- | --- |
|  | Amt in Cont – Certainty –  Injunction/combining |
|  | Was removal proper? § 1441 |
|  | Citizenship – @ Time of removal |
|  | Challenges |
|  | Erie problem? |

1. **SUBJECT MATTER JURISDICTION**
   1. **State court** – Removal? Reverse Erie?
      1. *Lacks v. Lacks* – State courts have original jurisdiction
         1. Not fulfilling residency requirement for the COA is separate from the court’s competency to hear a case
         2. State court of original jurisdiction has SMJ over all matters unless there is a statutory or constitutional provision limiting jurisdiction
            1. Policy – wasteful of judicial resources – undermines finality of judgments
      2. *Capron v. Van Noorden* – Parties cannot consent to SMJ – SC-USA reverses Fed. District court decision that didn’t first establish diversity.
      3. Concurrent jurisdiction – State courts can hear either state or federal claims
   2. **Federal Court – Must ask if removal was proper under *§ 1441***
      1. **Constitutional Grant** – Art 3, §2 grants for controversies between cit. of 2+ states
      2. **Diversity** – *28 USC § 1332* (Statutory grant)
         1. **Amt in controversy** – *§ 1332(a)* – *more than* $75k *exclusive of costs and interest*
            1. **NOTE**: The person challenging diversity must prove to a legal certainty that relief sought could not exceed $75k (§ 1332)
            2. Injunction – valued at worth to Π, worth to person invoking, or either
            3. Combining $$$

Single Π/Single Δ – Combine

Multiple Π/Single Δ – no combining separate and distinct claims

CAN combine claims coming from a single title or right stemming from a common interest (if one loses, do the rest get more?)

Single Π/Multiple Δ – Need joint and several liability

* + - * 1. For Δ to invoke when amt stated is under $75k, must show to a legal certainty that mount stated is mistaken (*St. Paul v. Red Cab*)
      1. **Citizenship** – *§ 1332* – NEED BOTH CONSTITUTIONAL AND COMPLETE
         1. Complete diversity **@ time of removal** (*Strawbridge, § 1332*)

Constitutionally only need minimal diversity (Art 3, § 2)

* + - * 1. *Dred Scott* – person must be both citizen of US and domiciled in state
        2. *Mas v. Perry* – Domicile – state where person has taken up residence with the intent to reside indefinitely
        3. *Hertz Corp v. Friend* – “Nerve Center” – *§ 1332(c)*
        4. *Rose v. Giamatti* – Unincorporated assn. looks @ citizenship of every member
        5. Alienage –*§ 1332(a)(2)*

Citizens of a state & citizens of a foreign state (NO alien v. alien)

Non-citizens can’t invoke diversity

US citizen domiciled abroad is a citizen of no state

* + - * 1. Policy surrounding nerve center

Simplicity

Legislative history eliminated original 50% of business approach

Attempt to move away from the sporting theory of justice

* + - 1. Judicial Exceptions
         1. *Akenbrandt* – tightens domestic relations exception to include ONLY divorce, alimony, or child-custody
         2. *Marshall v. Marshall* – Bankruptcy court has SMJ to adjudicate *in personam* tortious interference claim since it does not involve *in rem* proceeding against any of the property in the probate court
      2. **Challenging SMJ**
         1. If a flaw is discovered after the start of the case, ***before judgment***

Can’t add non-diverse in diversity

Dismissal of non-diverse can cure flawed diversity – *Catterpillar*

Change citizenship does not break diversity if good @ filing

Change citizenship of non-diverse does not fix diversity – *Grupo Dataflux*

* + - * 1. If flaw is discovered after final judgment

Default judgment is easier to vacate

If there was fact finding necessary to determine SMJ, unlikely to vacate

* + - * 1. Parties collusively joined or made – *28 USC § 1359*

No jurisdiction if a party, by assignment or otherwise, has been improperly made or joined to invoke jurisdiction of such court

* + - 1. CAFA – *§ 1332(d)* – minimum diversity in class action – $5mil+
      2. Policy
         1. Fear of hometown prejudice

Makes sense to have fed ct. hear multi-state issues – equal footing

* + - * 1. Cross-pollination of ideas
        2. Helping state courts manage caseload

|  |  |
| --- | --- |
|  | Diversity? |
|  | Constitutional test |
|  | Statutory – Motley |
|  | Statutory – Smith |
|  | Merrel/Grable/Empire |

* + - * 1. Supports competition btwn state and fed system that “lifts all boats” – higher standards through competition
    1. **Federal Question** – “Arising Under” (Art 3, § 2)
       1. **SHOW BOTH CONSTITUTION AND STATUTE**
       2. Throat clear diversity
       3. **Constitutional Test** – Constitution Article III § 2
          1. *Osborne v. Bank of the US*

Ingredient test – as long as there is some issue of federal law that is an ingredient of the case

The case “arises under” federal law and Art 3 is satisfied

* + - 1. **Statutory test** – *28 USC § 1331* – ONLY Π COUNTS!
         1. *Motley test* – Face of Π’s well pleaded complaint needed to prove claim
         2. *Wellworks* – Federal statute creates COA (or created by implication)
         3. *Smith/Grable* Exception – Does Π’s right to relief depend on a substantial question of federal law, which is actually disputed and necessary to his claim that doesn’t upset the balance between federal and state courts?

*Grable* Factors

Is the federal issue actually disputed?

Is the federal issue necessary to Π’s case? – Can you show the violation without it?

Is the federal issue substantial enough to override Motley? Lack of private right of action? (*Merrell Dow)* lack does not foreclose substantiality (*Grable*) 🡪 Other considerations from facts?

Comport with federalism? – Flood gates (*Grable*) – Narrow/pure matter of law? Fact-bound and messy? (*Empire*)

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| --- | --- |
|  | Is there federal SMJ? |
|  | Gibbs 1 |
|  | Diversity – Kroger |
|  | Gibbs 2 |
|  | Diversity – Erie? |

* + 1. **Supplemental Jurisdiction** – *28 USC §1367*
       1. Is there a claim over which you could get federal SMJ?
       2. *28 USC § 1367* – Overrules *Finley*, Codifies *Gibbs/Kroger*
          1. *Gibbs* Part 1 – District court has SuppJ over all claims from the same nucleus of operative fact (unless provided otherwise by statute). NOTE – only exceptions are diversity! *Finley*-type federal question SuppJ is OK

Allows SuppJ to full limit of Ar. III of the Constitution

* + - * 1. *Kroger* Limitations – is this Federal question, or Diversity?

