Civil Procedure II Outline

Introductory Cases

Antisemetisme v. Yahoo Inc. *(2000)* (France)

Facts: Individuals were selling Nazi memorabilia on Yahoo's marketplace, which was against the law in France. P sued D for allowing these sales, French court found jurisdiction and ordered D to take all measures to prevent the sale of Nazi memorabilia on its marketplace.

Yahoo v. Antisemetisme *(2001)* (California District Court)

Facts: P argues that it's technologically impossible to prevent the sale & it violates P's first amendment rights.

Holding: French ruling clearly violates the 1st amendment, but France do what it wants within its own borders, but the U.S will not enforce it.

Google Spain v. Agencia Espanola (2014, European Court of Justice)

Facts: P sued Google & newspaper for posting P's mortgage foreclosure and maintaining it online years after P resolved the issue.

?: Is Google responsible for content posted on its search engine?

Holding: Yes, the subject of the data may require that Google remove the links.

Erie Doctrine

Swift v. Tyson (1842): D gave a bill of exchange to a 3rd party for a property which the 3rd party didn't own. 3rd party paid P for a debt with the bill & D refused to pay the bill.

The case was brought into federal court on diversity grounds, and the issue was whether state N.Y law applied or federal (holder in due course doctrine) applied.

Holding: Court held that federal courts may interpret the law, they have the authority to interpret & apply general commercial law. This expanded federal judicial power, creating a body of "federal general law".

Erie v. Tompkins (1938): P was walking along the R.R tracks when he was hit by an open R.R car. Filed a lawsuit in a federal court based on diversity. D argued that for the purposes of Pennsylvania State Law P was a trespasser & therefore D owed no duty of care to P. P argued that no such law existed, and therefore it should be decided by federal law.

Holding: Replaced Swift Doctrine with Erie Doctrine. Federal Courts are no longer entitled to create their own common law for issues that properly fall within state law. Federal Courts sitting in diversity are to apply state substantive law and federal procedural law. **Unless there is a conflict between state and federal substantive law.

Problems with Swift Doctrine:

- Invasion of state rights, federal judges could simply overrule state laws under the "general law"
- "General law" under Swift helped resolve the horizontal legal issue (choosing venues between federal venues in diversity), but it enflamed the vertical one (choosing between federal & state court). The Erie Doctrine has done the opposite, created issues with horizontal choice of law (btwn picking federal courts in diversity).
- Incorrectly interpreted the Supremacy Clause, b/c there is no "federal common law" mentioned

Rules of Decisions Act

Mandates that substantive state law be applied in State cases, unless the U.S Constitution says otherwise.

Guaranty Trust v. New York (statute of limitations)

Facts: P brought diversity suit against D in N.Y, alleging state law breach of trust. N.Y statute of limitations had expired, however the case could be maintained in federal court.

Holding: The question isn't whether something is procedural or substantive. The question is whether there is a potential difference in outcomes between federal and state court that would cause forum shopping. Outcomes in federal court based on diversity should be largely the same as state court. Because in this particular case federal law would provide a remedy while New York law would bar York's suit, the court should apply state law

Ragan v. Merchants Transfer & Warehouse (tolling statute of limitations)

Facts: Highway accident occurred in October, 1943, P sued in Kentucky Federal Court based on diversity. P filed the complaint in Sept., 1945, and service was made in Dec., 1945. Kentucky has a two year statute of limitations. Under state law the statute of limitations wasn't tolled until the summons was served, under federal law the statute of limitations was tolled once the claim was filed. P argued the rule was procedural and therefore the fed rule should apply & his claim had been tolled.

Holding: Followed the *Guaranty Trust* analysis. In this particular case the federal law concerning tolling would provide a remedy whereas the State law would not, Kentucky's law must apply.

Byrd v. Blue Ridge (1958)

Facts: P was an independent contractor for D, was injured on the job & filed a diversity suit for negligence. D argued that P was a statutory employee & therefore could not sue under S. Carolina law. State practice is to allow a judge to determine whether P is a statutory employee however the federal practice is to allow a jury to determine.

Holding: South Carolina's mandate for judges to determine this issue and not the jury is not a state-created right or obligation. The outcome of the case is only one factor to be considered when making a determination of which law to apply. The 7th Amendment creates a strong federal interest in allowing juries to decide issues of fact.

Other Factors Include: Respecting the independence of the federal system. The risk of a varying outcome here between judge & jury is very slight.

Sibbach v. Wilson (1941)

Facts: P filed a diversity suit against P for an injury in an automobile accident. D moved for an order to require P to submit to a physical examination under FRCP 35, P refused. P was sanctioned under FRCP 37, and then appealed the constitutionality of FRCP 35, claiming that it violated state substantive rights.

Holding: Congress properly delegated to the Supreme Court in the Rules Enabling Act the power to make procedural rules. The Rules Enabling Act limitations are properly interpreted to refer to rules outside of procedure. The two rules deal with procedure because they are related to the judicial process for enforcing rights and duties recognized by substantive law and for administering redress. An FRCP that is arguably procedural meets the requirements of the REA.

§2072 Rules Enabling Act

(a) S.C shall have the power to prescribe general rules of practice, procedure, rules of evidence for cases in U.S District Courts & C.O.A

(b) Can't abridge, enlarge or modify any state substantive rights.

Hanna v. Plumer (1965)

Facts: P filed diversity suit against D in Mass. Federal Court claiming high damages as a result of an auto accident. P gave notice to D based on Rule 4(d)(1) by leaving the notice at the D's place of residence with D's wife. D moved for summary judgement, b/c the state required hand delivery of service of process.

Holding: Outcome determination analysis is not solely determinant. Outcome Determination Test must be read with reference to the aims of *Erie*. Such as; forum shopping discouragement, and avoidance of inequitable administration of the laws. 4(d)(1) regulates procedure and is therefore a valid federal rule.

The rule does not encourage forum shopping b/c P could have easily served D with hand service instead, P's service to D's wife was reasonable, and finally the Court has never invalidated a federal rule. **Where the federal rule is clearly applicable, the test is whether the Rule falls within the Rules Enabling Act.

Harlan Concurrence: SCOTUS should look at whether the difference in state & federal law would affect primary non-litigation behavior, if so than the state law should apply. Example: If a Rule was significant enough for a corporation not to incorporate in a state or to get more insurance.

Would the federal statute affect the settled expectations one was relying on?

Walker v. Armco (1980)

Facts: On August 22, 1975 hammered a nail in the wall which shattered & struck him in the eye. P filed a diversity claim suit on August 19, 1977, but service of process wasn't delivered until December 1. D claimed that based on state statute of limitations, P's claim was time barred. P argued FRCP 3 ("civil action is commenced by filing a complaint with the court") should govern and interpreted it to mean that statute of limitations was tolled.

Holding: Court does not have to determine whether a FRCP is within the scope of the Rules Enabling Act if a clash between the FRCP & the state law is avoidable. Here, there is no indication that FRCP 3 was intended to toll a state statute of limitations & therefore the two can exist together.

VII Amendment "Re-Examination" Clause

No facts tried by a jury shall otherwise be re-examined other than according to the rules of common law.

Gasperini v. Center for Humanities (1996)

Facts: P sued D for losing his photos for which he had loaned to D for educational purposes. Sued in federal court on diversity jurisdiction, P witness testified the photos were valued at $1500 each. D lost & was ordered to pay $450k. Appellate Court reversed based on New York's (5501(c)) "deviates materially" standard, finding the judgement to be excessive.

