Syllabus  
Civil Procedure  
Professor Robert Pfeffer  
Autumn 2010  
University of Alabama School of Law

Course Books


3) Required: Most recent supplement to HTFM (“HTFM Supp”), which will be referred to as supp. [not yet available – will let you know if you need to get this]

4) Required: Daniel Meador, *American Courts*

5) Recommended: You may wish to purchase a hornbook or commercial outline like Joseph Glannon’s *Civil Procedure: Examples and Explanations*

Office Hours

I have set aside Mondays 1-4 for office hours and students are encourage to visit during that time with any questions. You may stop by or make an appointment for another time or speak with me after class.

Course Procedures and Policies

1) Students are expected to attend, and be prepared for, all class sessions.

2) Cell-phones must be turned off, or be on silent or vibrate mode.

3) Students may use computers in class. But, during class, students may not use computers for any reasons other than taking notes; students may not use computers for applications not connected with the course, such as (but not limited to), surfing the web or sending e-mail or IM’s, as doing so not only is a distraction to the student who is doing so, but also to other students as well as to the professor.

4) Your grade will be based upon one end of semester exam, which will be from 3 to 4 hours in length, and will consist of a combination of essay and short answer questions (and perhaps, some multiple choice questions). I will
provide more details on the exam toward the end of the semester. I reserve the right to adjust your final grade down by one-half grade (e.g. from B+ to B) for excessive absences, lack of class preparation, and/or failure to comply with the stated course procedures and policies, to the extent permitted by the rules of the University and the School of Law.

5) Because of the vast amount of material we need to cover, I generally will not take questions in class, but do encourage students to come to office hours or to contact me for an appointment if they have questions on the material.

**6) Reading for the first class and first week:** For the first class, read the assigned reading for Pennoyer v. Neff as described below along with the notes in this syllabus. In the first week we will aim to cover at least through International Shoe and maybe World Wide Volkswagen. Also, it would be helpful to your understanding of Civil Procedure to read the entire Meador American Courts book as soon as possible, particularly parts one through four. You should be able to get through this in a couple of hours or so. It is a great introduction to the federal and state court system.
TOPIC AREA ONE: CHOOSING THE PROPER COURT

I. Territorial (Personal) Jurisdiction

- Overview of Territorial (Personal) Jurisdiction

Territorial jurisdiction involves the issue of whether a court has power to adjudicate with regard to particular parties – i.e. persons or entities (or even property, which can be a party to a civil suit). Often territorial jurisdiction is referred to as personal jurisdiction, although in a technical sense, personal jurisdiction is only a subset of territorial jurisdiction because territorial jurisdiction may be over a person (which includes artificial persons like corporations) and property. In this course we will use the term personal jurisdiction and territorial jurisdiction interchangeably because the casebook calls it territorial jurisdiction whereas most cases and lawyers refer to it as personal jurisdiction.

Personal jurisdiction involves the issue of geographically where can a plaintiff bring suit and obtain jurisdiction over the defendant. If, for example, you were in a car accident in Birmingham in what jurisdictions would you be allowed to sue? Presumably you could sue in Alabama. But suppose the defendant was a resident of Texas, could you sue in Texas? Suppose the facts were different. What would happen if the damage occurred while you were driving through Mississippi and the person who damaged your car was a resident of Texas? Could you sue in Mississippi? Texas? Alabama? What if the driver were driving a delivery truck as part of his or her job and the employer was based in Oklahoma and also had an office in California? Where could you sue the company?

These are the types of issues we will be discussing in this section of the course. One thing to keep in mind, is that personal jurisdiction is not generally an either/or matter. That is, the fact that you might be able to sue in Alabama does not necessarily mean that you cannot sue somewhere else.

One thing that you will come to realize is that the issue as to whether a court has personal jurisdiction over a given party almost always focuses on the defendant. That is, if there is a dispute as to personal jurisdiction, the dispute will be whether a court has personal jurisdiction over the defendant. The plaintiff (the party bringing the suit) is generally deemed to have submitted to the personal jurisdiction of any court that he or she brings suit in.

Another thing that you will learn is that personal jurisdiction involves constitutional as well as statutory issues. The constitutional dimension of personal jurisdiction typically involves the due process clauses of either the 5th or 14th Amendment, the full faith and credit clause, and the overriding issue of the sovereignty or
territorial reach of individual states under the constitutional scheme and/or of the federal government. The statutory element will depend upon the statutes and rules of the jurisdiction in which a case is brought.

A. The Bases for Asserting Territorial Jurisdiction over a defendant or property

1. Constitutional Matters

   a. Traditional Basis for Jurisdiction over a person or property

Reading: Pennoyer v. Neff: HTFM 160-167; notes on Pennoyer 2-4; 5-7, 9 HTFM 167-71 [see background note below before reading the case] Note: In reading this case and all other cases, you should look up any unfamiliar legal terms in a legal dictionary. There are several law dictionaries. Black’s Law Dictionary is a well-respected source. There are also on-line dictionaries such as dictionary.law.com

   Background on Pennoyer v. Neff: This is a somewhat challenging case. First, it is an old case which is somewhat densely written and disorganized. Second, the procedure by which the case arrived at the Supreme Court is a bit tricky. To better understand the procedural posture, carefully read three introductory paragraphs on page 160 before delving further into the case.

The basic idea is that after Mitchell won a suit against Neff in Oregon state court he was able to obtain a writ of attachment to obtain ownership of property that had been Neff’s and Mitchell sold that property to Pennoyer. Eight years later, Neff sued Pennoyer in federal circuit court (at that time, a federal trial court), to get his property back. The federal circuit court agreed with Neff. Pennoyer then sought review of the federal circuit court’s decision in the US Supreme Court. The decision you will read is the Supreme Court’s opinion upon its review of the federal circuit court’s decision. The Supreme Court’s opinion focuses entirely on whether the judgment in the Oregon state court (rendered 8 years earlier) was valid and whether the federal circuit court was correct in concluding that it was not.