In **diversity** cases, Δ made parties through any of these are not allowed if they violate diversity in any way

Rule 14 – Joinder

Rule 19 – Required Joinder

Rule 20 – Permissive Joinder

Rule 24 – Intervention

Π Joined by Rule 19 or Rule 24

NOTES – Only about amount in controversy

Rule 23 – Allapattah – only named Π in class action needs to be over amount in controversy

NOTE EXCEPTION – Π joined under Rule 20

CONCEPT – additional claims/parties brought by Δ are usually allowed, additional parties brought by Π are usually not

* + - * 1. *Gibbs* Part 2 – Discretion to release all or part of a case if

Involves complex state law

State law claim predominates

All original Jurisdictional Claims are dismissed

If the judge feels like it

* + - 1. POLICY
         1. Judicial economy
         2. Convenience and interest of litigants
         3. No parallel litigation
         4. No conflicting judgments – reputation of the judicial process
         5. Abandon claims because they cannot be brought in a forum
         6. Preservation of the role and power of the federal courts – drives cases out of federal court that should be in federal court
    1. **Removal** – Watch out for Erie problem – Considered @ time of removal
       1. *28 USC § 1441*
          1. Removal court must have been able to have original jurisdiction over the claim (Syngenta)
          2. *§ 1441(a)* – Case may be removed by Δ, if multiple Δ, all must consent *(§ 1446*)
          3. *§ 1441(b)* – **Hometown Δ cannot remove** to hometown district
       2. Rules!
          1. *§ 1446(b)* – Δ has 30d to remove from the time that removal would be appropriate – service, etc. 🡪 if alienage, you have 1y from start of case
          2. *§ 1447(d)* – remand to state court cannot be appealed

1. **VENUE AND *FORUM NON CONVENIENS***
   1. **Venue** – Treat each district as an individual state
      1. *§ 1391* – Federal Venue Provisions (proper venue)
         1. District where any Δ resides if all Δ are in the same state
         2. Place where substantial part of events occur
         3. District in which any Δ is subject to PJ when action commenced if there is no other suitable district
         4. Corporations are done like minimum contacts
         5. Aliens are good in any district
      2. *§ 1404* – District court can transfer to another court where venue was also appropriate and is maybe more convenient
      3. *§ 1406* – can transfer or dismiss in cases where venue is improper
      4. *Van Dusen* – **in diversity**, transferor venue law follows the case
         1. *§ 1631* – if transferred to cure personal jurisdiction, transferee applies

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| --- | --- |
|  | Threshold: Adequate alternate forum? |
|  | Factor #1: Deference to Π’s choice of forum |
|  | Factor #2: Public vs. Private interests |

* 1. ***Forum non Conveniens***
     1. Factors (*Gilbert* factors from *Iragorri*)
        1. Must be an adequate alternative forum
           1. Are there significant disadvantages in the alternate forum?
           2. Can be granted even if other forum is less Π-friendly (*Piper*)

Can Π bring suit there at all?

Can Π get any kind of recovery?

* + - * 1. Only if it is so bad there is no remedy at all
      1. Must give deference to Π’s choice of forum (Factor #1)
         1. Is Π forum shopping?
         2. Can Π get jurisdiction over Δ’s here/there?
         3. Where was the harm felt?
         4. Sliding scale – Π at home, strong; Π foreign, weak (*Iragorri*
         5. Convenience – which forum is actually convenient for all parties?
      2. Public vs Private Interests (Factor #2)

Private Factors: sources of proof, availability of PJ, cost of obtaining witnesses, other issues with making trial easy

Public Factors: Burden on court, choice of law difficulties

Is someone gaming the system? (*Iragorri* – Δ forum shopping)

Greater implications? (*Iragorri* – faulty elevators in use in the forum)

Will granting J create flood gates? (*Piper* – aliens want to try tort cases in US)

Problems of enforceability? (*Gilbert*)

* + 1. *Sinochem* – Can dismiss on FNC without determining PJ first

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|  | Which state law? |
|  | Is there a conflict? Which side wants what? |
|  | RDA |
|  | REA – Statutory |
|  | REA – Constitutional |

1. **ASCERTAINING APPLICABLE LAW**
   1. **State Law in Federal Courts – Erie Doctrine** – Remember broad scope on Byrd
      1. Which state law should be applied? (*Klaxon*)
      2. Is there a conflict between a state and federal system? Loos @ facts – find conflict yes and no
         1. Do the Rule and the statute cover the same ground? (*Stewart*)
         2. Do the plain text of the Rule and the statute conflict? (*Shady Grove*)
         3. Is there a direct conflict or is the federal rule narrower such that the state law can be superimposed? (*Hanna*)
         4. Is the conflict unavoidable? (*Hanna*)
      3. **No-Conflict 🡪 RDA** (*§1652*) – Is the state rule substantive?
         1. *York* Outcome Determinative – Would the judgment be overturned *ex ante*?
         2. Twin Aims of Erie (*Hanna*)
            1. Forum Shopping & inequitable administration of the laws

Π/Δ’s will always want to remove, Δ/Π’s will always want state court

Does the rule specifically favor one side or the other?

* + - 1. *Hanna* – Harlan Primary Conduct – Would it change conduct *ex ante*?
      2. *Byrd* Balancing Test – Broad scope
         1. State interest – Is it “bound up with the definition of the rights and obligations of the parties” created by the state statute?

Look @ the statute and the right the statute creates

Is there legislative history regarding the motivation of the provision?

* + - * 1. Federal interest – Potential for significant interference with federal system?
        2. Is it outcome determinative? 🡪 X will argue it is, see above
    1. **Yes-Conflict 🡪 REA** (*§2072*) – *Hanna* 2-Part analysis
       1. Statutory Test – Does the Federal Rule AEM a state substantive right? (*§ 2072(b)*)
          1. Does it *really* regulate procedure? (*Sibbach*)

Strong presumption from the rulemaking process (“Duly Promulgated FRCP”)

Does the rule speak to the form and mode of enforcing a right?