**Traditional standard for voiding a jury verdict is the "shocks the conscience" test

Holding:

Is 5501(c) Substantive or Procedural under Erie?

5501(c) is substantive, b/c if there was a difference in state v. fed law large verdicts in the federal system would be upheld & large ones in the state would be overturned. Serves Erie's two goals by discouraging forum shopping and avoiding the uneven administration of state laws.

Does 5501(c) Conflict with the 7th Amendment?

State Standard for reviewing jury verdicts can be applied w/o offending the 7th Amendment.

(Majority prefers to read *Erie* broadly & accommodate state policy judgements)

Scalia Dissent: 7th Amendment prevents Trial Court Judges from re-examining jury awards. It's okay for the states to review jury awards but not for the federal courts. The "rules of common law" language references the English who barred judges from reviewing jury awards.

Shady Grove v. AllState (2010)

Facts: P provided medical care to a woman injured in a wreck. D insurance company was supposed to pay for the care. New York allows 30 days for the insurance company to either pay or deny, the D paid late and then refused to pay the statutory interest. N.Y law (901(b)) prohibits class actions seeking penalties or statutory minimum damages. P filed diversity suit to recover the statutory interest (penalty) & sought relief through a class action.

Majority (Scalia):

Is it in conflict?

901(b) is in conflict with FRCP 23 which authorizes class action suits in federal courts.

The line between eligibility & certifiability is entirely artificial, both are pre-conditions for maintaining a class action. The relevant inquiry here is whether the individual FRCP regulates procedure or substance, if it regulates procedure than it is authorized by §2072.

Is R.23 procedural?

Scalia interprets the Rules Enabling Act to be a very low bar for a FRCP to meet. R. 23 allows a P to pursue a class action if he meets the prerequisites. 901(b) violates this because it prevents a P's from maintaining a class action under R. 23.

Concurrence (Stevens): Sides with Scalia Majority b/c the state law is procedural, but he feels the fed must apply some State procedural rules if they are a part of the State's "substantive rights". Procedural b/c New York listed the rule in it's state procedure handbook instead of general statutes.

Steven's would have the Court's apply the REA "can't abridge, modify or enlarge any state substantive right" on an individual state by state basis depending on whether the individual state considers it a substantive right.

**Application of the balance turns on whether the state law is actually part of it's framework of substantive rights.

Dissent (Ginsburg): Ginsburg argues that 901(b) & FRCP 23 do not clash with each other. R.23 allows a plaintiff to bring a class action, but 901(b) says what the plaintiff can bring the action for.

If federal courts are compelled by R. 23 to award statutory penalties while N.Y is bound by 901(b) than substantial variations in $ judgements may be expected.

The S.C traditionally interprets the federal rules so as to avoid conflict with important state regulatory policies.

Erie Analysis Overview

Is there a federal statute, FRCP, Constitutional Provision on point?

- If there is, than the supremacy clause kicks in & the fed law applies.. unless it's a FRCP

If it's FRCP. Does it comply with the REA? "Shall not abridge, modify or enlarge a state substantive right"

- If it does comply, than the FRCP applies

What if there is no federal directive on point? Erie analysis. Must apply state substantive law & federal procedure

- Judge made rules such as *Forum Non Conveniens* fall outside the Supremacy Clause & would therefore require a balancing test under the RDA.
- Outcome Determinative? *Guaranty Trust*
  - Shouldn't have different results btwn fed & state court
  - Statute of limitations pretty much *always* substantive
  - Problem is at some point *everything* becomes outcome determinative
- If not clearly substantive follow state law unless *fed interest* in doing it differently *Byrd*
  - 7th Amendment – strong interest in jury's deciding facts in fed court
- Twin Aims of Erie: Avoid forum shopping & avoid inequitable administration of law *Hanna*
  - If fed judge ignores state law would it cause litigants to flock to fed court?
  - Harlan Concurrence: would a difference in law affect primary non-litigation behavior?

Scalia: Would argue that the vast majority of the time (if not all the time) FRCP falls within the Supremacy Clause. Scalia likely wouldn't apply the fed rule only if linguistically there is clearly no conflict btwn the state & fed rule.

Stevens: Would not apply the FRCP if the analysis supported that the state rule falls within the state's substantive rights.

Ginsburg: Prefers to interpret the fed & state rule so they do not conflict

Webber v. Sobba (2003) *What does fed court do when substantive state rule is unclear?*

Facts: P sued D for negligence from injuries he sustained in a car crash where the D was driving. P sued in federal court based on diversity. D raised a joint-enterprise defense, P filed for summary judgement on the defense, but court denied. P appealed after losing the suit.

Holding: When the state law is unclear about a particular ?, fed court should apply the rule that the court believes the state would follow. Resources to factor include: related State caselaw, Restatements, authority from other states, and policy justifications.

The overwhelming majority of states reject the joint-enterprise defense to members of joint-enterprises who assert negligence against one another, this state has tended to expand Tort liability & it rarely diverges from the majority rule.

Finally, the joint-enterprise defense is unnecessary b/c comparative fault/negligence is available.

Choice of Law

Intra-State – Vertical conflicts between state & federal law

Inter-State – Horizontal conflicts between laws of 2 states

International Horizontal Conflicts – Conflicts between nation laws

Lexi Fori**:** Law of the forum, apply the law of the place where the case was filed.

Reasoning: Judges are most familiar with their forum's laws, cant apply other states laws accurately.

Negatives: Rewards P's who file in whatever state offering the most favorable laws. (Race to the Courthouse)

***Lex Loci*:** Use the law of the location where the particular incident took place.

Negatives: What is the significant event & where did it occur? Sometimes difficult.

Interest Analysis: Compare which jurisdiction has the most interest in litigating the suit – apply law of jurisdiction w/ most interest in the dispute.

Negatives: Can be very malleable – litigants won't know in advance what the law will be.

Multilateralism: Reaches multilateral consensus on a set of jurisdiction-selection rules. The rules identify a determinative contact for every controversy & uses it to select the law that will govern.

Jurisdiction selection rules tend to be absolute.

Negatives: Can't account for unique situations.

Unilateralism: Favors a process of discretionary decision making that can be tailored to the unique needs of each particular case.

Negatives: Lack of predictability & certainty.

Restatement Approach: Law governing a particular issue should be the law that has "the most significant relationship" to the occurrence and the parties.

Factors Include;

1) Needs of the interstate & international system
2) Relevant policies of the forum
3) Relevant policies of other interested states & the relatives interests of those states in the determination of a particular issue.
4) Protection of justified expectations
5) Basic policies underlying the field of law
6) Certainty, predictability, & uniformity of result
7) Ease in the determination & application of the law applied

Additional Factors for "most significant relationship"

1) Place where the injury occurred
2) Place where the conduct causing injury occurred
3) Domicile, residence, nationality, place of incorporation & place of business of the parties
4) Place where the relationship, if any, between the parties is centered

Dúpecage: Applying rules of different states to different issues in the same case.

Renvoi: Situations where a court, having concluded that another state's law should apply, recognizes the conflicts methodology of that other state would have directed that court to apply some law other than its own.

Discovery

FRCP 26-37 & 45 govern the Discovery Process.

Benefits: More accurate evaluation of one's own case & their opponent, party may expose false or misleading evidence, provide evidence a party presents at trial. Prevents Gamesmanship, locks evidence in place, & the idea is that settlements will come out better b/c both sides are well informed.