Questions and issues to think about for Pennoyer v. Neff

1. Focusing first on the issue of whether the state court had jurisdiction over Neff personally (i.e. leaving his property aside for the moment), what were the reasons the Supreme Court gave for determining that the Oregon trial court did not have jurisdiction over Neff?
2. Turing to the issue of jurisdiction over property, what are the three types of in Rem jurisdiction that the Supreme Court discusses. Note that the Court does not address this in that organized a manner, and you will probably benefit from looking at the notes following the case to understand this? Which of these three types of in Rem jurisdiction would be most applicable to the present case? Note that later in this section, when we read the case Shaffer v. Heitner, we will revisit the issue of the status of certain types of in rem jurisdiction.

3. What option did Mitchell have to be able to obtain a valid judgment against Neff (or at least his property) in this case? What was the problem with how Mitchell proceeded?

4. One issue floating around in the background here is that a party can challenge the ruling of a court that affects his or her rights on the ground that it did not have personal jurisdiction over him or her years later. Later in this section, we will address the question of what options a party (namely a defendant and his or her lawyer) has when the party believes that it has been sued in a court that has no jurisdiction over it. In this case, Neff simply didn’t show up – maybe he didn’t know about the suit, or maybe he did and decided that it was best not to show up. Later we will see if this is the only option for a party in Neff’s position.

b. A modern approach to territorial jurisdiction

Note: By the mid-20th century, modern commerce and the increase of interstate corporate activity made jurisdiction based purely upon finding the defendant in a given jurisdiction (i.e. state) problematic. Corporations (and even individuals) might cause harm in a given place without being present there. Our first case in this section, International Shoe, demonstrates this.

Reading: International Shoe HTFM 176-182 (majority opinion only—you might want skim Justice Black’s concurrence as well, but we will not focus on this in class and notes pp.185-188 (starting with note 1 in the middle of p. 185).

Note: International Shoe is a classic case that set out a broad framework that is still used today. In reading the case and the notes that follow, among other things, pay particular attention to concepts of specific jurisdiction and general jurisdiction (note that International Shoe itself does not use these terms) -- (see note 1) – but does discuss these concepts. BE PREPARED TO DISTINGUISH SPECIFIC JURISDICTION FROM GENERAL JURISDICTION
Reading: World Wide Volkswagen HTFM 189-197 (majority opinion and Brennan dissent – no need to read other dissents) and note 5 p. 201

Reading: Helicoptoros Nacionales HTFM 201-206 (majority opinion only) and notes 3,4 & 5 HTFM 208-09

Reading: Burger King and note 1 HTFM 209-224

Note: Burger King continues a debate that goes back as far as Hanson v. Denkla HTFM 187-88 and continued in World Wide Volkswagen regarding the extent to which factors beyond an out-of state defendant’s contacts with a jurisdiction – such as convenience to all parties and witnesses, what law it applies, the forum’s interest, etc. – should be taken into account in determining whether personal jurisdiction exists. Whereas World Wide Volkswagen focused almost entirely on the defendant’s contacts with the state, Burger King puts a lot of weight on other factors (see section B(2) of the case pp. 220-22). This debate is not really an either/or issue. Rather, it is a matter of degree. There seems to be little doubt on the court that a defendant’s contacts are important, the only issue is to what extent other factors change the outcome for a given level of contact, with Brennan (first in dissent in World Wide Volkswagen and then writing for the Court in Burger King) putting a fair amount of weight on these secondary considerations.

Reading: Calder v. Jones HTFM 238-39 (note 5)

c. Presence revisited

Introductory Note: In Pennoyer v. Neff the Supreme Court held that in order to assert jurisdiction over a person or property that it was necessary that the person or property be found (i.e. be present) in the jurisdiction in which a court is located. Starting with International Shoe we saw the Court abandon the notion that presence in the state is necessary to assert jurisdiction over a person, and instead focused on whether asserting jurisdiction comported with due process. This evolution leads to the question whether the presence of a person or property in a state is still a sufficient basis for asserting jurisdiction, even if it is not the only basis or whether the analysis or International Shoe and its progeny (World Wide etc.) applies even if the defendant or his property is found in the state where a suit is brought. In this subsection we will examine that issue

Reading: Shaffer v. Heitner HTFM 265-76 (majority opinion only)
Note: You may find it helpful to reread sections of Pennoyer v. Neff discussing in rem and quasi in rem jurisdiction

Reading: Burnham v. Superior Ct. of Calif and Notes 1-4 HTFM 281-96 and Notes 1-5 pp.

Note: You will note that there is no majority opinion. That means that although a majority of justices agreed on the outcome of this case, a majority did not agree as to the reason the case should come out as it did. That means that none of the opinions here is actually binding precedent.

d. Consent and waiver as a basis for jurisdiction over a defendant and challenging jurisdiction

Introductory Note: A party can consent to personal jurisdiction (compare this with subject matter jurisdiction when we address that topic). That is why we are not concerned with whether there is personal jurisdiction over the plaintiff – by bringing suit, the plaintiff has consented to be subject to the territorial jurisdiction of the court where he brought suit. The issues in this section are under what circumstances a defendant will be deemed to have consented to territorial jurisdiction or waived his or her right to object to territorial jurisdiction

(i) Consent by contract

Reading: Carnival Cruise Lines HFTB 328-35 (majority opinion only)

(ii) Consent by appearance and objecting to jurisdiction without consenting to jurisdiction

Reading: Note 1 HFTB 327-28; Insurance Corp and all notes HTFB 341-52

2. Long-Arm Statutes

Note: Up until now, with territorial jurisdiction (personal jurisdiction), we have focused purely on the constitutional issue (primarily the due process clause of the 14th amendment). But, there is also a statutory component when dealing with personal jurisdiction, particularly with out-of-state defendants. In reading the following materials, focus on the way in which the long-arm statues relate logistically to the constitutional question (i.e. in examining whether there is jurisdiction, how would one analyze both the statutory and constitutional question), rather than on the particulars of the New York long-arm statute. Also, it is important to understand the issue of how long-arm jurisdiction works in federal court – after all, the defendant in Bensusan clearly
had contact with the United States, but even the federal court in that case focuses on the contacts between the defendant and New York, the state in which the federal court in which suit was brought was located.