* + - * 1. In this case does the procedural rule AEM a substantive right? See above RDA to determine if its substantive (*Shady Grove – Stevens*)
      1. Constitutional Test – is the federal (\_\_\_) ***arguably procedural?***
         1. Can the rule be capably classified as procedural? 🡪 Constitutional (*Hanna*)
         2. *Stewart* – Federal statute
    1. *Gaspirini* – can we accommodate the state law within the federal law?
  1. **Ascertaining State Law**
     1. *Klaxon* – Choice of law rule that governs federal court in diversity is the choice of law rule of the state in which the federal court sits
     2. If there is no definitive choice of law statute or holding in state court
        1. Court considers dicta of the state SC
        2. Look to appellate courts of the state
        3. Look to lower courts of the state
        4. Certification – directly ask the state appellate or SC to rule on the issue
  2. **Federal Common Law** – Consider Erie, Federal Question, etc.
     1. Analysis
        1. Is there a uniquely federal interest and significant conflict between federal policy and the operation of a state law? (*Boyle*)
        2. Would the application of state law frustrate federal policy? (*Boyle*)
        3. Is there a gap in existing authority? US power in question? (*Clearfield*)
        4. Can we preserve uniformity in the system? (*Clearfield*)
        5. Would it disrupt commercial relationships predicated on state law? (*Parnell*)
           1. Yes? Apply state law
     2. Is there Federal Common Law making power? (*Clearfield*)
        1. *Meltzer* – Gaps in Federal Constitution or Statutes? 🡪 Enclave
        2. *Fields* – Congress has authority to make law in this area? 🡪 Coextensive
        3. *Kramer* – Federal court interpreting a statute? 🡪 Statutory Authorization
     3. Example
        1. Military Contractor Defense – *Boyle*
           1. US approved reasonably precise specifications
           2. The equipment conformed to the specifications
           3. The supplier warned the US about dangers in the use of the equipment known to the supplier, but unknown to the US
        2. NOTE: under supremacy – MC defense is binding in state court
        3. Brenan Dissent – active silence of Congress precludes Federal Common Law Enclave Creation in this instance
     4. NOTE: Federal Common Law gives Federal SMJ
  3. **Federal Law in State Courts** – Reverse Erie
     1. *Dice v. Akron* – FELA claim
        1. State courts must give trial by jury for federal claims (7th Amendment)
        2. Does the state rule conflict with federal law?
           1. Pseudo Byrd Balancing

Bound up with the rights and obligations of the act? – Part and parcel to the COA?

Consider state/federal interest

Is it procedural?

Yes? 🡪 State law for procedure

No? 🡪 Federal law for substantive

|  |  |
| --- | --- |
|  | Apply Rule 8 |
|  | Cross off Conclusory |
|  | Apply Twombly |
|  | Extras – Pro se? heightened pleading? |

1. **PLEADING**
   1. C**omplaint and Pre-Answer Motion**
      1. Analysis – Threshold: does the claim provide adequate notice?
         1. Apply *Rule 8* – Short plain – (a1) Statement of Jurisdiction, (a2) Statement of claim showing pleader is entitled to relief, (a3) demand for relief
         2. Pre-answer motion to dismiss (*Rule 12(b)*)
            1. 1) SMJ, 2) PJ, 3) venue, 4) process, 5) service of process, 6) failure to state a claim, 7) indispensable party
            2. No set of facts sufficient to support the complaint? (*Conley*) What they are alleging could not reasonably be true?
            3. Apply *Iqbal* (*Rule 12(b)(6)*)

Cross off conclusory statements

Is it a logical inference built on facts? Is it “on info and belief”?

Apply *Twombly* – incorporate as many facts as possible

Gone from possible to plausible? – assume facts in favor of Π

How great are the inferences needed to be drawn? FACTS!

Reasonable alternative explanation? (parallel conduct) FACTS!

Will disco pose huge burdens? (*Twombly*)

Pleading under FRCP is trans-substantive, no tie of pleading to disco (*Iqbal*)

Simple tort claim that doesn’t challenge common sense? (*Erickson*) – No need to plead unnecessary detail

Do we require heightened pleading? (*Rule 9(b)*) 🡪 plausibility is not the same as heightened pleading (*Iqbal*)

Is there information asymmetry? Is disco critical? FACTS!

Has Π pleaded themselves out of court? (*American Nurses*) 🡪 FACTS

* + - * 1. Could/should Δ file a *Rule 12(e)* – Motion for more definite statement
        2. Note: No heightened pleading in civil rights cases – *Leatherman*
        3. Note: No need to plead a prima facie case – *Swierkiewicz*
      1. NOTE: invalid claims alongside valid claims to not dismiss whole claim, but Π could potentially plead himself out of court
    1. Policy
       1. Provide notice (Federal Rules), Frame issues, Disclose evidence, Dispose of meritless cases
  1. **Heightened Pleading**
     1. *Rule 9(b)* – in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud/mistake. Malice, intent, knowledge, etc. can be alleged generally
     2. Private Securities Litigation Reform Act – high standard for federal securities fraud
     3. Policy
        1. Professional reputation
        2. Fraud is multifaceted and takes place over a long time
           1. Usually a completed transaction – rewinding the past
           2. People allege fraud to get punitive damages in contract disputes
        3. Deterrence of frivolous strike suits
        4. Providing adequate notice
  2. **Answer**
     1. *Rule 8(b)(2)* – Has Δ fairly responded to the substance of the allegation?
     2. *Rule 8(b)(3)* – General denial for all allegations including jurisdiction of the court
     3. *Rule 8(b)(5)* – Lack knowledge/information sufficient to form a belief about the truth
     4. *Rule 8(c)* – Affirmative defenses (remember preclusion, must raise *all* affirmative defenses)
        1. After *Twombly/Iqbal* it is unclear what the standard is BUT *8(c)* uses “stating” rather than “showing” language of *Rule 8(a)(2)*
  3. **Counterclaim**
     1. *Rule 13(a)* – Compulsory – Arise from the same transaction or occurrence? Use it or lose it
     2. *Rule 13(b)* – Permissive – Any other counterclaim
     3. NOTE: Counterclaim treats Δ as if filing a complaint 🡪 see above
  4. **Amending Pleading**
     1. Amend before 21d after service OR before response? (*Rule 15*)
        1. If no – need consent of other party or leave from court
           1. Granted as justice requires 🡪 so long as no prejudice to other side
        2. If yes
           1. “As a matter of course” – party can amend once without leave
           2. After once – requires permission of other side or leave of court (*15(a)(2)*)

Factors in determining if justice requires

No prejudice to other side

Assert legally insufficient claims, barred by SOL, bad faith, had opportunity to amend and failed to do so