Civil litigation used to go to trial significantly more frequently, now that number is less than 1 in 50.

**Losing party of a discovery decision has no immediate right to appeal

Discovery that a party must initiate R. 30-36

R. 30-32 – depositions

R. 33 – interrogatories

R. 34 – request for production of documents & tangible things or inspection of premises

R. 35 – physical or mental examination requests

R. 36 – request for admission

Initial (Required) Disclosure

26(a)(1)(A)

i. Information of individuals likely to have discoverable info
ii. Copy of all information that a party has in its possession that it may use to support its claim or defense unless solely for imp
iii. Computation of each category of damages claimed by the disclosing party
iv. Any insurance agreement under which an insurer may be liable to satisfy all or part of possible judgement

- requires each party to disclose the identity of witnesses & documents that the "disclosing party may use to support its claims or defenses" unless the use would be solely for impeachment.

Discovery Methods

Interrogatories:
Other party is required to respond, helps you investigate so you know what further discovery to request, less expensive than depositions.

Requests for Production:
You can get all the documents, this is how you find your evidence.

Deposition:
Often the best way to obtain info, lawyers ask the deponents (witnesses) questions, which they answer under oath. Usually conducted in an office. Lawyers rarely ask ?s of their own clients or friendly witnesses during a deposition, other sides attorney leads the questioning during a deposition.

Physical/Mental Examination:
Find out if someone is "faking it"

Requests for Admission:
Narrows scope for trial; know issues that actually need to be litigated

Discovery Process

26(a)(1)(C) – Parties must produce required disclosures no more than 14 days after the 26(f) conference
26(f)(1) – requires the parties to conduct a discovery planning conference at least 21 days before the scheduling conference or order. Conference concerns the nature of the claims & defenses & settlement.
26(f)(2) – must submit a joint discovery report outlining the parties discovery plan within 14 days after the discovery planning conference.

16(b) – Court must order a scheduling order

Scope of Discovery

- Been construed broadly to encompass any matter that bears on, or could reasonably lead to other matters that could bear on any issue that is or might be in the case.
- Has to be based on the claim or the defense, not on the general subject matter

26(b)(1) Scope of Discovery: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case.

Considering the importance of the issues at stake in the action, the amount in controversy, the parties relevant access to information, the parties resources, the importance of the discovery in resolving the issues, & whether the burden or expense of the proposed discovery outweighs its likely benefit. Discoverable information need not be admissible at trial.

R. 26(c): *Protective* Orders: Trial judge has discretion in determining the extent of discovery when he has good cause.

Relevance: Based on the claim or defense, not the general subject matter. *See Robertson*

Proportionality: Is the information rxably accessible? If yes, test ends there & info is okay. Good cause in light of 26(b)(2)(C) factors? Cost sharing?

Robertson v. Peoples Magazine *(Relevance problem, outside the scope of discovery)*

N.Y 2015

Facts: P (former employee) sued D for unlawful race discrimination. P sent request for production of documents, 135 document requests. D objected to many of them based on relevance, burden & editorial privilege. D specifically objected to 36 of them because they contain editorial decisions, are burdensome & the requests are designed to harass the D.

Holding: P seeks nearly unlimited access to D's editorial files. This extends far beyond the scope of P's claims. The editorial decision-making information is also protected by a qualified editorial privilege. Therefore, the motion to compel discovery is denied.

State Farm v. Fayda *(26(b)(1) doesn't place all of the burden on party seeking discovery*

Facts: P alleges that the D submitted fraudulent insurance claims which weren't really medically necessary. P alleges that the D paid kickbacks to non-physicians, which was sometimes disguised as rent for D's offices. P filed a motion to compel D's to produce financial records, tax statement & financial document from other acupuncture offices that D owns. D objects based on irrelevancy & privacy.

Holding/Rationale: *The requirement of Proportionality doesn't place all of the burden on the party seeking discovery. Party resisting discovery generally has the burden of showing undue burden/expenses. Evidence of a D's motive for participation in a fraudulent scheme is relevant to this suit & these financial documents are relevant to show motive.

D failed to rebut P's showing that the records were relevant. Nor did D establish that P has an alternative source for the information.

Gilead Sciences v. Merck *(proportionality)*

Facts: Merck asserts that Gilead infringes upon 2 of its patents to a nucleoside. Gilead argues that it was the one to conceive the invention in 2003 with a compound named PSI 6130.3. Key issue is what did Gilead synthesize & when did it know it. Merck demands additional discovery related to the test tube in 2003.

Holding: A party seeking discovery must show that its proportional to the needs of the case before anything else. Gilead has already admitted and presented evidence that the two test-tubes from 2003 are not PSI 6130.3. Its possible that Gilead is lying but without more specific information triggering reasonable doubt, the Court rejects Merck's request as disproportionate. If the Court were to allow this, Gilead would have to produce discovery on many compounds that are unrelated to the dispute.

E-Discovery 26(b)(2)

26(b)(2)(B) Limitations on E-Discovery: A party need not provide e-discovery from a source that the party identifies as not reasonably accessible b/c of undue burden or cost. If that showing is made, the Court may nonetheless order discovery if the requesting party shows Good Cause, considering the limitations of (b)(2)(C).

26(b)(2)(C) Additional Limitations: Court must limit the frequency or extent of discovery otherwise allowed if it determines that:

i. The discovery sought is unrxably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome or less expensive
ii. Party seeking discovery has had ample opportunity to obtain information in the action or
iii. The proposed discovery is outside the scope permitted by 26(b)(1)

U.S Guardiola v. Renown Health big e-discovery case

Facts: P alleges that D uses a fraudulent inpatient reimbursement scheme to bill Medicare for more expensive healthcare. P filed a motion to compel production of gap period emails between 04/11-02/13. D argues that it hasn't produced the emails due to technology, email retention policy, & cost. During the period, D used a backup solution system for emails. After 6 months emails were stored on a backup tape. D argues it would cost more than $250k to produce the emails. P argues for production based on relevancy.

Holding: 26(b)(2)(B) requires a three part test for analyzing E-Discovery.

1) Whether the party opposing production has demonstrated that the information isn't reasonably accessible due to undue burden/cost.
2) If 1 is met, has the party seeking production demonstrated good cause for production in light of the (b)(2)(C) e-discovery factors.
3) If the discovery isn't reasonably accessible, than the court may consider cost sharing.

1st Part - **"Cost" under (b)(2)(B) only relates to production not document review & review costs.

$150k is not an undue cost, its not examined as a number alone but within the context of other facts. $150k is a very small portion of D's revenues.

2nd Test - 7 Factor Balancing Test for Good Cause;

1) Specificity of the discovery request
2) Quantity of info available from other & more easily accessible sources
3) Failure to produce relevant info that seems likely to have existed but is no longer available on more easily accessed sources
4) Likelihood of finding relevant, responsive info that cant be obtained from other, more easily accessed sources

5) Predictions as to the importance & usefulness of further information
6) Importance of issues at stake in the litigation
7) Parties resources

Court does a 7 factor balancing test for illustration even though the first element isn't met. Court finds that the party seeking discovery demonstrated Good Cause.