**Reading:** Introductory Note HTFM 241-42; *Bensusan Restaurant Corp.* HTFM 243-47; Notes 1-2 and 6 pp. 247-50; FRCP 4(k)

**B. An Additional Requirement for Asserting Territorial Jurisdiction: Adequate Notice**

**Introductory Note:** So far we have examined under what circumstances a defendant has a sufficient connection with a jurisdiction (i.e. state or the US) for a court in that jurisdiction to exercise jurisdiction over that defendant (or his property). But in addition, in order for a court to exercise jurisdiction over a defendant, the defendant must be properly apprised of the suit. The notice given to a defendant must comport with both statutory and rule requirements. In a majority of cases if there is any dispute, it involves the mechanics of giving notice in accordance with the rules of the court in question. In some cases, however, the rules of giving notice allow bringing a defendant into a suit in a way that may not necessarily be certain to give him or her notice of the suit. The issue in those cases is whether the method employed comports with due process.

1. **Rules regarding notice—the mechanics of serving a defendant**

   **Reading:** HTFM 317-23. **Note:** We are not going to spend a great deal of time going over the details of these rules. The idea is to get a sense of what service provisions look like. In practice, you will deal with the rules of the court where you case is being litigated in a given case, and you will probably end up having to pay close attention to those rules each time, as they vary form court to court, and often change over time.

2. **Constitutional Requirements of Fair Notice**

   **Reading:** *Mullane* HTFP 296-304; *Jones* HTFP 308-17
II. **Subject Matter Jurisdiction**

**Reading:** Preliminary Note on Subject Matter Jurisdiction HTFM 371-74;

**Note:** Read this material very carefully as it will help you understand this section. Make sure that in reading this introductory note that you understand what subject matter is, how it comes into play in state and federal court, how both constitutional and statutory provisions govern subject matter jurisdiction in federal court, the major bases for subject matter jurisdiction in federal court, and how the ability to waive or agree to subject matter jurisdiction in federal court differs from the ability to do so with regard to territorial (personal) jurisdiction.

**A. Federal Question Jurisdiction**

**Note:** Federal question jurisdiction is one of the two major bases for federal courts' jurisdiction.

**Reading:** Constitution Articles III, 28 U.S.C. § 1331

**Reading:** *Louisville & Nashville RR Co. v. Mottley* and all notes following it, HTFM 374-79

**Questions on Motley and the notes that follow:**

1) Was *Mottley* construing the scope of the constitutional bounds of federal question jurisdiction or a statutory issue? And if it was a statute, what is the current day provision (i.e. what title and section number)?

2) You’ll notice from note 2, that after the case was dismissed by the Supreme Court for a lack of federal jurisdiction, that the matter was tried in state court and eventually appealed all the way to the US Supreme Court again, which then did address the merits. How is it that there could be lack of federal jurisdiction the first time around, and yet jurisdiction for the Supreme Court to address the merits after the case had been in state court?

**Reading:** *Merrell Dow*, HTFM 380-84 (majority opinion only) and notes HTFM 387-89
Notes and questions on *Merrell Dow* and its accompanying notes:

1) In *Merrell*, the plaintiff actually brought the suit in state court, and the defendant *removed* the case to federal court. We will shortly be studying removal jurisdiction. For now, in this case, simply understand (as the Court points out) that whether the defendant has a right to remove the case to federal court turns on whether the plaintiff could have brought the suit in state court in the first place. (We will learn later that there are some exceptions to this rule).

2) Under the well-pleaded complaint rule, which we saw discussed in *Motley*, whether a cause of action arises raises a federal question for purposes of federal trial court (which in the present day are called district courts) turns on whether the plaintiff’s complaint states a cause of action arising under federal law. Although Justice Holmes expressed the sentiment that a cause of action arises under the statute that creates it, the Supreme Court did not consider the matter to be so simple. As you can see, *Smith v. KC Title* (fn 5 and note 1), found that a case based upon state law could, in some cases, arise under federal law. *Merrell* looks a lot like *Smith* in that the plaintiff’s right to relief seems to depend upon an interpretation of federal law even though it is a state cause of action. What factor(s) does the court look to determine that the plaintiff’s claim in *Merrell* did not arise under state law?

3) What is a declaratory judgment? If a plaintiff brings a declaratory judgment suit alleging that defendant is taking some action that violates federal law, is that alone enough to confer jurisdiction in federal district court? What is the test to determine whether there is jurisdiction in federal district court over a declaratory judgment suit?

4) In *Merrell*, because there was no “arising under” jurisdiction, if the suit were to proceed it would have to proceed in state court. Does that mean that the US Supreme Court would be precluded from reviewing the decision if in the suit there is still a dispute as to the meaning of the Federal Food, Drug and Cosmetic Act.

**Reading:** *Grable & Sons* and all notes following HTFM 389-97

**B. Diversity Jurisdiction**

Note: Although we are dealing with jurisdiction of the *subject-matter*, as opposed to jurisdiction over the *parties* (i.e. territorial or personal jurisdiction), whether there is diversity jurisdiction depends on, among other things, the parties’ citizenship.

**Reading:** US Const, Art III; 28 U.S.C. § 1332
**Reading:** *Mas v. Perry* and notes 1-4, HTFM 397-404

**Note:** The factual presentation of this case is not all that clear as to where the parties were at the time they filed this suit, particularly the move to Illinois. The basic scenario is that Mr. Mas was originally from Mississippi and Mr. Mas was originally from France; after they left those places, they lived in a couple of different places, but had no intention to remain in those places.