* + 1. Policy – cases should be decided on the merits
    2. *Rule 15(c)* – Relation back doctrine
       1. *15(c)(1)(B)* – Allows relation back on amendments against original Δ from same transaction
       2. *15(c)(1)(C)* – Relation back against new parties (*Krupski*)
          1. Arises from same conduct
          2. New Δ had notice that the action had been filed
          3. New Δ knew or should have known that but-for mistake, Δ would be in court
          4. Timing – *Rule 4(m)* – serve new Δ within 120d of original filing of the lawsuit
  1. **Sanctions**
     1. *Rule 11* – pleadings must be signed and certified to be true to the best of the attorney’s knowledge or face sanctions
        1. Must provide 21d “safe harbor” to amend, withdraw or justify mistake (Hadges)
        2. Did the action amount to contempt of court? (*sua sponte*)
  2. **Settlement**
     1. *Priest-Klein*: Parties choose not to settle when (1) mistake in EV calculation, or (2) they are irrational. 50/50 outcomes if you get to trial
     2. ,
        1. After discovery, estimates of P and A converge ΔC creates settlement window
     3. Confounding factors – Strategic behavior (info asymmetry), Endowment effect (loss > gains), Salience cues vs. Statistics (flood insurance after distant flood)

|  |  |
| --- | --- |
|  | Non-privilege, relevant, calculated? |
|  | AC – is/acting as attny? |
|  | AC – Waived? |
|  | WP – Prepared by lawyer for lit? |
|  | WP – Core WP? |

1. **DISCOVERY**
   1. ***Rule 26*** – Duty to disclose – general provisions
      1. *26(b)(1)*
         1. Is info non-privileged and relevant to the party’s claim or defense? FACTS!
         2. Relevant info need not be admissible at trial, but is it reasonably calculated to lead to the discovery of admissible evidence?
         3. All disco is subject to *26(b)(2)(C)* limitations.
            1. “Spoilage Charge” – Judge instructs the jury to construe a withheld piece of info against the withholding party
      2. *26(d)(2)* – sequence – disco can be nay order as long as it is after *26(f)* conference
   2. **Attorney-Client Privilege**
      1. Elements (*Rule 26(b)(5)*)
         1. Person communicated to is an attorney AND is acting as an attorney in connection with providing legal advice (*Upjohn*)
         2. Communication comes from a client, without strangers, NOT for the purpose of committing a crime or tort
         3. Privilege has been claimed and not waived by the client
      2. Extends to all employees, not limited by control group (*Upjohn*)
   3. **Work Product Privilege**
      1. *Rule 26(b)(3)(A)* – Docs prepared in anticipation of any litigation
      2. *Rule 26(b)(3)(A)(ii)* – Only overcome with substantial need and inability to get equivalent info without undue hardship
         1. Π can obtain same info by deposing witnesses himself (*Hickman*)
      3. *26(b)(3)(B)* – Is it core work product? (contains mental impressions, conclusions, opinions, etc.) 🡪 disclosure would degrade the profession (SEE POLICY) (*Hickman*)
         1. More than *26(b)(3)(A)* is needed, have they shown it? (*Upjohn*)
      4. Can seek leave to discover annoying docs *26(b)(1)*
      5. *26(b)(5)* – privilege must be expressly claimed and log of what is being withheld must be maintained
      6. Policy
         1. Would otherwise demoralize the profession
         2. Would turn lawyers into potential witnesses
         3. Preserves the adversarial system
         4. Lawyers need to be able to think/strategize
         5. Lawyers would simply stop writing things down subjecting facts to people’s memory
   4. **Federal Rule of Evidence 502**
      1. *502(d)* – Court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – the disclosure would not be a waiver in any other proceeding
   5. **Tools of Discovery**
      1. *Rule 34* – Request for documents – voicemail, taped convos, etc.
      2. *Rule 30* – Depose witnesses – *30(a)*(*(1)* without leave/*(2)*with leave)
         1. Testimony given under oath – can object to form of questions, or privilege
         2. *30(b)(6)* – Depo to corp – describe with particularity the topic. Corp must put forward the person with the most knowledge about the issue
      3. *Rule 33* – Interrogatories – Highly specific, pointed questions, usually to describe some kind of policy
         1. No more than 25 unless otherwise stipulated
   6. **Rule 16**
      1. Parties confer early
      2. Judge calls conference to discuss timeline
      3. Settlement discussion

|  |  |
| --- | --- |
|  | No genuine dispute |
|  | Burden |
|  | Adickes – New facts |
|  | Celotex – Holes in facts |
|  | Shift burden – more facts |

* + 1. Policy – Improves efficiency, attorneys don’t fight over minutia, cost control (party seeking info does not bear the cost of producing that info), judge can facilitate settlement, judge sets landscape of the case
  1. Policy – No surprises, limit information asymmetry, encourage settlement and summary judgment, cases are decided on the merits

1. **SUMMARY JUDGMENT** – Note, preclusion would happen at SJ
   1. Analysis – NOTE: In tort, Δ will not bear burden. If Δ challenges SOL, Δ bears burden
      1. *56(a)* – No genuine dispute as to any material fact and movant is entitled to judgment as a matter of law
      2. Burden is the same at SJ as at trial (*Liberty Lobby*) [preponderance vs. Clear&Con]
         1. Court can disregard inferences that are contradicted by the record (*Scott v. Harris*)
      3. Identify burden of persuasion 🡪 Π, Burden of production 🡪 Moving/nonmoving
      4. If persuasion is on nonmoving party, non will argue *Adickes*, moving will do *Celotex*
         1. *Adickes* – Foreclose possibility of disputed material fact 🡪 negate each element
         2. *Celotex* – Show nonmovant failed to establish an essential element to their case
            1. Remember burden shifting – once you point to holes, burden shifts to nonmovant to bring more data 🡪 must be able to lead to admissible evidence
            2. Remember *56(d)* – time to gather more facts, depose witnesses, etc.
         3. Facts must point to plausibility not just possibility (*Matsushida*)
   2. *Rule 56(a)* – If there is no genuine dispute of material fact and movant is entitled to judgment as a matter of law, court must grant SJ
   3. *Rule 56(d)* – When facts are unavailable to non-movant, court can grant time to gather facts and respond
   4. *Rule 56(e)* – Failing to support or address a fact
   5. *Rule 56(f)* – Court can grant SJ for non-movant (*sua sponte*) after giving notice and time to respond

|  |  |
| --- | --- |
|  | Mutuality? |
|  | Same transaction/occurrence? |
|  | Final judgment on the merits? |
|  | Matter previously available? |

|  |  |
| --- | --- |
|  | Claim preclusion? |
|  | Issue necessary? |
|  | * Run counter-factual |
|  | Final judgment on the merits? |
|  | Judgment in the alternative? |
|  | Non-mutual collateral? |

