

Civil Procedure Excerpts (II)



Professor Keith Rizzardi

The Exceptions to Supplemental Jurisdiction



Explain the cross references in 28 USC §1367:

IN A DIVERSITY CASE

THE PLAINTIFF CANNOT USE SUPP JDCTN TO MAKE
CLAIMS AGAINST NEW PARTIES...

Rule 14: 3rd Party Practice

Rule 19: Required joinder

Rule 20: Permissive joinder

Rule 24: Intervention

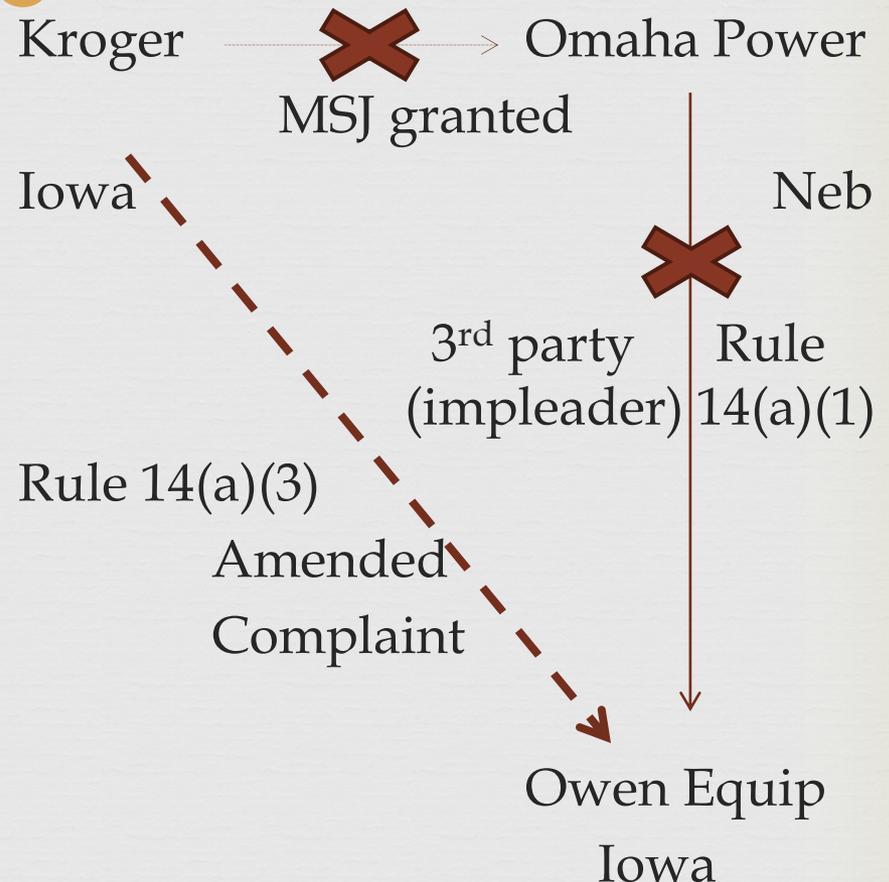
Owen Equip. v. Kroger, 437 U.S. 365 (p.737)

Same nucleus of operative fact?

Subject matter jurisdiction?

Supplemental jurisdiction?

Discuss



Owen Equip. v. Kroger, 437 U.S. 365 (p.737)

Follow the exceptions and the cross-references!

P did not sue D at first to gain federal diversity jurisdiction.

Can't later amend and claim supplemental jurisdiction.

No federal jurisdiction! See 28 USC 1367(b)

1. Puts limits on the stretching of the Constitution
2. Puts limits on Plaintiffs gaming of diversity jurisdiction

NOTE: Harsh. Ms. Kroger's verdict wiped out!

D Caterpillar wins? No problem. Fed court jdctn was OK.

P Kroger wins? Big problem. Fed court jdctn not OK.

Personal jurisdiction



Due process & territorial limits
Coming soon: long arm statutes

Jurisdictional distinctions



Subject matter jurisdiction

✧ A court must have the authority to hear a type of legal dispute.

Personal jurisdiction

✧ A court must have the authority to require a party (defendant) to appear in the forum and to defend the action there.

Due process for the FEDS



U.S. Constitution, Amendment V.

∞ No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

Due process for STATES



U.S. Constitution, Amendment XIV, Section 1.

☞ All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws.