3rd Element – Cost Shifting. *Zubalake* Factors Analysis

1) Extent to which the request is specifically tailored to discovery relevant information
2) Availability of such information from other sources
3) Total cost of production compared to the amount in controversy
4) Total cost of production compared to the resources available to each party
5) Relative ability of each party to control its costs & its incentives to do so
6) Importance of the issues at stake in the litigation
7) Relative benefits to the parties of obtaining the information

**Party opposing production fails to meet burden of showing that cost shifting is appropriate.

26(b)(4): Expert Information: Absent a court order on when to reveal expert information, it must be produced at least 90 days pre-trial [Part of 26(a)'s Required Disclosures] The facts and presumptions that act as the basis for expert opinions are discoverable

Privilege & Work Product

- Sometimes the law allows a privilege of non-disclosure
- Generally arises when society values a particular relationship such as marital, attorney-client, physician-patient, priest-penitent, journalist-source, & 5th Amend against self-incrimination
- Some privileges are absolute, others are qualified
- State law governs privilege regarding a claim or defense in civil cases

R. 26(b)(3)(A) *Documents Prepared for Litigation*: (Word Product) Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative. Unless it can meet the requirements of 26(b)(1) & the party shows that it has substantial need for the materials & cannot without undue hardship obtain their substantial equivalent by other means.

**Does not apply to documents prepared by expert witnesses, since they are not a party! *See Ecuador v. Himchee*

26(b)(3)(B): "*Core or Opinion Work Product*" receives absolute protection from disclosure. Core/Opinion Work Product includes mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

26(b)(4) *Expert Discovery*: A party may depose an expert witness whose opinions may be presented at trial.

Hickman v. Taylor (1947) (b)(3)(A) requires a heightened showing of necessity

Facts: Tugboat sank while towing a car float across the Delaware river in Penn. Accident was unusual, cause is unknown, & 5 on board drowned. D lawyer for the Tug Boat corp privately interviewed the 4 survivors & took statements for future litigation. One of the claimants for the deceased refused to settle, sued in federal court naming the tug boat owners as defendants. P filed 39 interrogatories, D complied with all but 38 which required statements from D's interviews with survivors.

Holding: P argues that attorney-client privilege must be restricted to confidential communication btwn attorney & client. Since the survivors were not clients of the D it is not privileged communication.

Court holds that deposition-discovery rules are to be interpreted broadly. The statements here fall outside of the attorney-client privilege.

However, D's interviews fall under 26(b)(3)(A). P makes no assertions that the D was dishonest or incomplete in giving its answer. Nor has P made a show of necessity or claimed that denial of the statements would unduly prejudice the P. The request falls outside of discovery b/c the P has access to the information, it's essential that an attorney works with privacy.

Republic of Ecuador v. Hinchee (b)(3)(A) doesn't apply to expert witnesses

Facts: Ecuadorean Indians sued Chevron & the court awarded $9.1 billion. Chevron sued Ecuador for failing to indemnify. Ecuador requested a deposition from Chevron's expert witness, Chevron refused. Chevron asserted work-product protection, however the court determined the work not to be privileged. Chevron appealed.

Holding: The communications are relevant, D argues that the communications are considered work-product and are protected under R. 26(b)(3)(A).

These document were prepared for trial & as part of the expert witness's work product. However, (b)(3)(a) does not apply to expert witnesses since they are not considered a party. Therefore, D's argument fails and the expert witness must submit his work product to P as part of discovery.

Sanctions

R. 37: Motion to Compel Discovery

R.26(c): Motion for a protective order, asks the Court to relieve it of or to limit/condition the obligation to provide discovery

Failure to provide disclosure is brought to the court by a motion to compel or by a motion for a protective order by the party resisting discovery.

R. 37 a-e: Governs sanctions

NHL v. Metropolitan Hockey Club (1976)

Facts: District Court dismissed P's complaint after a lengthy discovery process. Despite numerous extensions, the P still did not comply. Court found that P's behavior demonstrated callous disregard of its responsibilities & exhibited bad faith.

Holding: The most severe sanction must be available to the district court in appropriate cases to deter others who may be tempted by such conduct.

R. 37(a)(5)(A): minor sanctions. If a motion to compel discovery is granted, the court must require the non-moving party to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees, unless;

i. Movant filed the motion before making a good faith attempt to obtain discovery w/o court action
ii. Opposing party's nondisclosure was substantially justified or
iii. Other circumstances made an award of expense unjust

R. 37(b): major sanctions; generally not available for failure to comply with discovery requests, party must violate a court order that compels the party to produce discovery.

(b)(1): *Refusal to Obey Deposition* Order. Grounds for contempt of court.

(b)(2)(A): *Refusal to Obey Discovery Order*. Sanction actions by the court include:

- Direct that the matters be taken for what the prevailing party claims
- Prohibiting disobeying party from supporting/opposing designated claims/defenses
- Striking pleadings in part or whole
- Dismissing the action

(b)(2)(C): *Payment of Expenses*. Court must order that the disobedient party pay reasonable expense including attorney fees caused by the failure to comply, unless the failure was substantially justified or other circumstances make an award unjust.

**Exception circumstances exist which allow imposition of the major sanctions w/o a prior order. Party refuses to serve answers to interrogatories, respond to requests for production, or fails to appear at a previously noticed deposition.

R. 37(e): *Failure to preserve esi.* If esi that should've been preserved in anticipation of litigation cannot be restored due to party's failure to take reasonable steps to preserve it, the court may:

1) Upon finding prejudice to another party may order measures necessary to cure the prejudice or
2) Upon finding that the party intended to deprive the other party of information the court may;
   A) Presume the lose information was unfavorable to the party
   B) Instruct the jury that it may/must presume the information was unfavorable or
   C) Dismiss the action or enter default judgement

R. 45(e): sanctions for failure to obey a subpoena

Protective Order Motions

5 general circumstances – annoyance, embarrassment, oppression, undue hardship, or expense.

R. 26(c): *Protective* Orders: Trial judge has discretion in determining the extent of discovery when he has good cause.

Phillips v. GM (2002)

Facts: P sued D alleging a defective gas tank. Both sides agreed to a protective order that allowed the parties to share information but not with the public. One of D's experts testified about the amount of $ D had paid in previous settlements. P filed motion to compel the information & the judge ordered the information to be kept confidential under the protective order. L.A Times intervened after the case settled & requested the court to unseal the information. Court ordered the information unsealed, and GM appealed.

Holding: Pre-Trial discovery is presumptively public unless the party opposing release can show "good cause" to keep the information confidential.

Party seeking protection bears the burden of showing specific prejudice or harm will result if the protective order is not granted. The court then balances the public and private interests to decide whether a protective order is necessary.

The district court never conducted a "good cause" analysis and erroneously concluded that only trade secrets or other confidential information under R. 26(c)(7) could be protected from disclosure.

The law however gives district courts broad discretion in determining what type of information should be prevented from disclosure. The district court's decision is reversed, because it must make a "good cause" determination.

Disposition Without Trial

Case Management

Rule 16 = Pretrial conferences, scheduling, management

(a) Purposes of a pretrial conference:

Expediting disposition of the action. Establishing early and continuing control so that the case will not be protracted because of lack of management. Discouraging wasteful pretrial activities. Improving quality of the trial through more thorough preparation. Facilitating settlement

(a) Scheduling Orders - dictate the procedure for pretrial (violations can result in sanctions)

16(b): Judge is required to establish a scheduling order. Must be issued within 90 days of service of the complaint upon the defendant or 60 days after the defendant's appearance in the case (whichever is sooner). Judge will usually hold a scheduling conference with the parties attorneys prior to establishing the scheduling order.

