To: Civil Procedure Professors  
From: Jack H. Friedenthal, Arthur R. Miller, John E. Sexton & Helen Hershkoff  
Date: July 2019  
Re: 2019 Update Memo

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July 2019

Thank you for using our casebook in your first-year course in Civil Procedure. This Update Memo, designed to accompany the casebook and the 2019–2020 Rules Supplement (which was shipped earlier this month), offers additional materials that we hope will enhance your teaching and classroom experience. This Update Memo offers summaries of lower court opinions that are relevant to the major topics taught in the first-year course. These cases are not intended to provide a survey of the last year’s developments, although they highlight important issues and in some instances suggest trends. Rather, we have chosen to highlight these cases because the facts illustrate important rules or principles, the decision leaves open an important legal question, the dispute holds inherent interest, or the decision provides an exceptionally clear statement of the governing rules or circuit divisions. We hope you find these additional cases helpful as a basis for practice problems, as starting points for examination questions, and as insight into judicial practice. (Generally, our summaries do not include internal pincites.) In addition, we include summaries of amendments to procedural rules and statutes pertinent to the 1L course. Appended to the Update Memo is an edited version of the U.S. Supreme Court’s decision in Home Depot U.S.A., Inc. v. Jackson (Rules Supplement, p. 392) which can be distributed to students or attached to an updated Syllabus.

Some of you may wish to integrate online assessment tools into your course. Online tools are included with the CasebookPlus platform. They consist of a bank of multiple-choice questions with feedback. They are available at: http://home.westacademic.com/casebookPlus/faculty/. In addition, please keep in mind that the Teacher’s Manual for the comprehensive and for the compact versions of the Twelfth Edition can be downloaded from the casebook website: http://www.fmshcivilprocedure.com/.

This Update Memo also includes an Errata Sheet that can be distributed to students or attached to a Syllabus. We apologize for these errors; please keep us informed of any that we did not yet catch. We also hope that you will bring suggestions for improvement to us, and alert us to any of your own articles that might be included in future editions of the casebook. Thank you again for using our casebook.

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The 2019–2020 Rules Supplement contains the Federal Rules of Civil Procedure (including the abrogated Forms), comparative state rules, a set of local rules, portions of the Federal Rules of Appellate Procedure, a rich selection of federal statutes and constitutional provisions pertinent to the first-year course, an illustrative litigation problem with sample court papers, and a litigation flow chart, all of which we hope will be helpful to your course preparation. The rules are all updated to reflect the latest changes. As well, the Rules Supplement includes summaries of recent Supreme Court decisions; these cases for the most part are incorporated in the chapter-by-chapter discussion.

Recent Court Decisions of Interest Organized by Casebook Chapter

We include below summaries of various decisions that may be of interest to you when teaching the 2019–2020 course. We present the cases in the order in which they might be integrated into readings assigned from the casebook (comprehensive edition).

Chapter 1. A Survey of the Civil Action

The Concern and Character of Civil Procedure

*Biestek v. Berryhill* (Rules Supplement, p. 388), as a technical matter addresses whether an expert’s testimony can, alone, constitute substantial evidence to support an administrative decision involving Social Security benefits, even if the expert refuses a request to provide supporting data. However, the case also touches on many of the important themes of the 1L course: the role of the judge (in this case, an administrative law judge under a statutory duty to develop the record); the importance of competent counsel; and the ways in which procedural missteps can cause parties to forfeit rights and benefits. The dissenting opinion by Justice Gorsuch, on the dangers of government secrecy, provides a strong endorsement of due process and the rule of law. Some of you might want to include the decision in an introductory class on adversarial justice.

Chapter 2. Jurisdiction over the Parties or Their Property

Specific Jurisdiction

The U.S. Supreme Court did not decide any blockbuster, or indeed any, case on personal jurisdiction this term. However, the minimum contacts analysis of *International Shoe* (Casebook, p. 92) and *Hanson v. Denckla* (Casebook, p. 101) figured prominently in the Court’s decision in *North Carolina Department of Revenue v. The Kimberley Rice*
**Kaestner 1992 Family Trust, 588 U.S. ---, --- S. Ct. --- (2019), involving the scope of a state’s power to tax. The case arose when North Carolina tried to tax the income earned by a family trust. Though the trust’s beneficiaries were residents of the state, the trust’s grantor was a New York resident, New York law governed the trust, and the trust’s asset custodians were in Massachusetts. The trust earned no income in North Carolina and at no point during the tax period was a trustee a North Carolina resident. The Court found that the presence of in-state beneficiaries in this instance was insufficient to satisfy the due process requirement of minimum contacts with the state. The Court made clear, however, that a beneficiary’s in-state contacts could be relevant to the analysis of minimum contacts depending on the extent of the beneficiary’s “right to control, possess, or receive trust assets.” In the 1L course, mention of the decision could serve a number of purposes. It highlights the multiple purposes of the due process clause. It reminds students that both *International Shoe* and *Hanson* concern issues in addition to personal jurisdiction. And it identifies some of the factors that could, potentially, figure into the Court’s future analysis of purposeful availment for jurisdictional purposes.

In *Carmona v. Leo Ship Management*, 924 F.3d 190 (5th Cir. 2019), the Fifth Circuit considered whether a federal court in Texas had personal jurisdiction over a Philippine corporation with its principal place of business in Manila. The plaintiff sued the corporation after being injured when unloading pipes made by the defendant from a ship owned by another company while in Texas. The appeals court affirmed the district court’s dismissal for lack of specific personal jurisdiction not because the defendant did not purposefully avail itself of benefits in the Texas forum, but rather because one of the plaintiff’s claims did not stem from the defendant’s contacts with the state (the other claims were sufficiently connected to the defendant’s contacts). The facts of the case provide a good example of the purposeful availment test in action, and highlights an issue that some students find confusing or tend to overlook—that the claims must be connected to the contacts with the forum.

A number of recent appeals decisions address *Calder* (Casebook, p. 123) and how the “effects test” ought to apply in light of *Walden v. Fiore* (Casebook, p. 156):

In *Estate of Klieman by and through Kesner v. Palestinian Authority*, 923 F.3d 1115 (D.C. Cir. 2019), the D.C. Circuit held that the district court did not abuse its discretion in reconsidering its prior ruling, in light of *Daimler* (Casebook, p. 164), that it could exercise general jurisdiction over defendants, and that specific jurisdiction could not be exercised either as a matter of due process or consent jurisdiction under the Anti-Terrorism Act. Defendants were the Palestinian Authority and the Palestinian Liberation Office, and the suit arose from attacks during the Second Intifada on an Israeli bus in the West Bank, killing many, including Esther Klieman, a U.S. citizen, whose estate filed suit in federal court in the United States.

As to general jurisdiction, the appeals court first considered and rejected the argument that defendants had forfeited their jurisdictional objection by their delay in seeking reconsideration. As to the merits of the objection, the appeals court concluded that defendants were not “at home” in the forum. Although the court acknowledged that
in exceptional circumstances general jurisdiction nevertheless might be valid, it did not seriously explore this basis. Turning instead to specific jurisdiction, the appeals court rejected plaintiff’s argument that a link existed between the killing of Klieman “and the furthering of PA/PLO goals in the United States,” explaining that “[e]ven if some terrorist acts carried out in Israel or the West Bank were used by defendants to influence U.S. policy, nothing in the record indicates that this attack fills that bill.” The court also found jurisdiction was not valid under Calder’s effects test, read in light of Walden:

In glossing Calder’s “effects test,” the Walden Court stressed defendants’ intentional contacts with the forum. The “crux of Calder was that the reputation-based ‘effects’ of the alleged libel connected the defendants to California, not just to the plaintiff.” **B**ecause publication to third persons is a necessary element of libel ... the defendants’ intentional tort actually occurred **in** California.” **T**hus the “effects” of defendants’ libelous article—reputational harms arising in California—“connected the defendants’ conduct to California, not just to a plaintiff who lived there.” **W**alden

Unlike the tort in Calder, which had “occurred **in** the forum, **the** planning, carrying out, and occurrence of Klieman’s killing all took place in the West Bank. And the emotional suffering felt by forum residents and (perhaps) foreseen by the attackers cannot without more qualify as the relevant “effect.” The Walden Court rejected such an approach, reasoning that it would “impermissibly allow[ ] a plaintiff’s contacts with the defendant and forum to drive the jurisdictional analysis.” **I**nstead, “[t]he proper question is ... whether the defendant’s conduct connects him to the forum in a meaningful way.” **H**ere we lack such allegations.

In Power Investments v. SL EC, --- F.3d ---, 2019 WL 2529047 (6th Cir. 2019), the Sixth Circuit reversed the district court’s dismissal for lack of personal jurisdiction. The relatively simple facts are as follows: the defendant, a Missouri citizen, wanted to buy a power plant and secured financing from Power Investments. Over time, Power Investments became suspicious about defendant’s use of the loaned funds, and filed a lawsuit in state court for fraudulent misrepresentation and unjust enrichment. The defendant then removed to federal court and moved to dismiss for lack of personal jurisdiction. The Sixth Circuit considered the import of Calder and Walden and decided that the defendant had sufficient minimum contacts to establish jurisdiction, finding that the facts looked “more like Calder than Walden.”