1. **PRECLUSION**
   1. ***Res Judicata* – Claim Preclusion**
      1. Must be a final judgment that is on the merits
         1. Does not matter if judgment was in error (overturned later) (*Moitie*)
         2. *12(b)(6)* counts as on the merits
         3. Failure to prosecute counts as on the merits
      2. Claim (transaction or occurrence) must be the same in 1st and 2nd suit
      3. ONLY applies if the other matter could have been litigated at the same time
         1. Did not have to be litigated only needs to be available
      4. Mutuality – Parties must be the same or must have been adequately represented. Following are the **EXCEPTIONS** to mutuality
         1. Privity, Pre-existing legal relationship – *Matthews*
         2. Agreement to be bound
         3. Adequate representation
            1. Interests of party/non-party are aligned
            2. Party understood that he was acting as a rep or the court minded non-party interests
            3. Notice of the first suit to the non-party
            4. Class Action, Trustee/beneficiary
         4. Non-party assumed control over lawsuit
         5. Colluding to relitigate by proxy
         6. Special Statutory scheme (bankruptcy, *in rem* actions, litigation by US)
   2. **Issue Preclusion – Collateral Estoppel**
      1. Analysis – Is there claim preclusion?
         1. Prior judgment under diversity? (*Semtek*)
         2. Issue in 1st and 2nd case must be (1) actually litigated (*Cromwell*), (2) necessary to the judgment (*Rios*), and (3) a valid final judgment on the merits
            1. Is it necessary?

Use the facts

What are they trying to prove?

What is needed to prove it?

How does the precluded fact interact with this?

**Run the counter-factual**

Can it be appealed? Did the party being precluded win? (*Rios*)

Was it fully litigated?

* + - * 1. Is it a valid final judgment on the merits?

Must be a valid, final judgment on the merits

Default judgment – claim preclusive, NOT issue preclusive

Consent decree – judgment entered based on negotiations between parties

Judgment by administrative agency – consider how “court-like” proceeding is

* + - 1. Alternative grounds for judgment?
         1. Some courts preclude all grounds – counter-factual in isolation
         2. Some courts preclude none – counter-factual taken together
         3. Some courts preclude leading ground
      2. Non-mutuality? – SEE BELOW!
    1. **Non-Mutuality**
       1. Offensive Non-Mutual Collateral Estoppel (*Parklane*)
          1. New Π precludes Δ from relitigating previous issue

Could Π have easily joined previous action? 🡪 Joinder/Fence Sitter

Was there incentive for Δ to litigate the issue?

Are there prior inconsistent judgments? (Tmac likes this one)

Is Π taking advantage of new procedural opportunities that were not available before?

* + - 1. Defensive Non-Mutual Collateral Estoppel (*Blondertongue*)
         1. New Δ precludes Π from relitigating a previous issue
      2. Policy – Non-parties can’t be forced to intervene (*Martin* – white firefighters)
         1. Day in court ideal – notice and opportunity
         2. Hard to believe all effected parties will be aware
         3. Burden on present parties to implead those that they want bound
         4. Can’t burden someone that was a stranger to the previous lawsuit
  1. **Mutuality** – Parties must be the same or must have been adequately represented. Following are the **EXCEPTIONS** to mutuality
     1. Privity, Pre-existing legal relationship – *Matthews*
     2. Agreement to be bound
     3. Adequate representation
        1. Interests of party/non-party are aligned
        2. Party understood that he was acting as a rep or the court minded non-party interests
        3. Notice of the first suit to the non-party
        4. Class Action, Trustee/beneficiary
     4. Non-party assumed control over lawsuit
     5. Colluding to relitigate by proxy
     6. Special Statutory scheme (bankruptcy, *in rem* actions, litigation by US)
  2. ***Semtek* – intersystem preclusion**
     1. Affirms *Dupasseur* – Preclusive effect of diversity judgment is the same as it would be if the case were in state court – leads to forum shopping
        1. Vertical vs. horizontal uniformity
        2. Exception would be if there is a state law incompatible with federal interests (bankruptcy)
  3. Policy – efficiency and repose (closure)

|  |  |
| --- | --- |
|  | Necessary? |
|  | Indispensable Harlan? |

1. **JOINDER –** Remember maintain diversity, don’t forget Erie
   1. ***Rule 20* – Permissive Joinder** – Party is permitted to join so long as there are common questions of law or fact and they assert their right to relief that is joint or several and arises out of the same transaction or occurrence
   2. ***Rule 19* – Required Joinder**
      1. Required (*19(a)*)
         1. If absent, court (A) can’t afford complete relief, (B) or disposing of the action without them would (i) impair their ability to protect their interest (*Provident*) or (ii) risk inconsistent judgments for an existing party. (*Pimintel*)
         2. If yes to either A or B: Party subject to service of process and won’t break SMJ?
      2. If NO then: Indispensable (*Provident Tradesmen* – Doing it Harlan style) (*19(b)*)
         1. Π’s interest in having a forum – alternate forum?
         2. Δ’s interest in avoiding multiple litigation/risk of inconsistent judgment
            1. Is Δ’s liability fully decided after trial?
         3. Interest of the outsider – Can we suspend payment of damages pending indemnity?
            1. Does the judgment impair/impede his ability to protect his interest?
            2. Would they be precluded? Are the interests of the parties in litigation and the outsider aligned? (*Provident*)
         4. Interests of the courts and public in complete adjudication of disputes
            1. Public interest in avoiding piece meal litigation
            2. Is claim frivolous/futile 🡪 *Pimintel* – Sovereign immunity
      3. Indispensable (*Pimintel*)
         1. Prejudice to existing parties if the case were to go to judgment
         2. Extent to which that prejudice might be lessened by shaping the relief or including provision to lessen the prejudice
         3. Adequacy of the judgment WRT the required party
         4. Will Π have an adequate remedy if the case has been dismissed?

|  |  |
| --- | --- |
|  | Prerequisites |
|  | Requirements of Class |
|  | Consider Settlement |