- 16(b)(3)(A) requires that the scheduling order contain deadlines for joining parties, amending the complaint, completing discovery and filing motions.

Failure to comply with scheduling orders can lead to sanctions by the court.

Court must perform a 4 factor "good cause" analysis in cases where the party failed to identify a witness:

1) Explanation for the failure
2) Importance of the testimony
3) Potential prejudice of allowing the testimony
4) Availability of a continuance to cure such prejudice

R. 16(a)(5) & 16(c)(1) authorizes courts to discuss settlement at a pre-trial conference.

R. 16(c)(2)(I) authorizes the court to take appropriate action in "settling the case & using special procedures to assist in resolving the dispute when authorized by statute & local rule".

Town Ventures v. City of Westfield (the scheduling order)

Facts: P applied to D for permission to build a communication tower, D denied & P sued. Court entered a scheduling order that required P to effectuate discovery, designate expert witnesses & disclose info about those witnesses. P didn't even try to meet the deadlines. Parties jointly moved to revise scheduling order, P didn't meet the new scheduling order either. Court demanded P show cause, P described unexpected delays & asked for an additional extension. Court dismissed the case, P appealed.

Holding: Dismissal should only be employed when a P's misconduct is extreme, disobedience of court orders is extreme misconduct. Court has an interest in administering its docket & the court is entitled to expect that parties will meet it's self-imposed deadlines. Affirmed.

Aguna v. Brown & Root (2000) (major sanctions)

Facts: P's sued D for personal injury & property damage arising from D's uranium mining plant. 2nd set of P's brought suit alleging similar claims against partially overlapping D's. Court issued scheduling orders requiring Ps to establish certain elements of their claims through expert affidavits. Ps did this, but the court found that

they did not comply, so it granted additional time. Ps submitted additional affidavits that were still lacking, so the court dismissed. Ps appealed.

Holding/Reasoning:

Its within the district courts discretion to manage the complex discovery process. The scheduling order required information that the Ps should have had prior to even filing their claims. The court also gave the Ps several opportunities to meet the scheduling order. Therefore, the court did not commit clear error.

Ocean Atlantic v. DHR Cambridge Homes

Facts: P sued alleging copyright infringement & a bunch of other things. D's filed 42(b) motion requesting the court bifurcate liability & damages discovery.

Factors for Bifurcation: Convenience, avoidance of prejudice, expedition & economy.

Court found that P was highly unlikely to prove infringement, and therefore court can bifurcate damages to later.

R.M.R v. Muscogee County School District (1999)

Facts: P was molested at school by a music teacher & sued claiming D was vicariously liable. Jury sided with D, and P appealed claiming the court erred in improperly excluding a last minute witness not listed in the pretrial order.

The witness appeared to watch the trial & had been molested by the professor as well. D opposed the inclusion of the witness, arguing that not being allowed to depose the witness & prepare a defense would be highly prejudicial, court agreed.

Holding/Reasoning: Court's decision to exclude a witness not listed on pretrial order is reviewable only for abuse of discretion.

Factors include: 1) importance of the testimony, 2) reason for failure to disclose the witness earlier, 3) prejudice to the opposing party if the witness was allowed to testify.

District Court did not abuse its discretion, it would have been extremely prejudicial. P had other remedies such as asking for a continuance or requesting a mistrial. Both options would have given both parties an opportunity to investigate the claims.

Alternative Dispute Resolution & Mediation

Dispute Resolution
Adjudication: win/lose (court)
Arbitration: parties submit dispute to a neutral party, can't be appealed

- SCOTUS generally supports arbitration agreements/clauses (Concepcion - mandatory arbitration agreements)
- Federal Arbitration Act (preempts state laws impeding arbitration but allows state contract law protection)

Private Tribunals: paid 3rd party neutrals, may be appealed
Consensual Processes
Negotiations: parties resolve a disagreement btwn themselves/representatives
Mediation: informal process, impartial 3rd party helps others resolve a dispute but doesn't impose a solution.
Conciliation: sometimes used interchangeably with mediation.
Mixed Processes

Combine elements of more than one primary dispute resolution process
AT&T Mobility v. Concepcion

Facts: Sect. 2 of FAA (federal arbitration act) validates arbitration agreements, making them irrevocable & enforceable as long as the agreement is valid under contract law.

P's entered agreement for sale & servicing of phones with D. The agreement provided for arbitration of all disputes, but disallowed class actions within arbitration. Customer may initiate dispute through "notice of Dispute" form on D's website, if not resolved within 30 days P may invoke arbitration.

Ps sued based on D advertisement that phones were free, but it still charged sales tax. Complaint was consolidated within a class action.

California "Discover Bank Rule" allows consumers to demand class arbitration. Companies may not bar individuals from filing class actions.

Holding/Reasoning: The issue is whether the FAA pre-empts the Discover Bank Rule from classifying collective arbitration waivers as unconscionable. The rule does interfere with arbitration. A switch from bilateral to class action arbitration sacrifices informality, makes the process slower, and more costly. Class Arbitration requires procedural formality. Class Arbitration also increases the risks to D.

Summary Judgement

7th Amendment: preserves the right of jury trial in all suits at common law in which the matter in controversy exceeds $20 & precludes reexamination of a jury's factual findings except "according to the rules of the common law"

56(a): Summary Judgement; is proper if there's no genuine issue of material fact, & the moving party is entitled to summary judgement as a matter of law.

56(d): Allows summary judgement to be denied or continued if the nonmoving party hasn't had time to make full discovery.

50: Judgement as a Matter of Law; party has been fully heard on an issue & the court finds that a reasonable jury couldn't find for the party on that issue.

Summary Judgement: Comes after discovery, but before the trial.

Celotex . Catrett (1986)

Facts: P sued claiming that her husband died from asbestos exposure from contact with D's products. P failed to produce any evidence to show that deceased had been in contact with D's product. Trial court granted summary judgement. P appealed.

Holding: Non-Moving party has failed to make sufficient showing of an essential element of his case. Summary Judgement doesn't require that the moving party support its motion with evidence negating the opponents claim.

Scott v. Harris (2007)

Facts: Cop tried to intercept a motorist. D sped up & commenced a high speed chase. Cop employed a maneuver to make the P stop by rear-ending him, causing the P to lose control & drive into an embankment. P became a paraplegic & sued alleging violation of 4th Amendment against excessive force resulting in an

unreasonable search & seizure. The two parties differed on the facts, however a patrol video camera found that many of the P's factual assertions were lies.

Holding: Court is required to view facts and may draw reasonable inferences "in the light most favorable to the party opposing summary judgement". Facts may be viewed favorably to the non-moving party only if there is a genuine dispute.

Since the P's story is blatantly contradicted by the record, no reasonable jury could believe his story. The car chase posed a substantial & immediate risk of serious physical injury to others, no reasonable jury could conclude otherwise.

Legal Pluralism: Effect of Judgements

Claim Preclusion

(*Res Judicata*) – Claimant may only sue on a single claim once.

- Scope of Claim Preclusion is entirely dependent on the definition of a claim, how broadly or narrowly you define it.
- Also may block claims that weren't raised but are deemed that they should have been raised (compulsory counterclaim)

1) 2 cases must involve the same claim
- Maj applies: Claim is the same transaction or occurrence
- Min applies: Primary Rights, different claim for each right that was invaded.