Calder’s effects test, in light of Walden, was also central to a claim of defamation via the Internet in Vangheluwe v. GOT News, 365 F.Supp.3d 850 (E.D. Mich. 2019). The district court considered whether there was jurisdiction over Internet users in California, Indiana, and Wisconsin who allegedly defamed plaintiff by wrongly reporting them as the driver and owner of the car that killed Heather Heyer during the 2017 “Unite the Right” rally in Charlottesville. Quite apart from the topical importance of the dispute, the
decision is interesting for its discussion of social media practices that did not exist a decade ago:

Doxing, short for “dropping documents,” is the practice of disclosing a person’s identifying information (e.g., their home address) on the Internet to retaliate against and harass the “outed” person. This opinion addresses an issue of first impression: when a defendant drops a plaintiff’s documents on the Internet, does the defendant’s doxing amount to constitutionally minimum contact with the state where the plaintiff resides? On the facts of this case, the Court finds that the defendant’s disclosure of the plaintiff’s home address on Twitter is the type of doxing that creates minimum contacts with the plaintiff’s home state.

The court concluded that to establish jurisdiction, the defamatory statements must involve the forum state beyond just being about someone from that forum or targeting a party defendant knew was a resident of the forum. The court explained that “merely posting a defamatory statement about the plaintiff online is not enough to hale the poster into the state where the plaintiff resides; instead, the poster’s conduct must have involved the plaintiff’s state in some additional way”:

Although this rule is derived from opinions issued before Walden **, the rule is entirely consistent with Walden’s interpretation of Calder. According to Walden, “mere injury to a forum resident is not a sufficient connection to the forum.” ** And addressing Calder specifically, the Supreme Court noted that the National Enquirer had “a California circulation of roughly 600,000,” that “[the] defendants relied on phone calls to ‘California sources’ for the information in their article,” and that the defendants “wrote the story about the plaintiff’s activities in California.” ** True, the injury was to Jones’ reputation “in the estimation of the California public” and so the tort actually occurred in California.” ** But it was the defendants’ tortious conduct in the forum—”combined with the various facts that gave the article a California focus”—that permitted the court in California to exercise personal jurisdiction. ** So pre- or post-Walden, there must be “something more” than just mere injury to the plaintiff in the forum.

Nationwide jurisdiction and Internet activity were at the center of Plixer International v. Scrutinizer GmbH, 905 F.3d 1 (1st Cir. 2018). The First Circuit affirmed the district court’s holding that the exercise of personal jurisdiction against a German corporation under Federal Rule 4(k)(2) did not offend the Due Process Clause. The jurisdictional question focused on how “online activities translate into contacts for purposes of the minimum contacts analysis,” and the appeals court specifically noted that “this is an area in which the Supreme Court has not yet had the occasion to give clear guidance, and so we deliberately avoid creating any broad rules.” Scrutinizer, the German corporation, runs a self-service platform that helps customers construct software, and Plixer, a Maine corporation, sued Scrutinizer in federal court for trademark infringement.
Using the purposeful availment test, the First Circuit concluded that Scrutinizer had voluntarily served U.S. customers and it had enough contacts with U.S. customers to put it on notice that it might be haled into U.S. court. The First Circuit explained:

This Court has twice addressed “virtual contacts,” but in cases whose factual scenarios are far-removed from this one. One baseline principle has emerged: a website operator does not necessarily purposefully avail itself of the benefits and protections of every state in which its website is accessible. * * * The district court held that Scrutinizer had not merely made its website available in the United States; it had used that website to engage “in sizeable and continuing commerce with United States customers.” Plixer, 293 F.Supp.3d at 242. As a result, Scrutinizer “should not be surprised at United States-based litigation.” Id. We agree.

Along the way, the appeals court discussed stream-of-commerce jurisdiction, unilateral contacts, voluntary availment of the benefits of the forum, the scope of the Court’s decision in Nicastro, and the Marks test:

The Supreme Court last considered personal jurisdiction over a foreign defendant in Nicastro. The Nicastro plurality would have permitted the exercise of jurisdiction “only where the defendant can be said to have targeted the forum.” * * * That is the same rule that Scrutinizer urges us to adopt. However, this rule did not command a majority on the Court and so is not binding here. * * * In Nicastro, Justice Breyer held that “resolving [the] case require[d] no more than adhering to [the Supreme Court’s] precedents.” * * * Justice Breyer found no jurisdiction under any of the Court’s precedents. There was “no ‘regular ... flow’ or ‘regular course’ of sales,” as required by the concurrences in Asahi * * *. And there was “no ‘something more’” that the Asahi plurality would have required * * *. Justice Breyer also criticized New Jersey’s test, which would subject a foreign defendant to jurisdiction so long as it “knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states.” * * *. We need not adopt such a broad rule as the New Jersey court’s to uphold the exercise of specific personal jurisdiction over Scrutinizer.

Ultimately, although a close call, we conclude that the German company could have “reasonably anticipated” the exercise of specific personal jurisdiction based on its U.S. contacts. * * * Scrutinizer’s voluntary service of the U.S. market and its not insubstantial income from that market show that it could have “reasonably anticipated” being haled into U.S. court.

This holding accords with Supreme Court precedent. In Keeton v. Hustler Magazine, the Supreme Court upheld the exercise of jurisdiction because
the magazine publisher defendant had “continuously and deliberately exploited the [forum] market.” * * * The magazine publisher had a nationwide market—it had not targeted the forum particularly—but the court held it should reasonably anticipate suit based on its “substantial number of” sales. Id.

The decision also provides a helpful survey of cases in the states and other federal circuits on when the “regular flow or regular course of sales” in the United States is sufficient to show purposeful availment. Finally, the decision raises an often overlooked issue: the timing of a defendant’s contacts with the forum. In particular, the court considered the fact that the defendant had, inexplicably, filed a U.S. trademark application, after the litigation had begun, and gave weight to the application in the jurisdictional analysis:

We have stated that “in most cases, contacts coming into existence after the cause of action arose will not be relevant.” * * *. But we made that statement in a suit where the plaintiff alleged medical malpractice. * * *. That discrete-in-time tort is unlike the alleged continuing “tortious” conduct at issue here.

General Jurisdiction

In DeLorenzo v. Viceroy Hotel Group, 757 Fed. Appx. 6 (2d Cir. 2018), the Second Circuit affirmed the district court’s dismissal for lack of general personal jurisdiction. The plaintiff, the guest of a hotel located in the British West Indies, brought suit in New York federal court against the hotel, its owner/operator, and the corporate hotel group that owned the neighboring hotel property and neighboring hotel, alleging sexual assault by an employee of the neighboring hotel. The court found that none of the defendants was “at home” in New York despite such contacts as ten percent of business coming from New York, retaining a PR firm in New York, and the use of a highly interactive website that plaintiff used while in New York. The Second Circuit found that these contacts were insufficient to satisfy general jurisdiction requirements, highlighting how difficult it is to get general jurisdiction since the “at home” requirement was handed down in Daimler.

Chapter 3. Providing Notice and an Opportunity to be Heard

Notice & Service of Process

The question of service of process upon a foreign nation (Casebook, p. 238) was raised in Republic of Sudan v. Harrison (Rules Supplement, p. 386), in which the Court, eight-to-one, held that service under the Foreign Sovereign Immunities Act requires the summons and complaint to go “directly to the foreign minister’s office in the foreign state”; service at the foreign state’s embassy in the United States not was not sufficient. At stake was a default judgment on behalf of sailors and spouses of sailors injured in the
2000 bombing of the U.S.S. Cole against the Republic of Sudan. Justice Thomas dissented. The divergent statutory readings offer a good problem in statutory interpretation. Although the specific service question is outside the scope of most 1L courses, the decision underscores the importance of service of process to the validity of a judgment. Students also can be asked to consider whether the lawsuit is now at an end, or whether plaintiffs can attempt to serve defendant consistent with the majority’s ruling.

In Morales-Gonzalez v. Sessions, 742 Fed. Appx. 120 (6th Cir. 2018), the Sixth Circuit considered whether immigration removal proceedings should be reopened for failure to provide adequate notice of the hearing. Plaintiffs—a Spanish-speaking father and his three-year-old daughter—were arrested at the border as they tried to cross from Mexico to the United States. The record showed that an agent had personally served the plaintiffs with two notice-to-appear forms and had allegedly explained to them in Spanish that the judge could order them to be removed if they failed to appear for their hearing. Later, an immigration officer mailed plaintiffs notice that a hearing would take place in Memphis, Tennessee, followed up by a second notice that stated the date and time of the hearing. The second notice was returned to the court as undeliverable. Both notices were sent to the address that plaintiffs had provided. The Sixth Circuit held that the plaintiffs’ due process rights were not violated: first, because they failed to notify the court of a change in address although required to do so; and second, because the agent’s Spanish-language explanation of the hearing was sufficient under the circumstances and written notice in Spanish was not required. The decision provides an interesting contrast to Jones v. Flowers (Casebook, p. 222, Note 7).

In Bell v. Pulmosan Safety Equipment Corporation, 906 F.3d 711 (8th Cir. 2018), the Eighth Circuit discussed the requirements for adequate service of process and reversed the district court’s entry of a default for lack of service of process, finding that a doorman was not a registered agent of the corporation and therefore could not accept notice, even though the defendant was a dissolved corporation and its agent for service had died and arrangements had not been made for a substitute agent. The court cited Fashion Page (Casebook, p. 237) and distinguished the facts. The case provides a solid teaching hypothetical on the mechanics for giving notice to a corporation.