Pennoyer v. Neff



Collateral Attack

- Relitigating issues by contesting court decision (default judgment) in later case enforcing that judgment

Full Faith & Credit Clause (p.153)

- U.S. Const., Art. IV, Sec. 1
- Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.

Pennoyer v. Neff



Two principles of public law (& territoriality):

every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.

~~no State can exercise direct jurisdiction and authority over persons or property without its territory~~

Prof. Crump's PJ Categories



1. The territoriality concern?

☞ Is it property, or a person, within the state boundaries?

2. The distant forum concern?

☞ Was it fair to bring Neff (from California) into Oregon court?

3. The notice concern?

☞ Did the defendant know, based on proper personal service, or was it constructive (publication) or substituted (3rd party)

4. The long arm?

☞ Does the state law authorize the forum to assert jurisdiction over the defendant, or does it over-reach?

Internat'l Shoe v. Wash.



Minimum contacts test?

- ☞ Due process requires that a defendant subject to a court's jurisdiction, but not present in the territory, must have certain minimum contacts such that maintenance of the suit *does not offend traditional notions of fair play and substantial justice*.

Factors considered? (p.167-68)

- ☞ Continuous
 - ☞ Systematic
 - ☞ Casual
 - ☞ Single
 - ☞ Isolated
- ↑ likely
↓ unlikely
- ☞ Party received benefit & protections of state laws
 - ☞ Purposeful availment

Calder v. Jones:

Plaintiff's (winning) Argument



Core Facts

- ☞ Abundant contacts
- ☞ 600,000 magazines
- ☞ Travels to California
- ☞ Calls to, sources in CA
- ☞ Article intended tortious injury in CA, the focal point of story

Legal analysis

- ☞ Shoe:
 - ☞ Yes, minimum contacts
 - ☞ Sufficient & systematic contacts with CA, not merely casual or isolated
- ☞ VW:
 - ☞ Fair and reasonable b/c reporter should anticipate being haled into CA court to answer for article

Burger King v. Rudzewicz



Due process?
Minimum contacts?
Purposeful availment?

- ❧ Contract
- ❧ Consent
- ❧ Miami training
- ❧ Affiliation with BK
- ❧ Sophisticated people
 - ❧ Lawyers & accountants
- ❧ No duress

DISSENT

- ❧ Unfairness
- ❧ Regional office negotiations
- ❧ Financial surprise
- ❧ Uneven bargaining power
- ❧ Impaired witness access

Walden v. Fiore

9th Circuit Analysis



The Court of Appeals found minimum contacts:

- ✧ Petitioner's knowledge of respondents' "strong forum connections."
- ✧ Respondents suffered foreseeable harm in NV;
- ✧ Respondents' NV attorney contacted petitioner in Georgia;
- ✧ the cash seized in Georgia "originated" in NV;
- ✧ funds eventually returned to respondents in NV

Walden v. Fiore

SCOTUS Analysis (9-0)



- ❧ 9th Circuit improperly attributes a P's connections to the D
- ❧ Also makes those connections "decisive"
- ❧ Walden's conduct had nothing to do with Nevada itself.
- ❧ Due process analysis is for the DEFENDANT (not P).

Asahi Metal v. Superior Court of California, 480 US 102 (1987)

Stream-plus



Part II.B

- ❧ The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state.
- ❧ Additional conduct?
 - ❧ Advertising, designing, establishing, marketing,
 - ❧ Awareness not enough
 - ❧ Create control employ
- ❧ Reasonableness factors for exercise of jurisdiction are not satisfied.
- ❧ Factors?
 - ❧ Burden on D
 - ❧ State interests
 - ❧ P interests & injury
 - ❧ Judicial efficiency
- ❧ How many votes?

Asahi Metal v. Superior Court of California, 480 US 102 (1987)



Brennan, concurring

Stevens, concurring

Stream of commerce, by itself, is enough to establish minimum contacts. As long as marketed, the lawsuit is not a surprise.

- An examination of minimum contacts is not always necessary;
- The (un)reasonableness finding alone justifies reversal.
- P.S. stream-plus is met because Asahi annual sales & units
- How many votes?

J.McIntyre Machinery v. Nicastro, 564 US 873 (2011)(p.105)



Justice Kennedy Bottom line

- ❧ No PJ because no minimum contacts, machine not purposefully directed...
- ❧ contacts with USA not NJ
p110 p106

Breyer & Alito

- ❧ Opinion goes too far...
What does it mean to “target” the globe?