**Questions on *Mas v. Perry* and notes in HTFM**

1) What is the meaning and test of citizenship for purposes of diversity jurisdiction?
2) Can a natural person be a citizen of more than one state or country for purposes of diversity jurisdiction? What about corporations and unincorporated entities?
3) What is the meaning of complete diversity? Does the constitution require complete diversity? If not, why is complete diversity relevant in *Mas* or in any other cases?
4) What is the current minimum amount in controversy required in a diversity case? Would a claim for $50,000 satisfy the current diversity requirement? $75,000? $100,000?
5) What is the test for determining the amount in controversy? Does it matter what the plaintiff actually recovers?
6) Suppose there are multiple plaintiffs or multiple claims—can a party or parties aggregate the claims?

**Reading:** Note on the Origin and Purposes of Diversity Jurisdiction, HTFM 405-409 (Note: We probably will not spend a lot of time on this in class, but reading this note will give you some sense of some of the policies behind diversity and some of the arguments as to why it was or is needed (and whether it is still needed)

**C. Supplemental Jurisdiction**

**Reading 28 U.S.C. § 1367** (Note: Most of the cases in this section were decided before this statute was enacted. Therefore, you may want to read this statute at the outset to get some idea what it is about but then re-read it carefully after you have read the cases on supplemental jurisdiction)

**Reading:** *United Mine Workers v. Gibbs* and all notes following the case, HTFM 409-413

**Reading:** *Owen Equipment & Erection Co. v. Kroger* (majority opinion only) and notes 1-6 following the case, HTFM 420-25
**Reading:** *Exxon Mobil* and notes 1-5 HTFP 425-36

**D. Removal Jurisdiction**

**Note:** We have seen a couple of cases in which the defendant removed the case from state to federal court but we have not really analyzed the removal issue yet. So far with federal subject-matter jurisdiction, we have been analyzing the plaintiff’s choice to bring a case in federal court. In a removal case, the plaintiff has brought the suit in state court, but the defendant would rather be in federal court. The defendant therefore removes the case to federal court. The basic rule is that a defendant can remove a case from federal to state court if and only if the plaintiff could have brought the suit in federal court in the first place. But, there are some exceptions to this rule, as we will see.

**Reading:** 28 USC § 1441  
**Reading:** *Caterpillar Inc. v. Williams*, and all notes following the case HTFM 437-47

**Questions on Caterpillar and § 1441**

1. What is the basic test for determining when a defendant can remove a case from state to federal court?

2. Can a plaintiff remove a case?

3. What is the biggest difference between the removal requirements in a diversity case as opposed to a federal question case?

4. In the typical case with two or more defendants, what happens if one defendant wants to remove a case and other defendants do not?

5. Are there any special rules that make removal easier or harder in particular cases?

6. What does a party do when he or she wants to remove a case? When must the party do this?

7. Suppose Homer brings a federal civil rights suit against Chief Wiggam in the Alabama Circuit Court for the 6th Judicial District (which is in Tuscaloosa County) to what federal court can Chief Wiggam remove the suit? Suppose he doesn’t remove, then what happens? What if Wiggam
removes and the federal judge later remands, stating that she has concluded that there is no jurisdiction over the claim, what recourse does Wiggam have if he thinks that the judge was incorrect?

8. Suppose Eli, who is now lives in New York and intends to stay there indefinitely is visiting his alma matter in Oxford, MS and gets into a car accident when, Morgan, a long time Mississippian, who intends to remain indefinitely, dents Eli’s car at an intersection. Eli sues Morgan in state court in Lafayette County, which is where Oxford, MS is, on a state negligence theory. To which federal court can Morgan remove the case?

9. Suppose Monica sues Chandler in New York state for intentional infliction of emotional distress claiming that Chandler purposely failed to clean the dishes, and both are citizens of New York. Chandler, thinking this is a federal case removes it to federal court in New York and neither Monica nor the trial judge questions whether there is federal jurisdiction at first. But, halfway through the trial, Monica’s attorney says to the court that there is no basis for federal jurisdiction (and assume he is right on this point). Can the court remand at that point?

E. **Challenging Federal Subject Matter Jurisdiction**

    **Reading:** FRCP. 12(b)(1); FRCP 12(h)(3)
    **Reading:** Note on Direct Challenge to Federal Subject Matter Jurisdiction, HTFM 447-49
    **Note:** Keep this material in mind when we get to the topics of pleadings (TOPIC AREA 3) and collateral attacks on judgments
III. VENUE, TRANSFER AND FORUM NON CONVENIENS

Note: These related topics all deal with the situation where one or more trial court has both subject-matter and personal jurisdiction, but where there is an issue as to which of those courts should handle the case.

A. Venue.

Note: Venue, which in the present day is mainly a statutory matter, deals with which court within a given jurisdiction should adjudicate a matter, and the issue will then come down to the statutes governing venue in that particular jurisdiction. For example, if a party brought suit in an Alabama state court, assuming there was both personal and subject-matter jurisdiction in Alabama, the venue issue would be what county in Alabama the suit could be tried in, and one would look to Alabama statutes to determine which county or counties the suit could be tried in. If one were in a federal court that had both personal and subject-matter jurisdiction, one would look to federal venue statute to determine which federal district the case could be tried in (remember, however, that long-arm statutes may also limit which federal court a case can be tried in---usually a long arm statute will limit the matter to federal courts in a given state and venue statute will then determine which federal court in that state (if there is more than one) has venue).

Reading: All material HTFM 449-455 (very top)

B. Forum Non Conveniens

Note: Forum Non Conveniens is a judge-made doctrine that translates into “an inconvenient forum.” The basic idea is as follows. Generally, if there is more than one forum in which a case can be tried (i.e. more than one court that has personal and subject-matter jurisdiction, and where venue is proper), the plaintiff’s decision of which forum to bring a case in is usually not disturbed. But sometimes, even though the court in which a plaintiff has brought suit has personal and subject-matter jurisdiction, it might be deemed very inconvenient to bring a suit in that court.