Opportunity to be Heard

In Doe v. Baum, 903 F.3d 575 (6th Cir. 2018), a male student brought a civil rights action under 42 U.S.C. § 1983 against a university alleging that its disciplinary proceedings for sexual misconduct complaints violated the Due Process Clause because it did not require cross-examination of the alleged victim. Using the Mathews balancing test (Casebook, p. 256), the Sixth Circuit concluded that the student’s constitutional rights had been violated. This opinion clearly explains how to apply the balancing test and would be a good example to raise in class discussion. The Eastern District of Virginia declined to follow Baum in Doe 2 by and through Doe 1 v. Fairfax County School Board, --- F.Supp.3d ---, 2019 WL 2288439 (E.D. Va. 2019).
Chapter 4. Jurisdiction over the Subject Matter of the Action—The Court’s Competency

The Distinction between Jurisdiction and the Merits

Writing for the Court in *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1846 (2019), Justice Ginsburg addressed the difference between jurisdictional rules that determine a federal court’s power to hear a case and nonjurisdictional claim-processing rules, which “seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.” (This issue is discussed in the Casebook, p. 274, Note 7.) Title VII requires the filing of a charge with the EEOC within 180 days of an unlawful employment practice. The Court held that this was a claim-processing rule, which, unlike subject-matter jurisdiction, is waived as a defense if not timely raised. As the Court explained, federal courts exercise jurisdiction over Title VII claims under 28 U.S.C. § 1331; the charge-filing rule addresses a party’s procedural obligations. However, the fact that the rule is not jurisdictional does not make it nonmandatory, since defendant can raise the plaintiff’s failure as a “potentially dispositive defense” that “may rid them of the lawsuit against them.” Relatedly, the Supreme Court denied certiorari in *Graviss v. Department of Defense*, in which the Federal Circuit found that 5 U.S.C. § 7703(b)(1)(A)’s 60-day filing deadline for federal review of a Merit Systems Protection Board employment decision was a jurisdictional rule, and the plaintiff’s failure to meet the deadline meant that she could no longer seek judicial review. See *Fed. Educ. Ass’n Stateside Region v. Dep’t of Def.*, 898 F.3d 1222 (Fed. Cir. 2018), cert. denied sub nom. Graviss v. Dep’t of Def., 139 S. Ct. 2616 (U.S. 2019).

Removal and Federal Question Jurisdiction

*In re National Prescription Opioid Litigation* currently is a multidistrict litigation involving 1500 cases by government entities, Indian tribes, hospitals, third-party payors, and individuals against distributors and retailers of prescription opiate drugs. The Commonwealth of Kentucky filed one such suit, alleging only state law claims, and defendant Walgreens removed based on 28 U.S.C. § 1331 and the action was then consolidated with the MDL. Noting that the complaint did not on its face assert federal law claims, the court then inquired whether the suit was among the “special and small category” of cases under *Grable* (Casebook, p. 312) and *Gunn* (Casebook, p. 317) in which federal jurisdiction nevertheless lies. Defendant argued that the legal duties asserted by Kentucky arose under federal law. The court rejected that argument, explaining that the presence of overlapping state law duties meant that federal law could not necessarily be raised, and remanded. See *In re Nat’l Prescription Opiate Litig.*, 2019 WL 180246 (N.D. Ohio 2019).

Removal Jurisdiction and the Class Action Fairness Act

*Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743 (Rules Supplement, p. 392 and Appendix to this memo) illustrates the effects of claim structure on subject-matter
jurisdiction and on the ability for defendants to remove. The action began in a North Carolina state court when Citibank filed a debt collection action against George W. Jackson, alleging that he had failed to repay debts incurred in the purchase of a water treatment system using a Home Depot credit card. Jackson responded with a counterclaim, joining Home Depot and Caroline Water Systems as third-party class action counterclaim defendants, alleging violations of state consumer laws. Citibank dismissed its claims against Jackson, and Home Depot filed a notice of removal in federal court under the Class Action Fairness Act (CAFA). The Fourth Circuit found that Home Depot, as a third-party counterclaim defendant, was not a defendant entitled to remove under CAFA.

Writing for the five-Justice majority at the Supreme Court, Justice Thomas found that neither 28 U.S.C. § 1441 nor CAFA permits removal to federal court by a third-party counterclaim defendant. Justice Thomas pointed to the text of the removal statute, which authorized only removal for defendants of “civil actions,” not “claims.” The Court then concluded that authorizing removal for third-party counterclaim defendants under CAFA would create inconsistency, analogizing to the holding in Shamrock Oil & Gas Corp. v. Sheets (Casebook, p. 350), which stated that a counterclaim defendant who was the original plaintiff is not a “defendant.” Justice Alito, in dissent, argued that both § 1441 and CAFA authorized removal for defendants of “claims,” including third-party counterclaims, based on the underlying policy that removal should allow defendants access to a neutral forum.

Home Depot involved a permissive counterclaim in the class action context. In Viking Ins. Co. of Wisconsin v. Baize, 753 Fed. Appx. 549 (10th Cir. 2018), the Tenth Circuit considered whether a compulsory counterclaim provides an independent basis for federal jurisdiction in an interpleader action concerning insurance payments. In the amended petition for interpleader and declaratory relief, [the insurance company] asserted that Luke was entitled to $25,000 under the Policy’s bodily-injury coverage provision. Luke’s guardian claimed entitlement to an additional $25,000 under the Policy’s underinsured-motorist coverage. In addition, Ms. Baize and Mr. Smith filed counterclaims on their own behalf against [the insurance company arising from attempts to settle an insurance claim] for negligence, breach of contract, intentional and negligent infliction of emotional distress, knowing and reckless denial of claims without reasonable basis, and breach of the obligation of good faith and fair dealing. Although Ms. Baize and Mr. Smith did not initially make a specific monetary claim, they later characterized their counterclaims as compulsory and alleging an “amount in controversy in excess of $75,000,” * * *

In this procedural context, the Tenth Circuit found that jurisdiction existed, applying the rule that defendant’s compulsory counterclaim provided an independent basis for federal jurisdiction, citing 14AA Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3706 (4th ed.).
Diversity Jurisdiction, Bad Faith Joinder, and Removal

The standard for improper joinder (Casebook, p. 352) was at issue in Hoyt v. Lane Constr. Corp., 927 F.3d 287 (5th Cir. 2019), in which the Fifth Circuit determined that the district court did not err in refusing to remand a negligence claim brought by family members of a deceased driver. The driver was killed when his automobile slid off the highway after hitting a patch of ice and into a pool of water, where he drowned. His body was discovered when a second car slid off the highway, in exactly the same location, and landed on top of his vehicle. Plaintiffs brought suit in state court against three construction companies allegedly involved in the highway project that caused the dangerous ice patch and pool of water to form in that location. Summary judgment was granted for one company, another company was voluntarily dismissed from the suit by the plaintiffs, and the remaining non-resident company (“Lane”) removed on diversity grounds. Plaintiffs challenged the timeliness of Lane’s removal, as it was a few days more than one year after the suit was commenced in state court. The district court found that although removal is generally limited to one year following the commencement of the action, Congress created an exception in 28 U.S.C. § 1446(c)(1) when plaintiffs have acted in bad faith to prevent removal. Here, plaintiffs did not voluntarily dismiss the second company until one year and two days after filing suit: the district court found that the plaintiffs had added this defendant in bad faith to destroy diversity. The facts supporting this inference included knowing for months beforehand that the evidence did not support a claim against the company; the witness list for trial did not include any fact witnesses about the company; and they did not receive any consideration from the company for dismissing the claim against them. The decision includes an excellent discussion of the bad-faith exception enacted in 2011, the voluntary-involuntary rule (providing that a nonremovable action may become removable by the voluntary act of plaintiff), removal on the basis of an unappealed severance, and improper joinder. Circuit Judge Haynes, dissenting, argued that remand was required because defendant failed to show improper joinder and the district court applied the wrong standard when it concluded that the grant of summary judgment meant that plaintiffs had no chance of recovery against the dismissed defendant.

Other appellate court decisions involving bad faith joinder include: Allen v. Walmart Stores, 907 F.3d 170, 183 (5th Cir. 2018); and Dever v. Family Dollar Stores of Georgia, LLC, 755 Fed. Appx. 866, 869–70 (11th Cir. 2018). In Dever, the Eleventh Circuit considered a slip-and-fall case that presented a question of first impression: “how a district court should decide whether to permit or deny joinder of a nondiverse defendant after removal.” The court recognized that “[i]n most cases the Federal Rules of Civil Procedure liberally allow a plaintiff to join a new defendant,” “[b]ut a district court must scrutinize more closely” if the joinder would add a nondiverse party to a diversity action. The consequences of allowing joinder in this context would have a drastic impact on the forum: “[i]f the court permits the joinder of the nondiverse defendant, it must remand the case to state court. If it declines to allow the joinder, the federal court maintains jurisdiction.” The Eleventh Circuit ruled that a district court should “consider the extent to which the purpose of the amendment is to defeat federal jurisdiction, whether [the]
plaintiff has been dilatory in asking for amendment, whether [the] plaintiff will be significantly injured if amendment is not allowed, and any other factors bearing on the equities.” The Eleventh Circuit vacated the decision below, finding it was clear error for the district court to conclude that plaintiff was acting in bad faith to defeat diversity jurisdiction by joining the nondiverse store manager.