Ginsburg

- ❧ D brochure: “used throughout the world” & NJ is industry hotbed.
- ❧ Tradeshows & sales in whole USA
- ❧ But no suit in part of USA?

Civil Procedure



General jurisdiction

Relatedness

General or specific jurisdiction?

See *International Shoe*... pp. 82-82



**Single, isolated,
occasional, or
casual contacts**

**Systematic
& continuous
contacts**

Specific jurisdiction

*Contacts give rise
to the claim*

General jurisdiction

*Contacts unrelated
to the claim*

BOX "A" MAYBE: Specific Jurisdiction <u>might</u> or <u>might not</u> exist.	BOX "B" EASY: Specific Jurisdiction <u>likely does</u> exist.
BOX "C" EASY: General Jurisdiction <u>does not</u> exist.	BOX "D" MAYBE: Much more than "minimum contacts" <i>Essentially at home!</i>

Daimler AG v. Bauman, 571 U.S. ___ (2014) (p.115)

☞ “The inquiry is not whether a foreign corporations in forum contacts can be said in some sense to be systematic and continuous; it is whether that corporations affiliations with the state are so systematic and continuous as to render it essentially at home.

☞ “Neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principle place of business there.”

*Bristol Myers Squibb v.
Superior Court of California*



Specific jurisdiction = relatedness?

- ❧ Requires an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State.
- ❧ If no such connection exists, specific jurisdiction is lacking regardless of defendant's unconnected in-state activities.

What are the out-of-state plaintiff's going to do?

Transient Presence Jurisdiction



Tag, you're it.

Burnham v. Superior Court, 495 US 604 (1990)



Scalia Opinion (4)

Return to Pennoyer

- ⌘ Traditional notions of fair play & substantial justice?
- ⌘ Physical in-state presence = state court jurisdiction
- ⌘ Reasonable expectation

Stevens, Concurring (1)

- ⌘ Everyone overbroad
- ⌘ Reasonableness met here

Brennan Opinion (4)

- ⌘ Voluntary presence supports jurisdiction, not ipso facto!
- ⌘ All assertions of jurisdiction require due process
- ⌘ Visit a state, risk state power
- ⌘ Voluntary presence
- ⌘ Proper service

The Zippo test



Minimum contacts and the three types of websites

- ❧ Interactive websites that elicit information & sales (likely)
- ❧ Interactive websites that allow for exchange and posting of content (unknown)
- ❧ Passive websites (unlikely)

**Purposeful
Availment!**

Due Process, Notice & Service



Notice & Service of Process



Notice

❧ **Announcement** of court authority over a defendant through initial papers.

Service

❧ **Methods** by which statutes and rules allow litigants to inform the defendant of the suit.

Process

❧ **Substance** of the papers that inform defendant of the nature of the case, including the needed steps to defend against it.

Pennoyer v. Neff:

Important concepts re: notice



-
- ❧ In rem jurisdiction?
 - ❧ Attachment?
 - ❧ **Constructive** service?
 - ❧ **Extraterritoriality**?
 - ❧ **Substituted** service
- ❧ A courts power over property, distinct from the person.
 - ❧ The process of including property in a lawsuit for transfer to a creditor.
 - ❧ The use of a publication as a way to notify a defendant of a lawsuit.
 - ❧ The extension of power, such as the authority of a court or law, outside the usual jurisdictional boundaries.
 - ❧ Notification through service of a third person in accordance with law.
-

Mullane v. Central Hanover Bank, 339 US 306 (1950)



In the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits, but...

✧ An elementary and fundamental requirement of **due process** in any proceeding which is to be accorded finality is ***notice reasonably calculated***, under all the circumstances, ***to apprise interested parties*** of the pendency of the action and afford them an opportunity to present their objections.

Service of process



- ⌘ Process service must be >18 and not party to suit
- ⌘ Service within 90 days of filing complaint (extend for good cause)
- ⌘ Service on corporation through officers or agents – but not when out-of-state!



Service by email?



Rule 4 Complaint

- ❧ Rule 4(e)(1) “following state law for serving a summons...”
- ❧ Rule 4(f)(3) “by other means not prohibited by international agreement, as the court orders.”