2) Parties to the 2 suits must be identical or in "privity", must not have changed position
- Pretty narrow exception – most common are successors to property or class actions

3) 1st Case must have ended in a valid final judgement (on the merits)
- *Defining the Scope of a Claim may be difficult.
- *See* FRCP 41(b): unless the dismissal order states otherwise, all judgements are on the merits unless they are based on jurisdiction, venue, or indispensable parties

On the Merits: Includes dismissals based on failures during discovery. 12(b)(6) motions usually.

*Double Jeopardy is the criminal law analogue of Claim Preclusion

Judicial Estoppel – Prevents a party from taking a different position from one taken in previous litigation. (No hard-fast rules here, lots of discretion)

Same Claim

There are two different approaches for analyzing the "Same Claim"

"Same Transaction or Occurrence": Federal approach & majority of states. Claims involving property damage & personal injury that occurred in the same incident must be litigated in the same claim. "nucleus of operative fact"

Primary Rights Approach: Promotes duplicative litigation, has a much narrower view of the same claim. Allows claims to be brought separately involving property damage & personal injury. Different injuries give rise to different causes of action.

Carter v. Hinkle (VA 1949) (primary rights approach to claims)

Facts: P was in a car crash with D, P sued for property damages & D conceded that his negligence was the proximate result of the damage. P collected $1000 for the taxi. P sued again for personal injury against the same D.

Holding: Court takes the Primary Rights Approach to the Same Claim Analysis of Claim Preclusion. P may separate the action between personal injury & property damage as the court does not consider this the same claim.

Who Can be Bound?

Due Process Clause requires that one may not be bound by previous litigation unless he had an opportunity to appear/litigate.

Non-parties may be bound if they are in privity with a litigate. Privity relationships fall into 2 broad categories;

1) Nonparty is bound if he was represented by a party in another case.
2) Substantive legal relationship between a litigant & a nonparty can justify binding the nonparty

A nonparty represented by a litigant is bound by the judgement if he was unaware.

Configuration of the Parties

Claim Preclusion generally requires that the parties have the same litigation posture in both cases.

Valid, Final Judgement on the Merits

Courts accord claim or issue preclusion only on valid final judgements. Validity refers to the competence of the court & requires that it had jurisdiction.

Traditionally, courts have applied preclusion only to judgements on the merits, but a trial is not required.

**Virtually any judgement for P is on the merits

Exceptions to Claim Preclusion

Parties have agreed that the P may split the claims

The Court has expressly reserved P's right to maintain a 2nd action

P was unable in the 1st case to rely on a certain theory or seek a remedy b/c of limitations on subject matter jurisdiction or restrictions on the court's authority.

Issue Preclusion

Issue Preclusion (*Collateral Estoppel*) – Narrower, prevents relitigation of particular issue that were litigated & determined in the first case.

Issue Preclusion focuses on whether the same issue is before the court.

Elements:

1) Case 1 ended in a valid, final judgement on the merits
2) Same issue was actually litigated & determined in the first case
3) Issue was essential to the judgement in Case one
4) Against whom is issue preclusion being asserted? Due Process allows issue preclusion only against someone who was a party to case one or in privity (narrow, *See Hardy*)
5) By whom is issue preclusion asserted?

- Non-Mutual Defensive: Party is the defendant in Case 2, uncontroversial
- Non-Mutual Offensive: Party is the plaintiff in Case 2, controversial
    - *See Parklane*: SCOTUS says its okay as long as it's fair
- *Parklane Factors:*
    1) Party could foresee multiple lawsuits & therefore had the incentive to litigate strongly
    2) Party asserting offensive non-mutual issue preclusion could not have joined easily in 1st suit
    3) Are there inconsistent judgements?

William v. City of Jacksonville Police

(was the same issue litigated & determined in the first case?)

Facts: P's civil rights action was removed to federal court, judge granted summary judgement for D. Court declined to rule on the state causes of action, but it did find that D did not use excessive force, acted reasonably & had probable cause. P refiled in state court w/o the civil rights claim, but asserting the same cause of action.

Holding: P asserted in state court a negligence, false arrest & a claim against the officer in his individual capacity. Although the claims aren't barred by claim preclusion, they are issue precluded. All of the state claims rest upon elements that the first judgement decided in favor of D concerning the federal claim, therefore the state claims are barred.

Rios v. Davis

(Was the issue essential to the judgement in the first case?)

Facts: Corporation sued Davis for damage to its truck in a car crash, Davis joined Rios as a 3rd party defendant for damages to his vehicle. Davis answered that Rios was contributorily negligent. Court found that all parties were negligent & no recovery was available.

Rios later brought a suit against Davis for his injuries in the same car crash. Davis argued res judicata & collateral estoppel based on the previous suit.

Holding: Court held that P's claim isn't barred since the previous finding of Rios's negligence wasn't essential to the judgement. The previous judgement was in favor of Rios & therefore he had no right to appeal the case.

Types of Relationships that are Sufficient for Privity:

1) Nonparty whose succeeded to a party's interest in property
2) Nonparty who controlled the original lawsuit
- To have control over the litigation requires that the party have effective choice over the legal theories & proofs, & over the opportunity to obtain review
3) Nonparty whose interests were represented adequately by a party in the original suit

**Fact that additional defendants may be in the same industry & have the same legal strategy as the previous defendants does not allow for issue preclusion. *See Hardy*

Hardy v. Johns-Manville Sales Corp (*privity issue*)

(Against whom may issue preclusion be issued against?)

Facts: P's won judgement against 6 manufacturers of asbestos. In this case, different plaintiffs sued 6 of the same D's and 13 additional manufacturers. Trial Court held that P's could assert issue preclusion against ALL of the defendants b/c they were in privity with each other.

Holding: Trial Court stretches privity too far. None of the 13 manufacturers have succeeded to any property interests of the original six defendants. The 13 didn't have any control over the first case. ***The fact that all of the defendants are engaged in the manufacturing of asbestos is insufficient for privity.

Taylor v. Sturgell (2008) (*privity issue*)

Facts: 3rd party sued FAA for the release of documents for building an airplane, 3rd party lost. Taylor (3rd part's friend) then sued seeking the same thing.

Holding: No legal relationship btwn the 2 parties, & SCOTUS doesn't recognize "virtually represented" doctrine. Therefore claim may proceed.

By whom may issue preclusion be asserted?

Courts frequently allow assertions of issue preclusion by parties who weren't a party in the first case.

Mutuality Doctrine: Only parties to the previous action can assert issue preclusion. Not all jurisdictions follow anymore.

*Defensive non-privity issue preclusion (no problem)

*Offensive non-privity issue preclusion (case-by-case basis)

Blonder-Tongue (defensive non-mutual issue preclusion)

Facts: P lost suit against 3rd party on trademark infringement claim, court determined trademark invalid. P then sued D on same trademark.

Holding: P's claim is issue precluded, already had a fair & full opportunity to litigate the issue & lost. Non-mutual defensive issue preclusion is allowed here.

Packlane v. Shore (offensive non-mutual issue preclusion)

Facts: SEC won judgement against D b/c its proxy statement was materially false & misleading. P later sued alleging the same issue. P asserted issue preclusion based on the first suit.

Holding: Court held that D was issue precluded from relitigating certain issues even though the P was not in privity with the first suit.

Considerations for not allowing non-privity offensive issue preclusion;

1) P could have joined the first suit
2) Party could foresee multiple lawsuits?
3) Previous judgement was inconsistent with previous decisions
4) Different procedures/venues/burdens of proof?

These considerations are not found here, the P couldn't have joined the SEC action, no unfairness b/c the D had every reason to vigorously litigate the SEC action, and the previous judgement wasn't inconsistent.