Chapter 5: Venue, Transfer, and Forum Non Conveniens

Venue

Those of you who teach specialized venue statutes may want to mention case developments post-TC Heartland LLC (Casebook, p. 375). The meaning of a “regular and established place of business” under 28 U.S.C. § 1400(b) has taken on increased importance, and the role of technological infrastructure, like servers, has generated inconsistent outcomes among courts. In early 2019, the Federal Circuit denied a petition for panel rehearing in In re Google LLC, 914 F.3d 1377 (2019). The Federal Circuit previously declined to grant mandamus review to address the question of whether servers physically located in the forum constitute a regular and established place of business. In re Google LLC, 2018 WL 5536478 (Fed. Cir. Oct. 29, 2018). In In re Google, Google sought mandamus of a district court opinion, SEVEN Networks, LLC v. Google LLC, 315 F.Supp.3d 933 (E.D. Tex. 2018), finding that venue was proper in a patent infringement case because Google servers physically located in the district, and controlled by Google under contracts with local internet service providers, constituted a regular and established place of business. A forceful dissent by Judge Reyna argued that there must be a physical place of the defendant in the forum, not just a virtual space or electronic communications with an employee in the forum. An alternative rule potentially would subject a company that owns and controls service contracts on servers in a district to venue in any judicial district in which telecommunications infrastructure belonging to the company is located. Shortly after the denial of mandamus, another district court in Texas reached the opposite conclusion, that servers of a company located in a datacenter owned by a third-party did not constitute a regular and established place of business. See CUPP Cybersecurity LLC v. Symantec Corp., 2019 WL 1070869 (N.D. Tex. 2019).

Transfer under 28 U.S.C. § 1404

Those of you who teach the mechanics of transfer motions may be interested in Moore v. Cohen, 2019 WL 2396264 (D.D.C. 2019). Alabama politician Roy Moore filed a defamation, intentional infliction of emotional distress, and fraud suit in Washington, D.C., against comedian Sacha Baron Cohen and Showtime based on an interview conducted in 2018 that involved Moore setting off a pedophile-detecting wand. Moore argued that even though a clause in his contract to appear on the show stipulated that any dispute would be litigated in New York, the alleged fraud arising from the interview gutted the clause. Nevertheless, the court enforced the forum clause and transferred the action. Moore waited several weeks to challenge the decision to transfer, and the court held that it lacked jurisdiction to hear the motion having already physically transferred
the suit prior to the filing of the motion to reconsider. As the court explained, “The Court’s jurisdiction over this case ended on May 13, 2019, when it physically transferred the case file by sending it via extraction to the United States District Court for the Southern District of New York.” For added context, see Zack Budryk, Roy Moore ‘seriously considering’ another Senate bid, 2019 The Hill 441541, 2019 WL 1926537.

**Forum Non Conveniens**

A number of courts of appeals have considered whether a forum is adequate when the foreign judicial system is alleged to be corrupt.

In *Jones v. IPX Int’l Equatorial Guinea, S.A.*, 920 F.3d 1085 (6th Cir 2019), a Michigan citizen who had worked in Equatorial Guinea since 2007 was fired shortly after being transferred to work in the company’s subsidiary in Michigan. The employer, incorporated in Equatorial Guinea, alleged that the employee had stolen money; plaintiff sued, arguing the termination was pretextual to divest him of stocks. He sued in the Eastern District of Michigan; the district court granted defendant’s motion for dismissal on grounds of forum non conveniens, rejecting arguments that Equatorial Guinea was an inadequate forum because the judiciary is corrupt and plaintiff faces a risk of persecution in that country. The Sixth Circuit affirmed, applying the multi-factor test set out in *Piper* (Casebook, p. 386). The alternative forum was adequate because it recognized a cause of action to remedy breach of an employment contract. Further, the appeals court held that general allegations of corruption are not sufficient to show forum inadequacy, and so refused to credit Investment Climate Statements published by the U.S. Department of State that found Equatorial Guinea to be a high risk environment for investment, because they did not focus on employment disputes. Moreover, the appeals court agreed that plaintiff did not show a well-founded fear of prosecution and arrest merely by presenting evidence that his business partner, the employer’s majority shareholder, is related to the President of Equatorial Guinea. The appeals court further agreed with the district court that on balance the private interests favored trying the case abroad, despite costs to the plaintiff. As to the public interest, the factors supported dismissal because enforcing the employment contract would require that the court “untangle problems in conflict of laws.” Finally, as to the deference owed to plaintiff’s choice of forum, the court of appeals found that plaintiff had forfeited any claim to heightened deference by failing to raise that argument before the district court; even if not waived, plaintiff, although a U.S. citizen, had spent his professional life abroad, had founded a company abroad, and had failed to make similar investments in Michigan. Circuit Judge Nalbandian, concurring, argued that the district court failed as a first step to consider the level of deference to be accorded plaintiff’s forum choice, and that this step is a critical component of the forum non conveniens inquiry, but the omission was harmless error because “the record would compel the same result even under the correct legal standard.”

In *Acuna-Atalaya v. Newmont Mining Corp.*, 765 Fed. Appx. 811 (3d Cir. 2019), the circuit court held that a change in circumstances in the nation of the alternative forum required a remand for the district court to reevaluate the alternative forum’s adequacy.

The suit was brought by a family of Peruvian farmers residing in Peru against several
Delaware-incorporated entities that own a mining company operating in Peru to recover the farmers’ land. They sued in the District of Delaware contending that the mining company’s agents had used violence and other illegal tactics to evict them from their farm, which sits on top of a gold deposit. The district court found that Peru was an adequate forum; the court of appeals found that later developments undermined that conclusion, pointing to two state-of-emergency declarations by the President of Peru that the Peruvian “system for administering justice has collapsed.” The appeals court specifically addressed the standard for undertaking a review of forum inadequacy:

While the Supreme Court has not yet spoken to particular burdens or standards associated with a plaintiff’s assertion of unfair treatment in this context, the Eleventh Circuit has done so, offering a logical and persuasive approach: “defendants have the ultimate burden of persuasion, but only where the plaintiff has substantiated his allegations of serious corruption or delay. . . . [W]here the allegations are insubstantially supported, . . . a District Court may reject them without considering any evidence from the defendant. But where the plaintiff produces significant evidence documenting the partiality or delay (in years) typically associated with the adjudication of similar claims and these conditions are so severe as to call the adequacy of the forum into doubt, then the defendant has the burden to persuade the District Court that the facts are otherwise.” * * *

Chapter 6. Ascertaining Applicable Law

In Carbone v. Cable News Network, 910 F.3d 1345 (11th Cir. 2018), the Eleventh Circuit considered whether a state’s anti-SLAPP (Strategic Lawsuits Against Public Participation) statute applied to a defamation suit in federal court, a question that currently divides the circuits. The plaintiff sued a news network for publishing allegedly defamatory news reports about him, and the defendant moved to strike the complaint under the anti-SLAPP statute. The Eleventh Circuit agreed with the district court in finding that Federal Rules 8, 12, and 56 provide an answer to question in dispute; that the anti-SLAPP motion-to-strike procedure conflicts with these rules; and therefore the state rule does not apply in federal court. The court assessed the conflict between the state statute and each federal rule, and then looked holistically at the federal rules, explaining that taken together, “these Rules provide a comprehensive framework governing pretrial dismissal and judgment”; “the Rules contemplate that a claim will be assessed on the pleadings alone or under the summary judgment standard; there is no room for any other device for determining whether a valid claim supported by sufficient evidence to avoid pretrial dismissal.” The court placed great weight on the decision of then-Judge Kavanaugh in Abbas v Foreign Policy Group, LLC, 783 F.3d 1328 (D.C. Cir. 2015), that under the Federal Rules, “a plaintiff is generally entitled to trial if he or she meets the Rules 12 and 56 standards to overcome a motion to dismiss or for summary judgment,” and that the anti-SLAP statute abrogates and so conflicts with those procedural entitlements. The court explored at length what it means for a state rule to conflict with a
The existence of a conflict does not invariably depend on whether the state law abrogates a procedural right conferred by the Federal Rules, but instead turns on whether the Federal Rules and the state statute “answer the same question.” [Shady Grove, Casebook, p. 462]. Rules 8, 12, and 56 govern whether Carbone’s claim states a valid claim supported by sufficient evidence to avoid pretrial dismissal. Those Rules are “sufficiently broad” ... to ‘control the issue’ before the court, thereby leaving no room for the operation” of the motion-to-strike procedure. [Burlington N. R.R. Co. v. Woods, Casebook, p. 446]

[Defendant] CNN responds that the anti-SLAPP statute does not attempt to answer the question whether the plaintiff has alleged a claim that is plausible on its face, but instead answers whether the plaintiff’s claim satisfies a probability requirement. But this argument conflates the question a rule or statute is designed to answer with the standard it requires the court to apply in answering that question.

* * *

The New Jersey statute [in Cohen] neither abrogated rights conferred by the Federal Rules nor addressed the questions of disclosure and notice. Instead, it was designed only to protect against “strike suits” that were “brought not to redress real wrongs, but to realize upon their nuisance value.” * * *. Rules 8, 12, and 56, by contrast, constitute an exhaustive set of requirements governing pretrial dismissal and entitlements to discovery and a trial on the merits. And unlike the state statute at issue in Cohen, the Federal Rules and the Georgia anti-SLAPP statute address the same question: whether a complaint states a valid claim supported by sufficient evidence to warrant a trial on the merits.

The appeals court further rejected, almost out of hand, the argument that Rules 8, 12, and 56 violated the Rules Enabling Act; to the contrary, these rules affect only process and fall within Congress’s power to regulate the courts, citing Burlington, Sibbach (Casebook, p. 438), and Shady Grove (Casebook, p. 462).