* + 1. NOTE: *Pimintel* – Sovereign immunity trumps

1. **CLASS ACTION** – always consider subclasses
   1. ***Rule 23(a) –* Prerequisites** (*Castano*)
      1. Numerosity – Class is so numerous that joinder is impracticable (~40+)
      2. Commonality – Questions of law or fact that are common to the class
         1. Will differences in factual background for each member change the outcome?
         2. (*Wal Mart*) – Need to do fact-finding to get damages? Same kind of relief?
      3. Typicality – Claims/defenses of the named reps are typical of the claims/defenses of the class members
         1. Same events? Same legal arguments to establish liability?
         2. *Falcon* – Named didn’t get promoted, class included not-hired
      4. Adequate Representation – Will rep fairly and adequately represent the class?
         1. Need subclasses?
            1. Did absent Π have his day in court? (*Hansberry*)
            2. Choice of law analysis? (*Phillips Petroleum*)
   2. ***Rule 23(b)(1)/(2)* – Mandatory Class** – is mandatory status justified?
      1. If (1) limited fund – Interests of class members can affect interests of other members that aren’t parties to the litigation
         1. Have the amount of claims outstripped a necessarily limited fund? (*Fiberboard*)
         2. Is this an attempt to perform constructive bankruptcy? (*Fiberboard*)
      2. Are Π seeking (2) injunction?
         1. Damages sought by class members only incidental to the main claim? (*Wal Mart*)
   3. ***Rule 23(b)(3)* – Opt-out class** – Do common questions of law or fact **predominate** over any questions affecting individual members? Is a class action **superior** to other available methods for adjudicating?
      1. What are the individual’s interests in controlling prosecution?
      2. To what extent is there already litigation in play by/against class members?
      3. Desirability/undesirability of concentrating litigation in a particular forum?
      4. Difficulties in managing a class action?
         1. Is class action superior? Is this a new COA/right/law? (*Castano*)
   4. ***Rule 23(e)* – Settlement Classes** – Claims may be settled, or compromised only with the court’s approval.
      1. Step – 1
         1. Court must direct notice to class members that would be bound
         2. Those seeking approval must ID any agreement in connection w/ the proposal
         3. If *(b)(3)*, court may refuse unless it affords a new opt-out opportunity
      2. *Amchem* – *23(e)* does not require *23(b)(3)(D)* – class management consideration
         1. *23(a)* and *23(b)* must be satisfied 1st
         2. Settlement helps indicate adequate representation/predominance (*23(b)(3)*)
         3. NOTE: Significant fear that Δ is just buying preclusion from the lowest bidder
         4. Dissent: Must consider fairness/reasonableness of the settlement 🡪 Δ waived preclusion and SOL defenses
      3. Step – 2 – If binding, must be found fair, reasonable, adequate at a hearing
   5. *Philips Petroleum* – PJ focuses on named class members – no due process concerns, Choice of law must be considered when Π’s are from different jurisdictions
   6. *Wal Mart* – *23(b)(2)* is inappropriate for back-pay, requires class uniformity which back-pay would not give due to factual differences between class members. *23(a)(2)* commonality precludes non-uniformity because certification would AEM (*§ 2072b*) the rights of class members that don’t need to fully litigate their Title VII claim.
   7. Policy
      1. Lots of $ at stake
         1. Most of that goes to attorneys
      2. Powerful for rights enforcement
         1. Lawyer as the white-knight
      3. Lawyer empowerment device for blackmailing big settlements
         1. Lawyer as Frankenstein
      4. Relieves joinder problems in large suits
      5. Concerns
         1. Exception to the normal rule against non-party preclusion – concern about day in court for non-parties
         2. Due process and notice concerns
            1. Preserving party’s property – chose in action
      6. Remember, EV for Δ can be huge: which can be huge 🡪 pressure to settle

**Efficiency**. The burden of litigation on both the parities and the judicial system can at times be great, and so one goal is to resolve controversies in a relatively speedy and cost-effective manner.

TOPICS: motion to dismiss, issue preclusion, summary judgment, class actions, supplemental jurisdiction  
CASES: *Twombly, Iqbal; Blonder-Tongue; Matsushita, Scott; Shutts; Gibbs, Allapattah* v. *Amchem, Ortiz, Pimentel*

**Accuracy.** While we want litigation disposed of efficiently, we also care that disputes be decided “correctly” (assuming such a thing exists). If we didn't care about accuracy, we could just flip a coin.   
TOPICS: extensive discovery, appeals, federal jurisdiction for federal questions, mutuality/preclusion  
CASES: *Conley, Adickes, Doehr et. al., Wilks, Sturgell, Cooper, Am. Nurses / Dioguardi,*

**Repose & Finality.** Both the litigants and society want an adjudication that at some point becomes final, without the possibility of appeal or collateral attack.   
TOPICS: res judicata, joinder  
CASES: *Lacks, Moitie, Mathews v. New York Racing, Provident* v. *Pennoyer, Wilks, Capron, Cooper*

**Adversary System.** Best way to “out” the truth is by adversaries fighting before neutral observer, judge as referee rather than inquisitor.   
TOPICS: opportunity to be heard/day in court, federal judges v. state judges, adversarial v. inquisitorial  
CASES: *Doehr, Fuentes, Mathews v. Eldridge*,

**Judge-Jury Relationship.** Judges decide questions of law, juries decide questions of fact. Changing.  
TOPICS: summary judgment, plausible pleading  
CASES: *Matsushita, Scott v. Harris; Twombly,*

**Fairness 🡪 Impartiality & Consistency.** Like claims decided alike, treat litigants the same regardless of status.   
TOPICS: *Stare Decisis*, preclusion v. “gaming table,” sideline-sitters, forum shopping (*Erie*)  
CASES: *Walker, Blonder-Tongue, Parklane,* v. *Taylor, Moitie,*

**Access & Opportunity to be Heard**. How do we ensure equal access to justice system? In tension with efficiency.  
TOPICS: Day in court ideal, notice pleading, *pro se* litigants v. plausibility, preclusion, virtual representation. CASES: *Dioguardi*, *Erickson*, *Doehr, Taylor, Wilks*

**Federalism.** When does the need for uniformity, efficiency, outweigh state’s interest in governing selves?  
TOPICS: federal common law, *Erie* Doctrine, state law in federal courts, federal law in state courts  
CASES: Art III §2, Art VI ‘Supremacy,’ REA, RDA, *Swift, Clearfield cf. Erie*, *Klaxon*, *Semtek*