For example, suppose Brad’s car is hit by Ashley in Los Angeles and there are five witnesses. Suppose Brad lives in LA and Ashley spends most of her time in Los Angeles but has a vacation home in Kentucky, where she spends a few weekends a year. Suppose Brad sued Ashley in Kentucky state court, and serves her with process while she is there (so there will be subject-
matter and personal jurisdiction (remember *Burnham*). Ashley might argue that although the Kentucky court has jurisdiction that state court in Los Angeles, CA, also has jurisdiction and that it makes much more sense to try it there---that it really makes no sense to try the matter in Kentucky because none of the witnesses are there, the events did not take place there, and California law applies. That is the type of situation where forum non conveniens applies.

Forum Non Conveniens is generally a matter of the judge’s discretion and in most cases will not be granted merely because one place might be more convenient than another – it usually is reserved for situations where the plaintiff’s choice is really one that makes no sense. Also, because of the passage of the federal transfer statute, 28 USC § 1404, which we will discuss in the next subsection, the forum non conveniens doctrine is confined to matters in state court, *except* where a party is claiming that a suit should be tried in another country, which is the subject of the case we will look at next.

**Reading:** *Piper Aircraft*, notes 1-5 following the case 472-83, HTFM 472-83

**C. Transfer of Venue**

**Note:** Transfer of Venue for our purposes is a creature of federal statute (although some states also have statutes allowing transfer of venue within that state – e.g from one county to another). 28 U.S.C. § 1404 allows for transfer from one federal district court where a suit was properly brought to another federal district where it also could have been brought – it essentially takes the place of forum non conveniens dismissal in federal court, although the showing required for transfer is generally deemed lesser than for a forum non conveniens dismissal

**Reading:** 28 U.S.C. § 1404(a)
**Reading:** Notes 2 and 4, HTFM 466-68
**Reading:** 28 U.S.C. § 1406(a) and note 8, HTFM 471
**Reading:** Notes 9-10, HTFM 471-72.
TOPIC AREA TWO: WHAT LAW GOVERNS (“The Erie Doctrine”)

Introductory Note: Before coming to law school, you may have assumed that the law that would govern a given case would be the law of the jurisdiction that court was located in (i.e. that New York law would govern in New York state courts, Alabama law would govern in Alabama courts, and federal law would govern in federal courts). If you did assume that prior to taking this course, you should realize by now (especially if you have read Meador’s American Courts,) that that is not always the case. In a given case, an Alabama court might apply Mississippi or New York law, federal law (or even the law of Germany) and federal courts are often called upon to apply the law of the 50 states. The issue of deciding which law governs in a given case, is a topic that is more fully explored in a course on Conflict of Laws. In this section, we address the issue of whether a federal court should apply state law, as opposed to a federal law, or a more general national common law (what is known as the Erie issue) as well as the issue of what requirements are put on state courts to apply federal laws in given cases (sometimes referred to as the reverse-Erie issue).

I. The Law Applied in Federal Courts (the Erie doctrine)

Reading: Introductory notes HTFM 487-93


Reading: Erie RR. v. Tompkins, and notes 1-3 HTFM 493-501

Question on Erie; Erie held that where there was no governing federal statute, that a federal court must apply the state law. But which state’s law? The trial court in Erie was a federal court located in New York, but the Supreme Court held that that court should have applied Pennsylvania law. Why? See Note 2, HTFM 510 and Note 4, HTFM 578, discussing Klaxon

Reading: Notes on Erie and Substances/Procedure Distinction, HTFM 503-04

Reading: Guaranty Trust Co. v. York and Note 1, HTFM 504-09

Questions and notes on York

1. As we can see by York’s holding, even under the Erie doctrine, federal courts (in situations in which there is no controlling federal statute) are only required to apply state substantive law; they are still to apply federal procedural law. York, (as well as the upcoming cases) addresses the issue as to what constitutes substantive as opposed to procedural law.
2. What test did York say should be applied to determine whether a law (or rule) is procedural or substantive?

3. In this case, the statute of limitations was deemed substantive for purposes of the Erie doctrine – i.e. the York decision determined that it was substantive because the choice of federal or state law could determine the outcome of the suit. Note, however, that most state courts will apply their own statute of limitations even if they are going to apply the substantive law of another state – e.g. in a case brought in Illinois arising from a car accident that took place in Mississippi, an Illinois state court would most likely apply the Illinois statute of limitations, even if it were to apply Mississippi law as to the standard for negligence. This too could lead to forum shopping. Suppose the above case were brought in Illinois federal based upon diversity jurisdiction, what state’s law would an Illinois federal court apply as to the standard of care, and what state’s statute of limitations would it apply?

Reading: Byrd v. Blue Ridge Electrical Cooperative and notes 1-3, HTFM 511-517.

Questions on Byrd:

1. After Byrd, does the York outcome determinative test still apply?

2. Based upon Byrd, what other factors beside outcome determinativeness does a court look to in determining whether a law is procedure or substantive for Erie purposes?

Reading: Rules Enabling Act 28 U.S.C. § 2072; note 2(a), HTFM 509

Reading: Hanna v. Plumer and notes HTFM 517-29

Questions on Hanna

1. In what way do Hanna (and Sibbach) propound a different test for determining whether a law or rule is substantive or procedural based upon whether there is a federal rule of civil procedure covering a given issue as opposed to when there is no federal rule of civil procedure on point?

2. What does Hanna say the standard should be in determining whether a provision is substantive or procedural when there is no federal rule of civil procedure on point?

3. When a court is determining whether to apply a state or federal rule in a case in which a federal rule of civil procedure might apply (or at least where one party is arguing that a federal rule of civil procedure might apply) what are the
steps one must go through to determine whether to apply the state or federal provision?

4. Now combining questions 2 and 3, assuming there is no federal substantive statute on point, when a federal court is deciding whether to apply a given state or federal standard, what is the analysis that it needs to go through?