In Pappas v. Phillip Morris, 915 F.3d 889 (2d Cir. 2019), the Second Circuit reversed the district court’s error in applying Connecticut law to the question of whether the plaintiff could represent the estate of her deceased husband pro se. The district court reasoned that because it was sitting in diversity, it was duty bound to apply state law to the question of whether the estate representative could appear pro se. The appeals court held that a prior Second Circuit decision had relied on 28 U.S.C. § 1654 and federal case law, and that federal law, being procedural in nature, governed the decision. As the appeals court explained, “Who may practice law before a federal court is a matter of
procedure—which Congress and the federal courts have the power to regulate— notwithstanding contrary state law.” Nevertheless, the court then considered whether Connecticut’s state substantive law would be undermined by application of the federal procedural rule:

Connecticut’s substantive law will not be affected by permitting [the widow] to file motions, conduct depositions, or represent the estate at trial. Nothing about Connecticut’s rule disallowing pro se litigants from representing an estate *** indicates to us that the rule advances any important Connecticut policy other than the orderly administration of its own court system. * * *

Allowing a pro se plaintiff to represent an estate does come with its own set of concerns. * * * [L]itigation by a non-lawyer creates unusual burdens not only for the party she represents but also for her adversaries and the court. But that a pro se plaintiff may have difficulty navigating the complex legal process and that it may pose an extra burden on the court, gives us no reason to believe that this federal rule encroaches on any Connecticut substantive law, would give rise to forum shopping, or would occasion the inequitable administration of the laws. See [Hanna, p. 429]. The rule pertains solely to the orderly conduct of litigation before the federal court, and does not regulate the conduct of persons in the community. It is procedural—not substantive—and therefore a matter of federal law even in a diversity case.

Chapter 8. Modern Pleading

Detail Required under the Federal Rules of Civil Procedure

In In re U.S. Office of Personnel Management Data Security Breach Litigation, --- F.3d ---, 2019 WL 2552955 (D.C. Cir. 2019), the D.C. Circuit reversed the district court’s dismissal of a data-breach claim that affected more than 21 million people. The case involved complicated questions of standing, as well as the application of the Twombly/Iqbal standard (Casebook, p. 573 & p. 584). The suit was brought by federal employee unions alleging that the Office of Personnel Management’s (“OPM’s”) inadequate cybersecurity practices resulted in data breaches that exposed their members to a heightened risk of identity theft. The district court found that plaintiff’s allegation of wrong doing was not plausible compared to another explanation, that the Chinese government had stolen the data. The appeals court held it was error for the district court to “to have relied even in part on its own surmise that the Chinese government perpetrated these attacks. Absent any factual allegations regarding the identity of the cyberattackers, the district court was not free to conduct its own extra-record research and then draw inferences from that research in [defendants’] favor.” The majority considered and rejected the argument made in dissent, “that because this case involves government databases, ‘espionage *** is *** an “obvious alternative explanation” for the attacks.”
The majority found the complaint to be sufficient, given the nature of the information alleged to have been stolen and the fact that some of the plaintiffs already had suffered the consequences of identity theft. The circuit court found that “incidents of identity theft that have already occurred illustrate the nefarious uses to which the stolen information may be put, but they also support the inference that Plaintiffs face a substantial—as opposed to a merely speculative or theoretical—risk of future identity theft.” The circuit court concluded that the facts alleged moved the claims “across the line from speculative to substantial.”

Responding to the Complaint: Affirmative Defenses

Whether the Twombly/Iqbal standard applies to a motion to strike an affirmative defense under Federal Rule 12(f) is an issue that currently divides the lower courts, an issue discussed in the Casebook (p. 635, Note 4) and, according to the district court in Rubinstein v. Keshet Inter Vivos Tr., 2019 WL 2475179 (S.D. Fla. 2019), no United States Court of Appeals has decided the question on whether the plausibility standard enunciated in Twombly and Iqbal applies to affirmative defenses “and the district courts that have considered it do not agree on an answer.” The court held that the heightened standard does apply to the pleading of affirmative defenses, as a matter of notice, fairness, and judicial efficiency. The court then agreed that almost all of the affirmative defenses alleged were boilerplate and conclusory, often no more than a sentence long, and lacked sufficient factual support. By contrast, the Missouri district court in Arbogast v. Healthcare Revenue Recovery Grp., 327 F.R.D. 267 (E.D. Mo. 2018), held that Twombly/Iqbal do not apply to the pleading of affirmative defenses because the U.S. Supreme Court “was interpreting the language of Rule 8(a)(2) (governing a ‘claim for relief’), but the language of Rule 8(b) and 8(c) (describing responsive pleadings and affirmative defenses) is different and suggests . . . a more lenient standard.”

Chapter 9. Joinder of Claims and Parties: Expanding the Scope of the Civil Action

Addition of Claims: Counterclaims and Crossclaims

Estate of Manstrom-Greening v. Lane County., 2019 WL 2388793 (D. Or. 2019), provides a clear explanation of the differences among a crossclaim, counterclaim, and affirmative defense (Casebook, p. 678 & p. 688), with the court holding that “pleading the affirmative defense of contributory negligence is the only procedural mechanism by which Defendants may attempt to limit their share of liability.” The facts of the case are disturbing. After a young man committed suicide using the loaded service weapon that his father, a police officer, had left on the living room desk, the estate, through the decedent’s mother, sued the decedent’s father, his supervisor, and the county for negligence. The father responded by filing a crossclaim against the mother for contributory negligence. The court held that a defendant may attempt to reduce its share of liability relative to the fault of the plaintiff by pleading the affirmative defense of contributory negligence. Rule 13(g) did not permit the filing of a crossclaim because the mother was not an opposing party in her personal capacity; likewise, defendant could not
Permissively join the mother as a co-defendant under Rule 20. Nor would a counterclaim be available, because the mother, in her representative capacity, was not an opposing party subject to claims in her individual capacity and further, the claim against the mother, even in her individual capacity, had not yet matured.

**Permissive Joinder under Rule 20**

*Headhunter, LLC v. Does 1–9*, 2018 WL 4550450 (W.D. Va. 2018), raised the question whether “swarm” joinder is permissible under Federal Rule 20 (Casebook, p. 697), an issue that currently divides the lower courts. Swarm joinder is the practice of joining in one action multiple John Doe BitTorrent users that downloaded and uploaded the same file during a given period. The decision includes an excellent explanation of the BitTorrent protocol, a platform that enables peer-to-peer file sharing. In this case, plaintiff sought to enforce its copyright to the film A Family Man and sued “John Does,” identifiable only by their IP addresses, for downloading the movie from BitTorrent. The court held that “swarm joinder” under Rule 20 was impermissible; the fact that the nine defendants uploaded pieces of the same digital copy of the film over a three-week period did not provide a sufficient basis for an inference that their actions were transactionally related. As the court explained,

This is because of (1) the design of the BitTorrent protocol, and (2) the absence of any alleged facts that would permit the court to infer an exchange of data between these defendants. The D.C. Circuit provided an analogy that strikingly illustrates both issues:

> [T]wo BitTorrent users who download the same file months apart are like two individuals who play at the same blackjack table at different times. They may have won the same amount of money, employed the same strategy, and perhaps even played with the same dealer, but they have still engaged in entirely separate transactions. And [s]imply committing the same type of violation in the same way does not link defendants together for the purposes of joinder. [*AF Holdings, LLC v. Does 1–1058*, 752 F.3d 990, 998 (D.C. Cir. 2014)]

**Joinder of Required Parties under Rule 19**

In *Nassau & Suffolk Cty. Taxi Owners Ass’n, Inc. v. State*, 336 F.Supp.3d 50 (E.D.N.Y. 2018), the Nassau and Suffolk County Taxi Owners Association (NSTOA) sued New York, challenging the constitutionality of new legislation regulating ride-sharing services, like Uber and Lyft. NSTOA alleged that the regulations created a two-tier system with lighter regulations for ride-sharing services, in violation of the Equal Protection Clause. New York moved to dismiss, in part pursuant to Rule 12(b)(7), for failure to join Uber, Lyft, and other ride-share drivers as necessary parties under Rule 19. The court acknowledged that the absent parties have a strong interest in the litigation, but they were nonetheless not required parties. First, their absence under Rule 19(a)(1)(A)
did not prevent the court from granting complete relief among the parties. Second, they were not required under Rule 19(a)(1)(B) because “[a]ny harm that [Uber or Lyft] would suffer as a result of a negative outcome in this litigation would not be caused by their absence from the litigation.” Although the decision addresses a number of other complex issues, including state sovereign immunity, the discussion of Rule 19(a) is succinct and clear.

**Third-Party Practice under Rule 14**

*Boddy v. Pourciau*, 2019 WL 1979323 (W.D. Wash. 2019), illustrates the use of impleader in an interesting and accessible fact pattern. Driveline, a baseball pitching training company, brought libel, false light, and unfair competition claims against defendant, an employee at a rival pitching company. The claim concerned a Twitter post that alleged the use of performance enhancing drugs at Driveline. The Tweet linked to a screenshot of (fake) text messages between the owner of Driveline and its client Ward, a baseball player training there, discussing steroid use. Investigation revealed that Ward had fabricated the text messages and sent them to Pourciau to “rile [him] up.” Pourciau then filed a motion for leave to file a third-party complaint against Ward, asserting that if he were liable to Driveline for the tweets, then Ward would in turn be liable to Pourciau for fraud and negligent misrepresentation. The court denied the motion under Rule 14 because the fact that the claim arises from the same transaction or occurrence is not enough; third-party claims must depend on or derive from the plaintiff’s claim. Here, “Defendants’ potential liability to Plaintiffs is not the product of Mr. Ward’s alleged negligence, negligent misrepresentation, or fraud. Rather, Defendants’ liability will result from their own conduct: publishing false content about Plaintiffs with knowledge of the falsity or with reckless disregard for the truth.”