**Tradition v. Adaptation**. Scalia v. Breyer. Should procedure conform to old interpretations, devices? Or change to accommodate new developments in technology, society?  
TOPICS: court’s power (Territorial v. “minimum contacts”), AIC, supplemental jurisdiction, jury trials  
CASES: *Pawloski, Int’l Shoe, Burnham, Shaffer,* R23, 1367,

1. Personal jurisdiction.
   1. Sovereignty – full power within. Providing remedy.
      1. Limitation on the states to exert their authority outside of their territorial borders.
      2. Grant of full faith and credit.
   2. Expectations based on stare decisis. Note circularity.
   3. Planning conduct based on amenability to suit.
   4. Standard based test. Give up efficiency and certainty for accuracy and due process.
   5. Benefit vs. burden. (Burnham; Carnival)
   6. Balancing stare decisis with changing societal norms (technology, commerce, international relations)
   7. Internet jurisdiction.
   8. Reach of federal courts. Prevention of vertical forum shopping. (No constitutional barrier).
2. Notice.
   1. Have to be given opportunity to contest in order for adversarial system to work.
   2. Default judgments.
   3. Not determined on the merits
   4. Fraud.
3. Prejudgment attachment.
   1. Deprivation of property requires due process under 5A and 14A. Government is the one seizing the property.
   2. Risk of erroneous deprivation
      1. Immediate post-deprivation hearing
      2. Evidence showing on the merits prior to hearing
      3. What types of evidence are necessary for the attachment
      4. Who decides whether to approve pre-attachment deprivation (e.g., judge or clerk)
      5. Whether a bond is required
      6. Whether party seeking deprivation has some interest in underlying property
4. SMJ
   1. PJ is a liberty interest. SMJ is a statutory requirement.
   2. Federalism.
5. Diversity
   1. Fear of home-town prejudice
      1. Makes sense to have Federal Court hear multi-state issues – Equal footing
   2. Cross-pollination of ideas
   3. Operationalizes the privileges and immunities clause
   4. Eases case load of state courts. (But may not do this).
   5. Supports competition between state and federal system.
   6. May swamp federal courts.
   7. AIC – docket control
   8. Domestic relations exceptions
      1. Expertise
      2. Rights of the people
   9. Citizenship.
      1. Corporate nerve center.
         1. Simplicity.
         2. Legislative history signaled what it meant.
         3. Attempt to move away from sporting theory.
6. Arising under.
   1. Further increases federalism through “well-pleaded” complaint and interpretation of § 1331.
      1. Easy rule.
      2. Allows for easy docket control.
      3. Respect to state courts
      4. Cross-pollination.
      5. Choice to the plaintiff.
   2. Horizontal consistency in applying federal laws
   3. Floodgates!
   4. Broad constitutional requirement allows for narrower statutory interpretations.
7. Supplemental
   1. Efficiency
      1. Decreasing total lawsuits – Judicial economy
      2. Decreasing costs and convenience for litigants
   2. Consistency of judgments
      1. No parallel litigation
      2. No conflicting judgments – preserves the reputation of the judicial process
   3. Allows parties to litigate claims they would not be able to otherwise
      1. Keeps parties from abandoning claims because they can’t be brought
   4. Preservation of the power of federal courts – otherwise would drive cases from federal court that should otherwise be there
8. Removal jurisdiction
   1. See diversity.
   2. Not allowing hometown removal because there is no concern for hometown.
   3. Subtle disfavor. Plaintiff is the master of their suit.
9. Venue
   1. Convenience is the overriding concern.
10. Transfer
11. *Forum non conveniens*
    1. Judicially created – not authorized by Constitution or Congress
    2. Convenience
    3. Forum for the whole world
    4. Forum shopping
    5. Efficiency
    6. Adequate appropriate forum – nominal adequacy is OK
    7. Induces forum shopping
12. Erie
    1. Vertical uniformity in the system
    2. Protecting federalism by not AEM substantive rights of people in their states
    3. Reduces forum shopping and inequitable administration of the laws
    4. Attempts to strike a balance between state and federal interests
13. Federal Common law
    1. *Meltzer* – Gaps in Federal Constitution or Statutes? 🡪 Enclave
    2. *Fields* – Congress has authority to make law in this area? 🡪 Coextensive
    3. *Kramer* – Federal court interpreting a statute? 🡪 Statutory Authorization
14. Pleading
    1. Provide notice
    2. Frame issues
    3. Disclose evidence
    4. Dispose of meritless cases
15. Discovery
    1. Would otherwise demoralize the profession
    2. Would turn lawyers into potential witnesses
    3. Preserves the adversarial system
    4. Lawyers need to be able to think/strategize
    5. Lawyers would simply stop writing things down subjecting facts to people’s memory
16. Summary Judgment
    1. Allowing for the efficient disposal of law suits
    2. Protecting litigants from the unpredictability of jury determinations when their case forecloses the possibility of adverse judgment
17. Preclusion
    1. Efficiency and repose
       1. Let dead dogs lie
18. Joinder
    1. Attempt to bring disputes to complete and efficient resolution
    2. Due process protections of non-litigants, protecting their chose in action
19. Class Action
    1. Giving power to the little guy
    2. Lots of $ at stake
       1. Most of that goes to attorneys
    3. Powerful for rights enforcement
       1. Lawyer as the white-knight
    4. Lawyer empowerment device for blackmailing big settlements
       1. Lawyer as Frankenstein
    5. Relieves joinder problems in large suits
    6. Concerns
       1. Exception to the normal rule against non-party preclusion – concern about day in court for non-parties
       2. Due process and notice concerns
          1. Preserving party’s property – chose in action
    7. Remember, EV for Δ can be huge: which can be huge 🡪 pressure to settle

***POLICY***

* **Cite:**
  + FRCP 1: “just, speedy, and inexpensive”
  + Due Process: fed (5th) and states (14th)
* **Framing Questions**
  + **What is the power of the court?**
    - Where does it come from?
    - How far does it extend?
  + **What are the rights of the parties and the state?**
    - Matthews due process balancing
* **Major Concerns:**
  1. **Efficiency**
     1. Dismiss lawsuits
     2. Clear dockets
     3. Don’t want to have to hear the case before you can hear the case (8)
     4. Sometimes the price of systemic fairness is an unjust judgment against an individual (*Moitie*)
     5. Opposed- virtual representation
     6. (SJ, 12(b)(6), *Twombly*/*Iqbal,* preclusion, joinder, class actions)
     7. *In terrorem* concern
     8. *Celotex and Matsushita*
     9. Stare decisis and human tendency not to waste money
        1. (Taylor v. Sturgell)
  2. **Accuracy**
     1. Discovery (FRCP 16)
     2. Judge/jury
     3. Get to the merits (pleading standards, supportive discovery (16))
     4. Inspire trust in the law (also predictability, dignitary, repose)
  3. **Impartiality**
     1. Advantages for repeat players?
     2. Iqbal – separation of powers
  4. **Dignitary**
     1. Goldberg, Mathews-Balancing, Dioguardi,
  5. **Rationality**
     1. Balancing standards; multi-part tests
  6. **Predictability**
     1. Joinder/preclusion/class action rules don’t want multiple inconsistent judgments
  7. **Participation**
     1. Includes ACCESS
        1. Effective notice (*Mullane, Aguchak*)