II  Federal law in state courts (Reverse Erie)

Reading: Dice v. Akron, Canto & Youngstown RR Co. HTFM, 561-63 (majority opinion only)

III. Ascertaining State Law

Note: In a diversity case, a federal court applies state law. The issue that arises in this section is how a federal court is to ascertain what state law is. A federal judge does what a state court judge does – looks to state statutes and court ruling etc – to determine what the law is. In some cases, this is straightforward, but sometimes, there is clear state law on point, and this raises some issues. If a state court judge makes a mistake as to state law, there is always the option of appealing in the state system, but if a federal judge does so, then that is not possible. We will see how this can play out in the following cases

Reading: DeWeerth v. Baldinger I; Solomon R. Gugenheim Foundation v. Lubell; DeWeerth v. Baldinger II and note and 7 HTFM 567-78. (Note: Consider these cases together. In class, we will focus on the issue of how a federal court in the first DeWeerth decision in the 2nd circuit went about determining NY Law and whether this delivered the correct result, as well as alternative the court could have taken to the course it chose )

Reading: Notes 2,3,5,&6 HTFM 576-77

IV  Federal Common Law

Note: In Erie, the Court said that there is no federal common law – i.e. federal law is all statutory and where there is no federal statute, federal courts are not free to engage in judicial law making the way state courts often do (in torts and contracts, you probably have seen that much of what you have learned in not based upon statutes, but has been judicially developed over the years). Here we will see that Erie’s statement regarding no federal common law is a bit of an overstatement

Reading: Clearfield Trust Co. v. U.S. and notes 1-5, HTFM 579-84
TOPIC AREA THREE: PLEADINGS

Background:
Reading: HTFM 585-86

Note: Pleadings are the written submissions filed with the court and served on the other party that parties use to communicate to the court and the other party. Parties use pleadings, for example, to initiate a suit or to respond to a suit. In everyday parlance, many lawyers use the term “pleadings” to refer to both pleadings and motions. But in federal court (and many state courts) there is a difference between a pleading and a motion. A pleading is a written submission that does not seek any immediate action by the court; a motion may be in writing or oral (or it may be in writing but still result in a hearing or oral argument) that asks the court to take some action, such as dismissing a suit.

In this section, we will focus primarily on federal pleading rules. Many states’ pleading rules are similar to federal rules, although it is important to be familiar with the pleading rules for the particular court in which you are practicing.

I. The Complaint (the plaintiff’s pleading)

A. What is required in a complaint

Reading: FRCP 8(a); 12(b)(6) HTFM 587-95 (just read quickly to get an idea of what a complaint might look like).

Reading: Notes 1, 2, and 4, HTFM 603-06
Reading: Notes 1-8, HTFM 612-16

Reading: Bell Atlantic v. Twombly (maj. opinion only) and notes 1 and 5, HTFM 617-24, 628-31.

B. Allocating the burden of pleading

Note: Generally a plaintiff is required to plead -- in addition to other things like jurisdiction -- each of the elements of its cause of action. For example, in a contract action, a plaintiff will have to plead the existence of a valid contract, that defendant breached the contracts, and damages. But suppose it is a case in which the statute of frauds applies (the statute of frauds requires that certain contracts, like contracts for the sale of land be in writing). Must the plaintiff plead that a contract for the sale of land was
in writing, or is the defendant's responsibility to raise that issue in its answer—i.e. pleading that there was no written contract?

**Reading:** FRCPs 8(c) and 12(c); *Gomez v. Toledo* and notes 1-5, HTFM 638-643

### C. Heightened Pleading Requirements

**Reading:** FRCP 9(b); HTFM 644-45; 654-55 (note 1 only); 658-59 (notes 1-6)

### D. Ethical Constraints On Pleading

**Note:** Parties and lawyers generally enjoy what is known as the litigation privilege. That means that one typically cannot be sued for statements and submission one makes in connection with litigation. So, even if one files a law suit in which one purposely makes a false and damaging allegation (such as that defendant stole plaintiff’s property), neither that party or the party’s attorney will be liable in a defamation suit.

But, that doesn’t mean that filing a suit or putting in another pleading that contains false allegations (or even allegations that one thinks is true but which one has not properly investigated) is without consequences. In the federal system, FRCP 11 and 28 U.S.C. § 1927, as well as the court’s inherent power, subject a party and/or an attorney to sanctions for submitting inappropriate pleading or for other unethical behavior. State court have their own provisions governing sanctions for ethical violations in their courts. Note that there are separate provisions specifically that govern discovery abuses, which we will address when we get to discovery.

**Reading:** FRCP 11; 28 U.S.C. § 1927; *Zuk* and notes 1,3, and 4 HTFM 670-84

**Questions**

1. Who is subject to sanctions under FRCP 11, the lawyer, the attorney, or both? What about under § 1927?
2. Do FRCP 11 and § 1927 apply to all representations and submissions in a civil litigation or only written submissions?
3. What procedures are required before sanctions can be imposed?
II. **Responding to the Complaint** (the defendant’s response by answer or motion)

**READING:** FRCPs 12, 8(b)&(c); HTFM 684-85

**READING:** Zelinski and all notes HTFM 686-94

III. **Amended Pleadings**

**Note:** Sometimes after a party files and serves its pleading, it realizes that it made a mistake in its pleading or may have learned new information that is important for its pleading. That party may then want to amend its pleading. FRCP 15 governs when and how a party can amend or supplement its pleading. If a party is allowed to, and does, file an amended pleading, that pleading will supersede the pleading that it amends—i.e. the amended pleading is now the controlling pleading and the prior pleading is no longer in play. If a party supplements a pleading, then the original pleading and the supplemental pleading are both considered – the supplement pleading adds to, rather than supersedes, the original pleading.

**Reading:** FRCP Rule 15

**Reading:** Notes HTFM 694-96

**Reading:** Worthington and notes 1-4 HTFM 697-706

**Notes and Questions on Amended Pleadings**

1. When can a party amend its pleading as a matter of right? When must a party seek a court’s permission in order to amend?

2. Suppose the plaintiff files and serves its complaint on June 1, 2010, and, prior to the defendant’s having filed any response, amends its complaint and files and serves its amended complaint on defendant on June 3, 2010, on what date is the defendant’s response due? Same hypo, but prior to defendant’s response, plaintiff files and serves its amended complaint on June 15, 2010?