**Intervention**

The rule that an intervenor must independently show standing, even on appeal, was reaffirmed in *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), in which the Court dismissed the appeal of the Virginia House of Delegates in a challenge involving the redistricting of the state. Although the House had participated in the proceedings, the State, represented by the Attorney General, had decided against taking an appeal, and the Court held that the House lacked standing to pursue the appeal on its own; “[a]s the Court has repeatedly recognized, to appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing.”

The timeliness of a motion of intervene (Casebook, p. 746, Note 5) was at issue in *Griffin v. Sheeran*, 767 Fed. Appx. 129 (2d Cir. 2019). The heirs of Ed Townsend sued Ed Sheeran for copyright infringement, claiming that Sheeran’s song *Thinking Out Loud* infringed on *Let’s Get it On*, which Townsend co-wrote with Marvin Gaye. The suit was filed on July 11, 2017. On May 10, 2018, SAS, which owns one-third of the copyright on *Let’s Get It On*, moved to intervene, and the district court denied the request as untimely. On appeal, the Second Circuit, affirmed. As the appeals court explained, intervention
would prejudice the defendants because it would lead to the reopening of discovery; on the other hand, “denial of intervention would not prejudice SAS. Its interests and the Townsend Plaintiffs’ interests are aligned, since neither disputes the others’ alleged share of the *Let’s Get It On* composition, and SAS ‘remain[ed] free to’—and did in fact—‘file a separate action.’”

Chapter 10. Class Actions

Changes to Rule 23 took effect on December 1, 2018. The changes primarily relate to notice, objections, and appeals. Rule 23(c)(2)(B) has been amended to clarify the requirement that notice be made not only to classes certified under Rule 23(b)(3) for further litigation but also under Rule 23(e)(1) for settlement classes under Rule 23(b)(3). The Rule now specifies that notice may be made “through United States mail, electronic means, or other appropriate means.” The Committee Notes explain that the rationale for this change is to take into account modern changes in communications since the Rules’ first drafting.

The revised Rule 23(e)(2) identifies factors for district courts to consider when determining, after a hearing, the fairness of a proposed class settlement. These factors include consideration of whether:

(A) the class representatives and class counsel have adequately represented the class;
(B) the proposal was negotiated at arm’s length;
(C) the relief provided for the class is adequate, taking into account:
   (i) the costs, risks, and delay of trial and appeal;
   (ii) the effectiveness of any the proposed method of distributing relief to the class, including the method of processing class-member claims, if required;
   (iii) the terms of any proposed award of attorney’s fees, including timing of payment; and
   (iv) any agreement required to be identified under Rule 23(e)(3); and
(D) the proposal treats class members equitably relative to each other.

The amendments to Rule 23(e)(5) clarify the role of objectors in class proceedings. An objector must state the breadth of and grounds for the objection, and payments in connection with forgoing or otherwise abandoning objections or appeals are barred without court approval after a hearing. The Committee Notes explain that the primary concern motivating this rule change was to prevent objectors who may threaten to delay proceedings not out of concern for the actual fairness of the settlement but for personal gain by seeking consideration in return for withdrawing objections or dismissing appeals. This concern for blackmail objectors echoes former Judge Posner’s fear of

The amendments to Rule 23(f) clarify that an interlocutory appeal is available for a grant or denial of class certification, but not from a notice order under Rule 23(e)(1). In cases involving the United States, United States agencies, or officers or employees of the United States sued in their official capacities, the time to file a petition for permission to appeal has been extended from the ordinary rule of 14 days after the order is entered to 45 days.

*Home Depot*, discussed earlier in this Update Memo, can be referenced as part of a general study of the Class Action Fairness Act (Casebook, p. 822).

**Rule 23(c): Certification Decisions**

If teaching issue classes, it may be useful to identify the circuit split about the treatment of Rule 23(c)(4) at the certification stage. The Sixth Circuit recently summarized this split in *Martin v. Behr Dayton Thermal Products*, 896 F.3d 405 (2018), siding with what the panel labeled the “broad view” of Rule 23(b)(3)’s requirements as applied to a Rule 23(c)(4) issue class. Under the broad view, “courts apply the Rule 23(b)(3) predominance and superiority prongs after common issues have been identified for class treatment under Rule 23(c)(4)” rather than to the class as a whole. This allows issues to be certified for class treatment under Rule 23(c)(4), even when a lack of predominance and superiority would make a Rule 23(b)(3) class unavailable for an entire cause of action. The “narrow view,” by contrast, would deny certification of issues under Rule 23(c)(4) if Rule 23(b)(3) were not already satisfied. The Sixth Circuit found that this reading undercut the policy goals of Rule 23(c)(4) and that the broad view better served the Rule’s purpose. (The case also raised Seventh Amendment issues, with appellants arguing that individual proceedings after judgment in a Rule 23(c)(4) issue class would necessarily involve reexamination of a jury verdict. The Sixth Circuit concluded that the issues were not presented at the time of class certification, as there was no jury verdict, and the district court would have an opportunity to structure the case to avoid possible future constitutional violations.)

**Rule 23(f): Interlocutory Appeals from Certification Orders**

*Nutraceutical Corp. v. Lambert* (Rules Supplement, p. 386) involves Rule 23(f) (Casebook, p. 797). In a unanimous decision authored by Justice Sotomayor, the Court held that Rule 23(f), which sets a 14-day deadline to seek permission to appeal an order granting or denying class certification, is a nonjurisdictional claim-processing rule, as it appears in a rule and not a statute. Nevertheless, Rule 23(f)’s time limit is not subject to equitable tolling. Justice Sotomayor explained that certain claim-processing rules without textual flexibility, when properly raised, were mandatory; the analysis depended on whether the text of the rule showed a clear intent to preclude tolling, even though it did not have a jurisdictional character. The Federal Rules of Appellate Procedure specifically carve out petitions for permission to appeal as unavailable for extension, indicating “a
clear intent to compel rigorous enforcement of Rule 23(f)’s deadline, even where good cause for equitable tolling might otherwise exist.”

**Rule 23(d): Orders Regulating the Conduct of Pretrial and Trial Proceedings**

*Frank v. Gaos*, 139 S. Ct. 1041 (2019), presents an opportunity to discuss policy and trends in *cy pres* awards (Casebook, p. 801), which are distributions to nonprofit or charitable organizations made when the distribution of settlement funds to class members is practically or economically burdensome. *Frank* presented the question of when a *cy pres* award that does not provide direct relief to the class could be “fair, reasonable, and adequate” under Rule 23(e), but the U.S. Supreme Court declined to rule on the merits. Instead, the per curiam opinion vacated the Ninth Circuit’s opinion and remanded for further consideration on whether plaintiffs had Article III standing to bring a claim. The class representatives in *Frank* sued Google on behalf of an enormous class of Internet users, claiming privacy violations under the Stored Communications Act, 18 U.S.C. § 2701. The parties reached a settlement and agreed that it was not practicable to distribute the $5.3 settlement fund among the entire class. The trial court approved a plan that would instead divide the fund among six privacy-focused organizations chosen by class counsel and Google. A group of objectors represented by the Center for Class Action Fairness challenged the settlement, arguing that a predictably low claim rate would make it feasible to distribute the fund directly to those class members who would actually make claims. The objectors argued that direct awards to only a subset of class members, those who filed claims, was preferable to an award that only indirectly benefited class interests through privacy research and advocacy. They also asserted that, if a settlement fund was non-distributable, then Rule 23(b)(3) superiority was not satisfied. *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017), vacated and remanded sub nom. *Frank v. Gaos*, 139 S. Ct. 1041 (2019). Because the Court remanded for further consideration of Article III standing without considering any of the Rule 23(e) issues, it remains an open question whether a *cy pres* award is a fair, reasonable, and adequate settlement in cases with large numbers of absent class members.

**Settlement Classes**

*Hyundai & Kia Fuel Economy Litigation*, 926 F.3d 539 (9th Cir. 2019), provides a good illustration of the requirements of Rule 23(b)(3) in a Rule 23(e) settlement context. In this case, a divided three-judge panel initially vacated and remanded the district court’s settlement class certification, holding that the district court had failed to analyze variations in state law. The Ninth Circuit, sitting en banc, disagreed with the panel and affirmed the district court’s order for settlement. Judge Nguyen, writing for the majority en banc, concluded that all class members had suffered similar harms from automobile manufacturers’ misrepresentations about vehicles’ fuel economy, regardless of whether they had purchased the vehicles new or used, and that it had been appropriate for the district court to apply California law to the nationwide class. The Ninth Circuit found that the defendants’ common course of conduct satisfied the requirements of Rule 23(b)(3) predominance, as required in the Rule 23(e) settlement context, and the majority praised the district court for its careful findings and management of a complex case.
Class Action Waivers

If teaching *AT&T Mobility, LLC v. Concepcion* (Casebook, p. 838), it may be useful to discuss the circuit split on whether arbitrators or the federal courts interpret ambiguous class action waivers. The U.S. Supreme Court denied certiorari in *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1322 (2019), in which the Eleventh Circuit concluded that the parties intended for the arbitrator to determine waiver. The *Maizes* plaintiffs were members of a cost savings club who sought to arbitrate as a class, and Spirit argued that the arbitration agreement, which was ambiguous, did not authorize class arbitration. The Eleventh Circuit agreed with the district court’s determination that the arbitrator, rather than the federal courts, should interpret the agreement. The court pointed towards the arbitration agreement’s adoption of the American Arbitration Association rules as evidence of the parties’ intent to have the arbitrator determine the availability of class arbitration, a position consistent with that of the Fifth Circuit but contrary to that of the Third, Fourth, Sixth, and Eighth Circuits.