***Non-Mutual issue preclusion is not available against the U.S

Interjurisdictional Preclusion

Different jurisdictional situations in the U.S give rise to different rules & regulations.

Suit 1 – Suit 2

State – State: If party loses in State A than the party can only bring the same suit in State B if the party could have brought the suit again in State A. (Based on Full Faith & Credit Clause, only refers to states)

State – Federal: §1738 Full Faith & Credit Statute (federal law) Says the exact same thing as state – state when a party brings a claim to federal court already litigated in state court.

Federal – State: *Semtek* addressed this issue. Second state court should adopt the rule that would be applied the federal court sitting in diversity in the first state. Presumptively this would be the first state's rule.

Federal – Federal: Federal Question Jurisdiction is easy because its within one legal system and the court just reviews what the Supreme Court rule is. Federal Diversity? Probably apply same rule as *Semtek*, apply the 1st suit's claim-preclusive rule.

Semtek v. Lockheed Martin (2001)

Facts: P brought suit in Cali, which was removed to federal court based on diversity. Court dismissed P's claim based on Cali 2 year statute of limitations. P then brought the claim in Maryland state court b/c it had a 3 year statute of limitations. D argued for claim preclusion.

Holding:

P argues that since California does not consider dismissals on statute of limitations grounds to be "on the merits" than his claim should not be claim precluded in Maryland.

D argues that FRCP 41(b) controls since a federal court sitting in diversity ruled on the 1st case, and 41(b) considers dismissals based on statute of limitations to be "on the merits".

SCOTUS rules that 41(b) does not actually dictate what dismissals are entitled to claim preclusive effect. 41(b) only bars refiling in the same court. This interpretation would likely violate the Rules Enabling Act, and would create substantial variations between state and federal litigation.

Court rules that the 2nd case should apply the rule that the 1st federal case did. Since the first federal court sat in diversity it would apply California's rule which does not consider statute of limitations dismissals to be claim preclusive. Therefore, the 2nd suit may proceed in Maryland.

Recognition & Enforcement of Foreign Judgements

U.N Convention On Regulation & Enforcement of Foreign Arbitral Awards is the primary legal basis for enforcing international commercial arbitration awards. (U.S is a party)

Convention on Choice of Court Agreements, described as the litigation counterpart to the Convention on Regulation. (U.S is not a party)

Majority of U.S States have adopted a version of the Uniform Foreign Money Judgements Recognition Act

In many States, an action to enforce a foreign money judgement may be done though expedited procedures, such as summary judgement

U.S Court may not recognize a foreign state judgement if;

a) judicial system that ruled doesn't have impartial tribunals or procedures compatible with due process or

- Court looks at the legal system as a whole, not the individual case

b) court that ruled didn't have personal jurisdiction

U.S Courts don't have to recognize a foreign state judgement if

a) ruling didn't have s.m.j

b) D didn't receive notice in sufficient time

c) judgement obtained by fraud

d) cause of action or judgement itself is repugnant to U.S public policy or to the state

e) judgement conflicts with another final judgement

f) foreign court proceeding contrary to the parties agreement to submit the issue to another forum

Society of Lloyd's v. Ashenden

Facts: Foreign P sued American D in Britain and won judgement of $100k. P then sued in Illinois to collect $ judgement. D requested that the Court ignore the British judgement, D argued it was denied due process.

Holding: **Court looks at the legal system as a whole, not the individual case. Court does not require that the foreign court's due process be exactly the same as the United States. English Court is sound, has procedures that comply with due process. D's argument is soundly rejected.

Bridgeway v. Citibank

Facts: P sued D in Liberia and won. P brings suit in the U.S to collect on the judgement.

Holding: Court refuses to enforce the Liberian judgement because the court system in Liberia has broken down since the Civil War commenced. P argues that since D participated in the suit in Liberia it is estopped from arguing that the judgement should not be enforced. Court holds that participating in a suit where jurisdiction & venue is proper does not amount to accepting that the Court System is fair & impartial.

Class Actions

FRCP 23 governs the Class Action

Court must certify the class in a class action suit & must approve the settlement.

Four prerequisites that all class actions must adhere to
a(1): numerosity: class is so numerous that joinder is impossible (but not too numerous to where the class becomes unwieldy)
a(2): commonality: common ?s of law or fact exist among the class
a(3): typicality: claims/defenses of the representative must be typical of the class
a(4): adequacy of representation: fairly & adequately protects the interests of the class
Four Types of Class Actions

(b)(1)(A): "Incompatible Standards" Injunctive relief cases where chief concern is that litigant may be subject to incompatible court decrees. (advantageous to D to have a class here)

(b)(1)(B): "Limited Fund Class Action" requires that the fund is definitely limited, entire fund must be used, and it requires equitable treatment among Ps. **Avoid a rush to the courthouse

(b)(2): "Equitable" class action when injunctive or declaratory relief is sought. Pursue an injunction to pursue a large scale discrimination problem.

- Cant be incidental to the $$ damages, *See Haley*

- Cant shoehorn a b(3) into a b(2) *Wal-Mart*
- Example: desegregating a swimming pool or a school, affects the class as a whole

(b)(3): "Damages". Permits individual monetary claims. Requires Predominance & Superiority. 2 biggest categories are 1) mass torts, 2) aggregation of small claims

- ? of law or fact common to class must predominate over questions affecting individual class members.
- Class action must be superior to other available methods for fairly & efficiently adjudicating the controversy

Factors pertinent to predominance and superiority are:

1) Class members interest in individually controlling the prosecution or defense of separate actions
2) Extent & nature of any litigation concerning the controversy already begun by or against class members
3) Desirability or undesirability of concentrating the litigation of the claims in the particular forum
4) Likely difficulties in managing a class action

(c)(2)(B): (b)(3) class action requires the best notice practicable given the circumstances, individual notice to members that can be identified through reasonable effort. Notice must inform proposed class members that they may opt-out

Haley v. Medtronic

(Cal. 1996)

Facts: P received a pacemaker from D, which was allegedly defective. P's pacemaker had not yet failed, but P alleged emotional distress stemming from fear of a future failure. More than 66k people had received the pacemaker. P moved to certify a class action, damages claim as a (b)(3) & an injunctive order for medical monitoring under (b)(2). Issue is whether the (b)(3) class action meets the prerequisites.

Holding: Meets the numerosity requirement, b/c there are more than 60k potential class members and the class members are not confined to one geographic area.

Meets the commonality requirement b/c the underlying defect is related to the same defective material in all of the pacemakers.

Meets typicality requirement b/c all of the would be class members claims would be based on the same legal theory & D's course of conduct is the same with respect to the individual class members.

Adequacy of Representation is met, P's attorneys are competent, no conflict of interest, the representatives individual interests are the same or similar to the class members.

Fails to meet Superiority Requirement. P fails to establish why the case should be brought into Cali District instead of another jurisdiction. The claims are based on state law, and therefore the court would necessarily have to apply a number of different states laws.

Since the (b)(3) class fails, the (b)(2) class fails since it was simply a stratagem to get to court & the (b)(3) was the main motive for litigation.

Wal-Mart v. Dukes

(2011) S.C

Facts: Lower Court approved a class under (b)(2) comprising of 1.5 million Ps, former & current female employees of D. Ps allege that local supervisor discretion violates Title VII discrimination against women b/c they were denied promotion & equal pay based on sex.