3. Rule 15(c), provides the rules in federal court as to when a party’s amended pleading relates back. Read this rule carefully, and consider the materials in HTFM regarding relation back. What is the significance of the relations back rules and doctrine?
TOPIC AREA FOUR: JOINDER (with a quick comment on class actions)

Introductory Note: Sometimes a party will want to bring more than one cause of action against a defendant (such as a claim against a financial advisor for both fraud and negligence, or claim for a breach of contract and tort). Likewise, sometimes a plaintiff will want to sue more than one defendant in a single suit, or more than one plaintiff may want to join together in a single suit against one or more defendants. Also, if a plaintiff sues a defendant, the defendant may want to sue the plaintiff as well. Finally, a defendant who is sued may want to sue yet another party, perhaps another defendant in the same suit, or a party who is not yet in the suit.

Each of the above types of scenarios raise the issue of what is called “joinder.” We will examine the federal rules that address joinder and provide the strictures of what claims and parties can be joined in a single suit. When doing this, however, you must also consider restrictions on the subject matter of the federal courts, a matter we already considered. That is, merely because a rule of civil procedure allows for joinder of a claim or party, that does not confer subject-matter jurisdiction where it does not already exist, which is why we addressed the issue of supplemental subject-matter jurisdiction.

We will spend a few minutes discussing class actions, which is a situation where there are so many plaintiffs that a representative plaintiff sues on behalf of similarly situated plaintiffs (or more rarely, where there are too many defendants for a single suit). For example, someone claims that he was made ill by the defendant’s pharmaceutical might sue on behalf of all parties who also suffered injuries from taking the same drug, which might number in the 10,000. We will not spend much time on class actions.

I. Joinder of Claims

A. Multiple Claims in the Same Pleading

Reading: FRCP 18(a); HTFM 710-11

Reading: FRCP 42; HTFM 711-12

B. Counterclaims

Reading: FRCP 13(a) and (b); Jones v. Ford Motor and notes 1-5, HTFM 712-24

C. Cross-Claims

Reading: FRCP 13(g); Fairview Park and notes 1-5, HTFM 724-28
II. Joinder of Parties

A. Permissive Joinder

**Reading:** FRCP 20(a); Kendra v. City of Philly and notes 1-5 HTFM 732-40

B. Compulsory Joinder

**Note:** Pay close attention to the terminology, which has changed over the years—note 3, HTFM 750 addresses this.

**Reading:** FRCP 19

**Reading:** Temple v. Synthes Corp. (note: read FRCP b/c it is referred to in this case, to help you understand the court’s reference to that rule)

**Reading:** Helzberg Diamond Shops and notes 3-6, 8-10, HTFM 745-753

C. Impedader (also called 3rd Party Practice)

**Note:** Suppose that Homer Simpson’s car ran out of gas on Springfield Turnpike and was therefore stopped in one of the lanes. Ned Flanders is driving along and has to stop so he doesn’t hit Homer’s car. After Flanders stops, Moe rear ends Flanders’ car. Flanders sues Moe only, claiming that he was injured and his car suffered damage due to Moe’s negligence. If joint and several liability applies, which it does in most jurisdictions, Flanders can recover all his damages from Moe, even if Homer was partly at fault. Moe may take the position that although he was negligent, that if he has to pay Flanders for his damages, that Homer is also negligent for having run out of gas on a highway, and that therefore he should recover from Homer, all that he (Moe) has to pay to Flanders. In order to do this, Moe will have to *implead* Homer, and, if he does, Moe will be known as a third party plaintiff and Homer will be known as a third party defendant. Impedader often also comes up where an insured is sued and *impleads* its liability insurer.

**Reading:** FRCP 14(a)

**Reading:** Owen Equipment v. Kroger (we read this before, but now revisit an abbreviated of this case) and notes 1-7 HTFM 761-65
D. Additional Joinder Matters (Interventions, Interpleader and Class Action)

**Reading:** FRCP 24

**Reading:** 28 U.S.C. § 1335(a)(1); FRCP 22, Notes 1, 3a and 3b, HTFM 790-92

**Reading:** FRCP 23, 794-95
TOPIC AREA FIVE: DISCOVERY

Note: If you become a civil litigator, particularly in a commercial area, including antitrust, bankruptcy, or intellectual property, there is a good chance that a large part of you practice will involve discovery – obtaining facts, documents, and tangible items, like a device that is subject of a patent dispute, prior to any trial. Discovery has become a larger part of American litigation, both because of liberal discovery rules and because pleadings generally have fewer details than in years past. Discovery is used in some other countries, but generally not to the extent as in the United States, and often is not used at all or in a very limited sense in certain non-common law countries (typically in Western Europe and some Asian countries, like Japan)—in fact it may a criminal offense to engage in discovery in these countries, which can raise issue for an American lawyer who has a multinational case.

I. Scope and Mechanics of Discovery

Reading: FRCPs 26-37

Reading: HTFM 882-89; notes 6-8, HTFM 905-07

II. Privileges, Work-Product and Privacy Limits on Discovery

Reading: Notes 1-4, 6-7 HTFM 914-16

Reading: FRCP 26(b)(3), Introductory Note, Hickman v. Taylor; Upjohn and notes 1-5, HTFM 917-31

Reading: FRCP 26(c); Note 1, HTFM 946-47

III. Discovery Ethics and Abuses

Reading: FRCP 26(g) Washington State Physicians and notes 2-6, HTFM 958-78.
TOPIC AREA SIX: DISPOSITION WITH TRAIL

Note: Most suits that are brought never reach trial. Many are settled, while others are disposed of by the court prior to trial. We have already seen some examples of a court disposing of a claim or case before trial. For example, a court can dismiss a case for failure to state a claim FRCP 12(b)(6) or for lack of subject matter jurisdiction FRCP 12(b)(1).