Relatedly, the Eleventh Circuit’s decision in *Dye v. Tamko Bldg. Prods., Inc.*, 908 F.3d 675 (11th Cir. 2018), shows further developments in interpreting waivers of class arbitration, tackling the issue of when parties can be bound to individual arbitration and barred from seeking class actions based on the waiver of another. Homeowners sought certification of a class to sue a shingle manufacturer, alleging violation of state consumer protection laws, breach of express warranty, strict products liability, and negligence. The district court denied certification, holding that the contractors who had purchased shingles in packages containing mandatory, shrink-wrap arbitration agreements had accepted the agreements on behalf of the homeowners on whose homes they would install the shingles. The Eleventh Circuit affirmed, holding that the arbitration agreements were valid under Florida contract law and that home contractors, acting as homeowners’ agents, could bind the homeowners to the arbitration contract. The contractors’ knowledge of the contract was imputed, even when the homeowners themselves lacked actual notice of its terms.

Further on the topic of class actions and arbitration, the U.S. Supreme Court denied certiorari in *Taylor Farms Pacific, Inc. v. Del Carmen Pena*, 138 S. Ct. 976, (2018). This left open the question of whether evidence supporting a motion for class certification must be admissible under the Federal Rules of Evidence. The Courts of Appeals have split on this issue. In *Sali v. Corona Regional Medical Center*, 909 F.3d 996 (9th Cir. 2018), *cert. dismissed*, 139 S. Ct. 1651 (2019), the Ninth Circuit acknowledged decisions by the Third, Fifth, and Seventh Circuits that evidence supporting a class certification motion should be admissible but adopted the Eighth Circuit’s approach that “a district court is not limited to considering only admissible evidence in evaluating whether Rule 23’s requirements are met.”
Chapter 11. Pretrial Devices for Obtaining Information: Depositions and Discovery

Students may be interested to know about the discovery issue that is at play in the ongoing litigation challenging the inclusion of a question about citizenship in the census. In *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), the second question presented was whether, in an action seeking to set aside agency action under the APA, a district court may order discovery outside the administrative record to probe the mental processes of the agency decisionmaker when the explanation provided does not match the facts. In March 2018, Secretary of Commerce Wilbur Ross announced in a memo that he had decided to reinstate a citizenship question on the 2020 census questionnaire, allegedly at the request of the Department of Justice to use the citizenship data in enforcing the Voting Rights Act.

The government provided the administrative record for the decision in June 2018. However, at the Department of Justice’s urging, the Government supplemented the record with an additional memo from the Secretary, which revealed that he had begun considering the addition of a citizenship question in early 2017 and had asked the Department of Justice to formally request its inclusion. Arguing that the supplemental memo indicated that the record was incomplete, respondents asked the district court to compel the Government to complete the administrative record. The court granted that request, and the parties jointly stipulated to the inclusion of additional materials that confirmed that the Secretary and his staff began exploring reinstatement of a citizenship question shortly after his 2017 confirmation, attempted to elicit requests for citizenship data from other agencies, and eventually persuaded the Department of Justice to make the request. The court also authorized discovery outside of the administrative record, including compelling a deposition of Secretary Ross, which the Supreme Court stayed pending further review in *Department of Commerce v. U.S. District Court for the Southern District of New York*, 2019 WL 2649788 (U.S. June 28, 2019).

Chief Justice Roberts, writing for a divided Court, determined that although the district court prematurely invoked the *Overton Park* exception based on a “strong showing of bad faith or improper behavior” in ordering extra-record discovery, it was ultimately justified in light of the expanded administrative record. The Court noted that the appropriate order for discovery would have been an order to complete the administrative record, and then authorizing extra-record discovery, such as depositions, on the basis of those additional record documents. The majority of the Supreme Court concluded that the District Court was warranted in remanding the case back to the agency in which the explanation was pretextual, as the evidence did not match the Secretary’s justification for his decision.

Justice Thomas, joined by Justices Gorsuch and Kavanaugh, wrote an opinion concurring in part and dissenting in part. On the topic of discovery, Justice Thomas cited concerns that political opponents can easily raise claims of pretext, and cautioned against creating an “endless morass of discovery” for administrative decisions. Furthermore, in his view, the APA does not authorize courts to be so intrusive in their review of agency decisions.
Days after the Supreme Court issued its opinion in Department of Commerce v. New York, the government announced that the 2020 census will not include the citizenship question. See, e.g., Amy Howe, 2020 Census Goes to Printer Without Citizenship Question, SCOTUSBLOG (July 2, 2019, 6:23 PM), https://www.scotusblog.com/2019/07/2020-census-questionnaires-go-to-printer-without-citizenship-question/. However, the next day, the administration changed course. See, e.g., Dan Mangan, Trump administration will continue fight to put citizenship question on 2020 census: Court filing, CNBC (July 5, 2019), https://www.cnbc.com/2019/07/05/trump-administration-will-fight-for-census-citizenship-question.html. And a few days later, the administration announced a different approach. See, e.g., Katie Rogers, Adam Liptak, & Michael Crowley, Trump Says He Will Seek Citizenship Information From Existing Federal Records, Not the Census, The New York Times (July 11, 2019), https://www.nytimes.com/2019/07/11/us/politics/census-executive-action.html.

The use of default as a sanction for discovery violations (Casebook, p. 921, Note 7) is illustrated by Taser International v. Phazzer Electronics, 754 Fed. Appx. 955 (Fed. Cir. 2018), the plaintiff, Taser, filed suit against Phazzer for patent and trademark infringement, false advertising, and unfair competition. Over the course of the litigation, Taser filed three motions to compel discovery, all of which were granted, but Phazzer failed to produce the required documents and witnesses. It also failed to comply with many other orders entered by the magistrate judge. Taser eventually filed a motion for sanctions under Federal Rule 37, asking the court to enter default judgment, which the court granted. Phazzer appealed, and the Federal Circuit found that the district court had not abused its discretion in entering default judgment. It ultimately held that Rule 37 gives district courts broad discretion to fashion appropriate sanctions, and the use of default as a sanction was reasonable.

Chapter 12. Case Management

The opioid litigation is a developing and timely illustration of a district court judge using strong case management techniques in a complex and closely watched case. It also can be discussed in the context of Multidistrict Litigation (Casebook, p. 382). Presiding Judge Dan Aaron Polster of the Eastern District of Ohio indicated his intention to “do something meaningful” in response to the opioid crisis, using an aggressive, compact litigation schedule to force settlement if necessary. See Transcript of Proceedings, at 4, In re Nat’l Prescription Opiate Litig., No. 17-cv-2804 (E.D. Ohio Jan. 9, 2018) (“People aren’t interested in depositions, and discovery, and trials. People aren’t interested in figuring out the answer to interesting legal questions like preemption and learned intermediary, or unravelling complicated conspiracy theories.”); see also Jan Hoffman, Can This Judge Solve the Opioid Crisis?, N.Y. Times (Mar. 5, 2018), https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html. Although Judge Polster remains committed to pushing the parties towards global settlement, a bellwether trial is currently scheduled for fall of 2019. Jan Hoffman, Opioid Lawsuits Are

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The immense consolidated litigation is proceeding using both special masters and magistrate judges. See, e.g., In re Nat’l Prescription Opiate Litig., 2019 WL 2477416, at *23 (N.D. Ohio Apr. 1, 2019) (magistrate judge’s opinion recommending a ruling on defendants’ motion to dismiss); In re Nat’l Prescription Opiate Litig., 2019 WL 1872908, at *1 (N.D. Ohio Apr. 26, 2019) (district court’s opinion modifying the Special Master’s recommendation and determining sanctions for plaintiffs’ failure to disclose an agreement with a witness). Other disputes in the litigation may be useful in class when discussing, for example, the limits of discovery. See, e.g., In re Nat’l Prescription Opiate Litig., 2019 WL 763564, at *1 (N.D. Ohio Jan. 23, 2019) (denying defendant McKesson’s request to compel production of a statewide pharmaceutical system database “apparently without placing or attempting to place any geographic or temporal limitations on their request”). The Sixth Circuit found in June 2019 that the district court had abused its discretion in allowing the filing of certain pleadings under seal. In re Nat’l Prescription Opiate Litig., 2019 WL 2529050, at *14 (6th Cir. June 20, 2019).

Chapter 13. Adjudication without Trial or by Special Proceeding

The Motion for Summary Judgment under Rule 56

Williams v. Office of District Attorney Erie County, 751 Fed. Appx. 196 (3d Cir. 2018), illustrates the difficulties of pro se parties litigating summary judgment motions (Casebook, p. 957). A pro se indigent prisoner challenged the state’s refusal to perform post-conviction DNA testing or to provide him with access to DNA evidence post-conviction. The court denied plaintiff’s request for counsel, denied discovery requests, and granted summary judgment in defendant’s favor. The Third Circuit affirmed, finding there was no error in the court’s granting summary judgment without first providing the prisoner notice of requirements for defending against summary judgment. Discussion might focus on Local Rule 12.1 and 56.2 for the Southern and Eastern District of New York (Rules Supplement, p. 317) requiring in specified contexts that notice be given to a pro se party of the consequences of certain procedural motions.