Holding: Fails to meet Commonality Prerequisite for a class action. Only evidence P had of Commonality was a sociologists opinion. Demonstrating the invalidity of a local manager's discretion in regards to equal pay & promotion does nothing to demonstrate the invalidity of other managers or the entire system.

Additionally, this was certified under the incorrect Class. (b)(2) does not authorize class certification when each member would be entitled to a different injunction or individual monetary claim. Individual monetary claims belong in (b)(3).

Personal Jurisdiction Issues Concerning Class Actions

Phillips Petroleum v. Shutts Class Action P's don't have to meet minimum contacts

(1985)

Facts: D produced & purchased natural gas from leased land in 11 states. P sued in Kansas State Court arguing that D failed to pay interest payments on royalties. Kansas court granted (b)(3) class certification consisting of 33k members. Reps provided each member with notice, 3,400 opted out. Less than a thousand members resided in Kansas & less than .25% of the gas leases were in Kansas. D argued that P members had to meet minimum contacts test.

Holding: Minimum Contacts test doesn't apply to Ps, b/c the burden placed on absent class members isn't the same as on an absent defendant. Concerns for absent class members are met in other ways. Class Actions may not be dismissed or settled w/o approval from the court. Court may amend the pleading to ensure the class is properly represented.

Due Process does not require that Class Members "Opt-in". Members must receive notice plus an opportunity to participate in the litigation. Notice must be the best practical (*Mullane*) & it must provide the absent class member the opportunity to remove himself from the class. (Ruling only applies to (b)(3) actions)

Subject Matter Jurisdiction Issues Concerning Class Actions

Class Action Fairness Act of 2005: (CAFA) Provides that federal courts have original jurisdiction over claims if:

1) a.i.c exceeds $5 million (individual claims are aggregated)
2) Class has more than 100 members
3) Parties are minimally diverse (a single class member is diverse from a single D)

Standard Fire Insurance v. Knowles

(U.S 2013)

Facts: P seeks class certification, but says that the class wont seek $5 million, therefore P wants to remain in State Court.

Holding: The stipulation that P asserts concerning the $5 million does not make a difference. To make a difference the stipulation must be binding, & P's stipulation is not. P can't legally bind members of a proposed class before its certified. P doesn't even speak for the class, and the Court may decide that the P doesn't even adequately represent the class.

CAFA Exceptions

§1332(d)(4)(A): Local Controversy Exception – Court shall decline to exercise jurisdiction when;

- Greater than 2/3 of the members of a proposed class are citizens of the state in which the action was filed.

§1332(d)(4)(B): Home State Exception – Court shall decline to exercise jurisdiction when…

- Greater than 2/3 of the members of proposed class & the primary defendants are citizens of the State in which the action was originally filed.

§1332(d)(3): Discretionary Jurisdiction – District Court may in the interests of justice & looking at the totality of the circumstances decline to exercise jurisdiction when…

- 1/3-2/3 of members of proposed Ps & primary defendants are citizens of the state
- Courts must consider these factors:
  A) Claim asserted involves matters of national or interstate interest
  B) Class asserted will be governed by laws of the State in which the action was originally filed or by laws of other States
  C) Whether the Class Action has been pleaded in a manner that seeks to avoid federal jurisdiction
  D) Class action has been brought in a forum that has a distinct nexus with the class members, alleged harm or the D's.
  E) citizens of the state in which the action was filed in all aggregated class members is substantially larger than the # of citizens from any other State, & the citizenship of the other class members are dispersed among a substantial # of states
  F) whether, during the 3 year period preceding the filing of the class action, 1 or more class actions asserting similar claims on behalf of the same or similar Ps have been filed

Preston v. Tenet Health System

(5th Circ. 2007)

Facts: P's represent class of patients & relatives of deceased who were hospitalized at D's hospital during Hurricane Katrina. Alleges that D failed to maintain premise in order to avoid loss of power during the Hurricane. D filed to remove to fed court, P filed for remand based on the local controversy exception of CAFA.

Holding: Evidence was adequately presented to make a credible estimate of the class members. Dispute is mainly between Louisiana Ps and Louisiana Ds and based on Louisiana state law.

Claim Preclusion Issues Concerning Class Actions

Stephenson v. Dow Chemical

(2003)

Facts: In late 90s Ps filed suit against D, Ps are Vietnam Vets who were exposed to Agent Orange. In 84 a virtually identical class action was settled against the D. District Court dismissed & Ps argued on appeal that they were inadequately represented & therefore preclusion is inapplicable.

The previous class action was certified as a 23(b)(3). Parties settled for $180 million & provided that the class included future manifestations of injury. Payments were to be made from 01/85-12/31/94, but no payments were to be made after 94. The payments were not adjusted for inflation.

In 89 & 90 2 class actions were filed arguing that the injuries manifested after the 84 settlement, but they were both dismissed since they could still collect on their claims.

Holding: This is different from the 2 dismissed claims b/c Ps injuries here manifested after depletion of the funds. Ps were not proper parties to the judgement in 85 b/c they weren't properly represented. The class wasn't subdivided between holders of present & future claims. These must be subclassed b/c they have conflicting interests.

Settlement Class Actions

Parties never intend to litigate the case. Before the class is filed, Ds negotiate a settlement with a lawyer who negotiates on behalf of a putative class. Lawyer files a class action & the parties ask the court to approve the settlement.

**This manages the D's litigation risks but it raises new problems for the courts b/c the class reps & the D's don't stand in an adversarial posture!

Amchem Products v. Windsor

(1997) (23(b)(3) class)

Facts: (b)(3) class certification sought by P which would potentially encompass millions of people who were or may be injured by past exposure to asbestos. C.O.A reversed the trial court's decision on the class prerequisites. P appealed.

Holding: Ps had no subclasses. Settlement stipulations included for categories of 1) compensable diseases, 2) mesothelioma, 3) lung cancer, 4) certain other cancers. Class members for certain kinds of claims receive no compensation.

**policy at the core of (b)(3) is too overcome the problem of small recoveries.

**Court may not examine (b)(3)(D) for management problems b/c the proposal is that there will be no trial.

Predominance is not met here. A common interest in a fair compromise is insufficient. There are too many disparate ?s concerning different class members to support Predominance. Class members were exposed to different asbestos containing products, some members suffer no physical injuries, each member has a different history of cigarette smoking.

Adequacy of Representation (a)(4) is not met either. Interests of the currently injured & interests of exposure only Ps are not aligned.

In Re NFL Players Concussion Litigation (3rd circ. 2016)

Facts: More than 5000 former NFL Players brought suit against the NFL for allegedly failing to protect them from brain injuries when they were playing. Parties agreed to a settlement class action, more than 3900 players had yet to develop brain injuries.

Holding: C.O.A affirmed the $1 billion settlement. Distinguished from *Amchem* b/c the district court had created sub-classes of claimants for present & future victims & had appointed separate counsel on behalf of the subclasses.

The settlement fund was also uncapped & adjusted for inflation, which protected the interests of future litigants. Distinguish from *Stephenson* where settlement would not be adjusted for inflation & was capped.

Transnational, International & Comparative Law

Civil Procedure II Outline

Transnational: domestic litigation that has some foreign component

Comparative: Exploration of another legal system to understand how that country articulates priorities, strikes compromises & achieves ends.

International: Systems, treaties & reform efforts that transcend national boundaries.

Civil Code has its roots in Rome & France, whereas the Common Law System originates in England.