Rule 5 Other documents

- ❧ Rule 5(b)(2)(E) “sending it by electronic means if the person consented in writing...”
- ❧ Rule 5(c)(3) “A court may, by local rule, allow papers to be filed, signed, or verified by electronic means...”

Caution re: service



- ⌘ Complaint AND summons
 - ⌘ Summons with names, dates, clerk signature
 - ⌘ Served by person over 18, not a party

- ⌘ Substituted service
 - ⌘ “Suitable age and discretion”
 - ⌘ “Usual place of abode” & invalid recipients (attorney?)

- ⌘ Request for waiver must be answered

Joe (from N.D. GA) has an auto accident with Dina (from S.D.Fla) and Devin (from N.D.Fla) in Atlanta. Alleging damages in excess of \$75,000, Joe sues for injuries in the U.S. District Court. *In which court is venue proper?*



- A. Any federal district in Florida or Georgia.
- B. Any federal district in Florida.
- C. Any federal district in Georgia.
- D. Only the U.S. District Court for the Southern District of Florida.
- E. Only the U.S. District Court for the Northern District of Florida or the U.S. District Court for the Southern District of Florida.
- F. **The U.S. District Court for the Northern District of Georgia, the U.S. District Court for the Northern District of Florida or the U.S. District Court for the Southern District of Florida.**

Transfers?



Please?

28 U.S.C. §1404

⌘(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

Forum non conveniens



Beyond domestic litigation...
into a global economy

Piper Aircraft v. Reyno

454 US 235 (1981)



Factual events, parties & geography

- ✧ Plane crash (Scotland)
- ✧ 5 decedents (Scottish)
- ✧ Owned & operated by Air Navigation, McDonald (UK)
- ✧ Plane built by Piper (PA)
- ✧ Prop built by Hartzell (OH)
- ✧ Wreckage in hanger (UK)
- ✧ Probate court (California)
- ✧ Wrongful death lawsuit by Renyo (Administrator)
 - ✧ Filed CA state court, removed to C.D.Cal., transferred to M.D.Pa)

Piper Aircraft v. Reyno

454 US 235 (1981)



Citing *Gulf Oil v. Gilbert*

Courts have inherent power under Article III to dismiss properly filed actions if necessary to protect defendants and courts from abusive tactics by plaintiffs...

Some plaintiffs seek not simply justice but perhaps justice blended with some harassment.

P's choice of forum UNLESS P's choice of forum would "establish... oppressiveness and vexation to a defendant... out of all proportion to a P's convenience..."

Piper Aircraft v. Reyno

454 US 235 (1981) (“balancing” test)

Public interest factors

- ❧ Court congestion
- ❧ Administrative difficulties
- ❧ Local interests
- ❧ Conflicts of laws
- ❧ Foreign laws
- ❧ Unfairness of burdening local jurors

Private interest factors

- ❧ Access to proof
- ❧ Ability to compel the unwilling
- ❧ Possibility of view of premises if appropriate
- ❧ Other factors re: “easy, expeditious and inexpensive”

Don't skip footnotes. FN 14 on page 138.

The Erie doctrine



Constitutional law meets civil procedure, again
DUE PROCESS...
FEDERALISM...

Constitutional Tensions



- ❧ Congress can make federal laws as necessary.
 - ❧ Art. I, Sec. 8
- ❧ Courts can hear cases based on federal laws.
 - ❧ Art. III, Sec. 2
- ❧ Federal laws are supreme.
 - ❧ Art. IV, Cl. 2
- ❧ Other powers are reserved to the states.
 - ❧ 10th Amendment
- ❧ States make laws, too.

Erie RR v. Tompkins



Rule of Decision Act:

“laws of the states” shall be regarded as rules of decision in civil actions

- Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state.
- State law comes from legislature in a statute or decisions of the highest court
- There is no federal general common law.

Hanna v. Plumer



The Rules Enabling Act...

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings and motions, and the *practice and procedure* of the district courts of the United States in civil actions...

Such rules shall not abridge, enlarge or modify *any substantive right* and shall preserve the right of trial by jury

Which state law?



A state's choice-of-law rule is considered a substantive rule that the federal district court is bound to apply.

So the federal district court will apply the choice-of-law rule that the state court would apply in the state where the federal court sits.

Choice of law: Restatement (2nd) of Conflict of Laws, §146 (1971)



⌘ Ex. In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship [contract, choice of law, etc]