

Updates for
Cross: *Civil Procedure Keyed to Yeazell's Sixth Edition,*
Emanuel Law Outline, © 2004

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Key for updates below: Chapter.Section.Subsection(s) in the Emanuel Law Outline.

3.III.A.5.b.i.: replace with following text:

- i. Domicile vs residence.** Although §1391 speaks in terms of residence rather than domicile, where a person resides in one state but is domiciled in another, courts use the state of domicile instead of the state of residence when determining venue.

4.V.C.2.a.iii.(b) at top of page: replace with following text:

- (b) Situations not covered by the exception:** In *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S. Ct. 2611, the Supreme Court held that supplemental jurisdiction is available in a case where multiple plaintiffs sue a defendant in diversity, but not all the plaintiffs satisfy the amount in controversy requirement. However, the Court also indicated that the holding would have been different if there was not complete diversity.

4.V.C.2.b. Example: at the end of the first paragraph in the Example, add the following paragraph:

See also *In re Ameriquest Mortgage Co. Mortgage Lending Practices Litigation*, 2007 U.S. Dist. LEXIS 70805 (N.D. Ill. 2007). In that case, Barbara Skanes claimed that house appraiser Douglas Trevino inflated the value of Skanes' property to increase the loan amount for which she could qualify, and increase Ameriquest's potential profit. The court held that supplemental jurisdiction is proper where there is a sufficient nexus between state and federal claims, and statutory discretionary factors do not weigh in favor of a decision to decline to exercise supplemental jurisdiction. Compare *Szendrey-Ramos v. First Bancorp*, 2007 U.S. Dist. LEXIS 74896 (D.P.R. 2007). A bank's general counsel was fired after finding that some bank officials violated the bank's code of ethics. She sued under Title VII of the 1964 Civil Rights Act for discrimination and retaliation, and under Puerto Rico law for wrongful discharge, defamation, tortious interference with contract, and violations of the Puerto Rico constitution. The court held that a court may decline to exercise supplemental jurisdiction where (1) the state law claims raise complex or novel issues, or (2) the state law claims substantially predominate over the federal claim.

4, Answer 33: replace with following text:

The court will deny the motion to dismiss. *Buch v. Hord* qualifies for diversity jurisdiction. As before, *Smith v. Hord* does not qualify of its own right. However, the *Smith v. Hord* claim will qualify for supplemental jurisdiction under these circumstances. The requirements of §1367(a) are satisfied (the analysis is the same as in Problem 32), and because §1367(b) does not mention claims by plaintiffs who join under Rule 20, that subsection is not a bar. The facts here are similar to the *Exxon* case.

Incidentally, because the facts specify that the \$100,000 is a separate fund, there is no possibility that the parties can aggregate their claims.

6.V.C.2 Examples: add to the end of the paragraph:

See also *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294 (5th Cir. 2004). In that case, mortgage company employees sought to avoid arbitrating their claims under the Fair Labor Standards Act, even though they signed contracts before employment began in which they agreed to arbitrate such claims. The district court granted the mortgage company's motion to compel arbitration. The court held that arbitration agreements providing that FLSA claims must be arbitrated are not per se unenforceable on the grounds that the employees' right to a judicial forum for FLSA claims cannot be waived. There is a strong presumption in favor of arbitration and a party seeking to invalidate an arbitration agreement bears the burden of establishing its invalidity. But compare that ruling to that in *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778 (9th Cir. 2002). In that case, Misty Ferguson sued Countrywide Credit Industries Inc. and her supervisor for sexual harassment, retaliation, and hostile work environment, and Countrywide moved to compel the matter to arbitration. The district court denied Countrywide's motion. The court held that an arbitration agreement is unconscionable, and therefore unenforceable, where it is a prerequisite to employment, job applicants are not permitted to modify the terms of the agreement, and the terms are one-sided, favoring the employer.

7.III.E.3: add section:

a. Recent case law: Recent case law indicates a willingness on the part of the Supreme Court to apply heightened standards to antitrust claims. See, e.g., *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007). In that case, the Supreme Court held that in order for a complaint to survive dismissal on the pleadings, the complaint must include enough facts to state a claim to relief that is plausible on its face. In this case, in order to state an antitrust claim under the Sherman Act, the complaint must state enough factual matter to suggest that an agreement

between the alleged conspirators was made. That the claim is conceivable is not enough. It must be plausible. See also *Jones v. Block*, 127 S. Ct. 910 (2007). Lorenzo Jones was a prisoner in Michigan. He sued the state after he suffered injuries in custody when the staff refused to reassign him to work he could perform in light of his injuries. The court held that a plaintiff need not plead and demonstrate exhaustion of administrative remedies in the complaint. The Federal Rules of Civil Procedure do not require that exhaustion be pleaded, and Rule 8(c) identifies a non-exhaustive list of affirmative defenses that must be pleaded in response, leaving room for exhaustion as an affirmative defense.

7.V.A. *Example. replace “Even though the mistake was ... the actual manufacturer” with following text:

By the time the defendant made this discovery, the statute of limitations had expired, which meant plaintiff could not sue the actual manufacturer. Notwithstanding this hardship to plaintiff, the court allowed the amendment. Given that the defendant had not acted in bad faith, the court held that only plaintiff should suffer from the parties’ joint mistake concerning the identity of the manufacturer.

8.VII.C: add subsection 6, as follows:

6. Preservation of Evidence. A party's duty to preserve material evidence extends to the period before litigation, when a party reasonably should know that the evidence may be relevant to anticipated litigation, and therefore the object of discovery. *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001).

8, Answer 105, first line:

Replace “26(g)” with “30(g)”.

13.I.C.2, third line: replace with following text:

* **2. Common law rule:** If the rules do not require a defendant to bring a particular counterclaim in suit one, the party who was the defendant is free to bring the claim in suit two unless it falls within the narrow common law compulsory counterclaim rule. The common law rule asks whether the claim in the second case would nullify the judgment in the first case. If the claim would nullify the judgment, it is barred. However, if the claim was a pure counterclaim, the common law rule allows the party to bring it in the

second case. *Martino v. McDonald's System, Inc.* 598 F.2d 1079 (7th Cir.), cert denied, 444 U.S. 966 (1979).

13.I.C.2.Example, first full paragraph: insert following as third sentence:

Smith demands a refund of the price.

13.I.C.2.Example, second full paragraph: replace last sentence with following:

Jones's negligence does not nullify Jones's breach of contract claim.

14.II.A.2.b: add the following to the end of the paragraph:

See, e.g., *Larson v. American Family Mutual Ins. Co.*, 2007 U.S. Dist. LEXIS 41864 (D. Colo. 2007). The Larsons sought to add their former lawyer to a complaint they filed against their insurance company, which failed to pay a house fire claim. Their lawyer at the time was in private discussions with the insurance company about the possibility of representing the company. The court held first that an amendment to a complaint seeking to join a party to a lawsuit that is filed one month after complainant confirms the party's involvement in the lawsuit is timely filed under the Federal Rules of Civil Procedure. The court also held that all persons may be joined in one action as defendants if claims against them arise out of the same transaction or occurrence as the other claims.

14.II.E.2.b.ii(a)3: replace with following:

3. Rule 19(a) compared: The notion of an interest is the same under Fed. R. Civ. P. 24(a) as under Fed. R. Civ. P. 19(a). *Glancy v. Taubman Centers, Inc.*, 373 F.3d 656 (6th Cir. 2004).