Conley, Erickson (*pro se)*

* + 1. Class actions (Hansberry, FRCP 23)
  1. **Adversarial system**
     1. As opposed to inquisitorial
     2. opportunity to be heard (*Mullane*)
     3. Cf. discovery process (FRCP 16)
     4. USA believes this is the way the truth will be outed by those who bear the burden to out it
     5. Sometimes requires supervision by judges (case management)
  2. **Repose**
     1. Increasing finality to each level of adjudication
     2. *Moitie, Lacks v. Lacks*
     3. Rule 13(a) (compulsory counterclaims)
     4. Preclusion
  3. **Judge vs. Jury**
     1. FRCP 8 vs. *Twombly/Iqbal*
     2. 7th Amendment
  4. **Federalism**
     1. Supremacy Clause: Art. VI.2
     2. FFC: Art. IV § 1
     3. FFC Act: 18 U.S.C. 1738
     4. 10th Amend (powers not delegated to US nor prohibited to the states are reserved to the states)
     5. Harlan’s Hanna concurrence: address contradictions of dual sovereigns (Montescqieukejrw;aewaerwelw;)
     6. State courts (general jurisdiction) vs. fed (limited)
     7. Applicable Law:
        1. RDA: state law in civil actions where applicable but congress can limit
        2. REA: SCOTUS makes rules of procedure
     8. Don’t want easier standards for fed courts (*Brown v. Board*) State Law in Fed Court: For:
        + 1. No (fear of) home-state advantage,
          2. “superiority” of fed courts (resources, political insulation, tenured, broader jury), cross-pollination/competition,
          3. subsidy to state courts,
          4. fed interests in multi-state issues.
        1. Against:
           1. Hometown loses from complete diversity req,
           2. Fed courts shouldn’t deal with state issues,
           3. drains incentives for state courts to improve.
  5. **Law and Economics**
     1. Efficiency
     2. Why litigate/settle
     3. Cost of litigation
* **Paradigmatic shifts:**
  1. Formalism (*Pennoyer*) 🡪 Realism (*International Shoe*)
     1. Formalism: law self contained internally coherent rational entity that could be deduced
     2. Realism: law abt social relations and governing people, common law changes with society, policy matters
        1. Critique: judge’s breakfast decides cases
     3. Specifically: Territorial Jurisdiction (Pennoyer) 🡪 Reasonableness
        1. Changes in integrated national economy
        2. Balance of states’ rights within their borders and non-residents
  2. Due Process
     1. Substantive (“liberty” includes right to K, Lochner v. NY) 🡪
     2. Procedural (Warren Court, 1960s, right to be heard) 🡪
     3. Functionalism/BALANCING:
        1. mid-1970s: HOW MUCH due process?, Matthews balancing
        2. Relative interests in accuracy and expediency
  3. Stringent SJ rules (FRCP drafters) 🡪 more open to SJ
     1. Increased judicial management; infringement on right to jury trial?
     2. Celotex, Anderson, \*\*Matsushita
  4. Elaborate common law pleading 🡪 code pleading 🡪 Liberal FRCP
     1. R. 8: Liberal pleading (Conley), Rule 15 (easy amendments)
     2. 🡪 *Twombly*/*Iqbal*
        1. Pleading doesn’t look like it’s all about notice anymore
        2. judge v. jury
  5. Originalism vs. evolving
     1. “originalism” – apply rules that existed at conception of the constitution/spec amendment – limits judicial alterations
        1. Scalia in Burnham
     2. Marshall: blind imitation of the past is bad
        1. Brennan in Burnham
  6. What is law?
     1. Derived from first principles, General Federal common law (*Swift*)
     2. Law derived from the authority of the state
        1. State common law is Law, Erie, Brandies
  7. Role of the Federal Courts (see federalism and balance of powers)
     1. Limited only to diversity until 1875
     2. Intervention preventing progressive legislation (Early 20th)
     3. Erie scaling back the federal judiciary (New Deal, York, Frankfurter)
        1. Clearfield Trust: Common law only to govern gaps, often piggyback on state law
     4. Federal prerogative asserted (Hanna, Warren)
     5. Expanding civil rights (Warren Court)
     6. Defining scope
        1. Raising amount in controversy
        2. Defining federal question
        3. Defining supplemental jurisdiction
  8. Expanding understanding of parties and preclusion
     1. Grudging accommodation of mass society
        1. Non-mutual estoppel
        2. Class Actions
           1. Representative party can bind others (Hansberry)

Adequacy

Legitimacy

Judicial scrutiny – “structural assurance of fair and adequate representation” (Amchem)

* 1. National 🡪 International context
     1. Asahi (extends federalism concerns internationally)
     2. Helicopteros (no real relationship, no jurisdiction)
     3. Bremen: 1972
        1. (K forum selection honored): can’t subject the world to our parochial laws
     4. Piper (weaker presumption for foreign D)/Irragori (not dispositive)
     5. Pimentel
  2. Technological Advances
     1. Dramatically increased costs of discovery
     2. Challenging territorial jurisdiction (Pebble Beach, Zippo)
  3. Shifting Balance of Powers
     1. Executive (Iqbal, Boyle, vs. Warren Court-Goldberg, etc)
     2. Legislative (Boyle, Amchem, 3 theories of fed common law)

Motivations for Mottley rule

1. Docket control: fed cts have limited resources
2. Federalism concerns: Bulk of lit should be deal with by state courts
3. Practical concern: Mottley test uch easier to apply than ingredient test
4. State courts like hearing the odd fed question.
5. Litigant autonomy: Nothing illegitimate about allowing P some control in picking forum. Allows P to keep case in state ct when he wants to.