Introductory Reading: HTFM 980-84

I. Summary Judgment

Introductory Note: Summary judgment is a commonly used device to attempt to dispose of a case prior to trial or to narrow the issues. Either party can move for summary judgment, although it is usually the party without the burden of persuasion who moves (generally the defendant).

Reading: FRCP 56

Reading: Adickes v. S.H. Kess and all notes, HTFM 984-996

Reading: Celotex and all notes 996-1006

Reading: Notes, 1-3, 6-7, HTFM 1011-15

Reading: Notes -1-3, 6 HTFM 1-6

Reading: Scott v. Harris (maj opinion only) and notes 1-3, HTFM 1015-21, 1026-27

Questions

1. Generally speaking, what is the difference in what a defendant must show to prevail upon a summary judgment motion as opposed to a motion to dismiss for failure to state a claim?

2. Should a summary judgment motion be granted merely because the non-moving party’s evidence seems completely non-credible? For example, in a car accident case, suppose 10 witnesses say that the defendant had a green light and that the plaintiff had a red light, and all of the witnesses have no stake in the outcome and none have anything in their history to indicate that they would lie. Suppose the defendant moves for summary judgment and, in response, the plaintiff proffers a single witness who says that the other witnesses are incorrect and that in fact the defendant ran the red light and the plaintiff had the right of way – should the case be allowed to go to trial? Suppose the plaintiff’s witness was color blind, had a history of lying, or was a good friend of the plaintiff?
II. Settlement

Reading: FRCP 16 and 68

Reading: Note 1, HTFM 1030-31; Notes 1-7 HTFM 1037-43; Notes 1-3, HTFM 1053-56

TOPIC AREA SEVEN: TRIAL

Note: The Seventh Amendment to the US Constitution provides that a right to a jury trial in common law for amounts more than $20, “shall be preserved . . . and that no fact tried by a jury, shall be otherwise reexamined by any Court of the United States [other] than according to the rules of the common law.” Although this might seem to say that one is entitled to a jury trial in any case for an amount more than $20, it does not actually say that – it says that the right in common law suits shall be preserved, meaning that the jury trial right is to remain as it was at the time of the framing of the bill or rights in 1791, as opposed to creating any new right to a jury trial.

State constitutions also have provisions addressing the right to a jury trial in a civil case. But note: The Supreme Court has never held that the Seventh Amendment applies in state court, unlike most of the provisions of the bill of rights.

I. Pretrial Conference and Order

Reading: FRCP 16, 26(a)(3); all notes, HTFM 1060-62

II. Right to Jury Trial

Reading: Notes 1-3, HTFM 1062-65

A. Scope of the Jury Trial Right

Reading: Beacon Theatres (maj opinion only) and notes 1 and 4, HTFM 1069-74, 1077, 1079

Reading: Chauffeurs and all notes, HTFM 1082-1095

Reading: Note 2, HTFM 1082; notes 2-4, HTFM 1098-99
B. Jury Selection

Reading: Introductory Comment, HTFM 1121; notes 1-3 1128-36; notes 1-5, HTFM 1142-46

III. Taking the Case From the Jury

Reading: FRCPs 50 and 59

Reading: Introductory Note, HTFM 1162, Notes 1-5 HTFM 1169-71; Introductory Note 1179-81, Note 2, HTFM 1189-90

Reading: Spurlin and all notes, HTFM 1190-98

Reading: Notes 1-5, HTFM 1202-1205

IV. The Judgment and Other Post-Judgment Motions

Reading: FRCPs 54, 58 and 79 and all notes, HTFM 1216-1218

Reading: FRCP 60 and notes 2, 3, 4 and 5, HTFM1219-20

TOPIC AREA EIGHT: PRECLUSIVE EFFECT OF PRIOR ADJUDICATION

Introductory Note: In litigation, parties generally get one bite at the apple. If Lennon sued McCartney for breach of contract and won, McCartney can’t typically retry the same suit; same idea if Lennon lost, he cannot typically sue again. But the issue is not always so straightforward.

We’ll deal with a number of complications regarding the effect of prior judgments in this section. Some include issues of what actually counts as a prior adjudications – suppose Lennon lost because he sued in the wrong court or the judge threw the case out before trial? What if Lennon sued for breach of one aspect of the contract but not another aspect, can he come back and sue on the other part if he won the first time, or lost the first time? Or suppose Moe sues Homer, claiming that Homer’s dog bit Moe, and one issue in the case was whether Homer actually owned the dog in question. If it is determined at trial that in fact Homer did own the dog, what if there is a subsequent suit between Moe and Homer over another dog bit. Can Homer continue to argue that he did not own the dog, or is that matter already settled by the prior suit? What if Ned then sues Homer over the
dog bite after the suit by Moe – can Ned say that it has already been determined in a prior suit that Homer owned the dog, so that Homer is barred from arguing that he did not own the dog in Moe’s suit against Homer?

Add'l Note: Pay particular determination to terminology. The term *res judicata* is often used informally to refer to any type of preclusion issue. But more specifically *res judicata* is used to refer to the effect of an adjudication between the same parties on *claims* that were adjudicated or could have been adjudicated. *Collateral estoppel* on the other hand refers to the bar to reconsidering a particular issue that was decided in a prior suit. In modern parlance, *Res Judicata* and Collateral Estoppel are often referred to respectively as Claim Preclusion and Issue Preclusion.

A. Background

   Reading: Introductory Note, HTFM 1223-24

B. Preclusion Between the Same Parties

   1. Claim Preclusion

   Reading: *Davis* and all notes HTFM 1231-42

   Reading: *Staats* and all notes HTFM 1242-48

   2. Issue Preclusion

   Reading: Introductory Note HTFM 1248-49

   Reading: *Levy* and all notes HTFM 1249-56 and notes 4-7, HTFM 1262-63

   3. Identity of Parties

   Reading: *Taylor* and all notes 1263-79

C. Preclusion Against Other Parties (where one of the parties to a subsequent suit was not party to a prior suit)

   Reading: Introductory Note 1279-80

   Reading: *Parklane* and all notes 1280-96