Default Judgment

In Sindhi v. Raina, 905 F.3d 327 (5th Cir. 2018), the Fifth Circuit held it was not an abuse of discretion for the district court to enter, and then decline to vacate, a default judgment against a foreign national, who had been sued by his employer for allegedly stealing source code and using the software to create a competing business. The decision carefully reviews the process for challenging an entry of default under Federal Rule 55(c) (Casebook, p. 988), and the assessment of whether good cause exists. Finding that good cause did not exist, the court then turned to Federal Rule 60(b). The case offers a clear framework for understanding when a default judgment may be entered and how a party may challenge it.
Chapter 14. Trial

The Province of Judge and Jury

Those of you who teach Markman (Casebook, p. 1030), might consider mentioning the decision in Merck Sharp & Dohme Corp. v. Albrecht (Rules Supplement, p. 391), which addressed the judge-jury decision in the context of preemption. Plaintiffs filed state failure-to-warn claims against a drug manufacturer. In previous cases, the Court had held that state claims of this sort would be preempted upon a showing of “clear evidence” that the Food and Drug Administration (FDA) would not have approved a change to the drug’s label. The Court clarified in Merck Sharp & Dohme that this was a question of law for the court and not one of fact for the jury. Writing for the majority, Justice Breyer acknowledged that determinations of the FDA’s hypothetical actions could present mixed questions of law and fact and could include “subsidiary factual disputes” in service of the broader legal question. Nevertheless, he argued that the trial judge was the more appropriate decisionmaker because of the complexity of the legal issues, and that the judges’ better understanding of administrative law and agency decisionmaking would then lead to greater uniformity among courts.

Demand and Waiver of Jury

When discussing jury waiver (Casebook, p. 1036), it may be useful to mention some writing by judges on whether a civil jury trial should be presumed. In early 2017, Justice (then Judge) Neil Gorsuch and Judge Susan Graber made the following recommendation to the Advisory Committee:

First, we should be encouraging jury trials, and we think that this change would result in more jury trials. Second, simplicity is a virtue. The present system, especially with regard to removed cases, can be a trap for the unwary. Third, such a rule would produce greater certainty. Fourth, a jury-trial default honors the Seventh Amendment more fully. Finally, many states do not require a specific demand. Although we have not looked for empirical studies, we do not know of negative experiences in those jurisdictions.

Chapter 15. Securing and Enforcing Judgments

The utility of the preliminary injunction (Casebook, p. 1135) may be illustrated by its prominence in a number of ongoing lawsuits challenging policies of the Trump Administration:

**Transgender Military Ban**

In 2017, a district court preliminarily enjoined various government officials and agencies from categorically excluding transgender individuals from military service and from separating, denying reenlistment and promotion, demoting, and denying medically necessary treatment to current service members due to their transgender status. *Stockman v. Trump*, 2017 WL 9732572 (C.D. Cal. 2017). Government defendants unsuccessfully moved to dissolve the injunction on the basis of a new 2018 Presidential Memorandum on transgender military service: the court found that this new memo did not moot the constitutional issues, finding that the memo was substantially the same as the prior memo on transgender military service. *Stockman v. Trump*, 331 F.Supp.3d 990 (C.D. Cal. 2018). An appeal was filed with the Ninth Circuit, but argument has yet to be scheduled in the case.

**Construction of a Border Wall**

In *Sierra Club v. Trump*, 379 F.Supp.3d 883 (N.D. Cal. 2019), the court preliminarily enjoined the Secretaries of various federal departments from taking any action to construct a border barrier in specific border sectors using funds reprogrammed by the Department of Defense under Section 8005 of the Department of Defense Appropriations Act. Although the plaintiffs’ environmental claim was unlikely to succeed on the merits, the court found that the Executive Branch likely exceeded its statutory authority by attempting to reallocate funds for a border wall after Congress had denied the request to appropriate funds for that purpose. The plaintiffs, an environmental group working with a coalition of border community groups, demonstrated that they were likely to suffer irreparable injury to their recreational and aesthetic interests if the barrier was constructed. The court merged the analysis for the balance of the equities and the public interest because the government is a party, determining that the public has an interest in ensuring that statutes enacted by their representatives are not imperiled by executive fiat.

**Immigrant Detention**

A class of detained asylum seekers challenged the government’s policy or practice of excessively prolonging their detention, and moved for a preliminary injunction requiring that bond hearings be held before the Executive Office for Immigration Review within seven days of their request. *Padilla v. US Immigration & Customs Enf’t*, 379 F.Supp.3d 1170 (W.D. Wash. 2019). The court found that the asylum seekers established all four elements for injunctive relief: a likelihood of success on the
merits, irreparable harm if their relief is not granted, a balance of equities in their favor, and that the public interest will be benefited by the relief they seek. In applying the balancing test from *Mathews v. Eldridge* (Casebook, p. 256), the court found the plaintiffs had “considerable private interests at stake: A constitutional right to press their due process claims, including the right to be free from indeterminate civil detention, and their right to have bond hearings conducted in conformity with due process.”

Chapter 16: Appellate Review

Changes to the Federal Rules of Appellate Procedure

Modifications to Rules 8, 11, 25, 26, 31, 39, and 41 were effective as of December 1, 2018. Alterations to Rules 8, 11, and 39 are to account for the use of securities other than bonds to obtain a stay of judgment consistent with the amended Federal Rule of Civil Procedure 62. Updates to Rule 25 address electronic filing, signature, and service. Rule 26 eliminates the “three-day rule” for electronic filings, and, as a result, revised Rule 31 extends the period for filing a reply brief to 21 days. Finally, Rule 41 clarifies that a stay for the mandate to file a petition for certiorari granted by the court of appeals automatically extends when the Supreme Court extends the time for filing a petition. And, a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court’s order denying certiorari, absent extraordinary circumstances.

A final note is that the Judicial Conference Committee on Practice and Procedure has approved alterations of Rules 3(d), 5(a), 21(a) and (c), 26.1, 32(f), and 39(d) and (e), and has transmitted them to the Supreme Court. If the Supreme Court approves these changes, and unless Congress intervenes, the changes will be effective December 1, 2019.

Rule 8. Stay or Injunction Pending Appeal

Rule 8(a)(1)(B) was modified from including only a bond, to including a “bond or other security to obtain a stay of judgment.” The qualifier “appropriate” has been removed before security in Rule 8(a)(2)(E). These changes make Rule 8 consistent with amended Federal Rule of Civil Procedure 62.

Rule 11. Forwarding the Record

Rule 11(g) removes the qualifier supersedeas before bond, and adds “other security provided to obtain a stay of judgment.”

Rule 25. Filing and Service

Changes to Rule 25 make it consistent with the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, and service.
Rule 25(a)(2) has been divided to address nonelectronic filing in subsection (A), and electronic filing and signing in subsection (B). There is now a general presumption that a represented person must use electronic filing, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. In contrast, an unrepresented person may be allowed to file electronically and only required to do so by court order, or a local rule with reasonable exceptions. A filing made through a person’s electronic-filing account and authorized by that person, together with that person’s name on a signature block, constitutes the person’s signature under revised Rule 25(a)(2)(B)(iii).

Rule 25(c) updates the manner of service to account for the role of electronic filing. Under Rule 25(c)(2) electronic service may be made by either sending it to a registered user by filing with the court’s electronic filing system or by sending it by other electronic means that the person to be served consented to in writing.

Rule 25(d) has been updated to reflect that papers served via the court’s electronic-filing system do not require additional proof of service. Additionally, service may be made to electronic addresses.

**Rule 26. Computing and Extending Time**

In general, courts may extend the time prescribed by the rules for good cause. However, Rule 26(b) lists two situations when the court may not extend the time to file. First, a notice of appeal, except as authorized by Rule 4, or a petition for permission to appeal. Second, a notice of appeal or petition involving the order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

Rule 26(c), on additional time after service, now explicitly excludes electronic service from receiving three additional days after the period would normally expire under Rule 26(a).

**Rule 31. Serving and Filing Briefs**

Subdivision (a)(1) was revised to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the “three-day rule” in Rule 26(c), attorneys were accustomed to a period of 17 days to file a reply brief. The Committee Notes concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs, so decided to round up a full week to 21 days.

**Rule 39. Costs**

Rule 39 (e)(3) on costs on appeal that are taxable in the district court has been updated to include a “bond or other security.”
Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

Subdivision (b) was revised to clarify that an order is required for a stay of the mandate. The phrase “by order” was deleted as part of the 1998 restyling of this rule. The Committee Notes explain that although the change was intended as merely stylistic, it has caused uncertainty concerning whether a court of appeals can stay its mandate through mere inaction or whether such a stay requires an order. Requiring a court order serves the dual functions of providing notice to litigants and facilitating review of the stay.

There are three changes in Rule 41(d):

Subdivision (d)(1)—which formerly addressed stays of the mandate upon the timely filing of a motion to stay the mandate or a petition for panel or en banc rehearing—was deleted as redundant and the rest of subdivision (d) has been renumbered and renamed accordingly. Rule 41(b) sets the presumptive date for issuance of the mandate at 7 days after entry of an order denying the petition or motion. The Committee Notes emphasize that the deletion of subdivision (d)(1) is intended to streamline the rule; no substantive change is intended.

Under Rule 41(d)(2)(B), if the court of appeals issues a stay of the mandate for a party to file a petition for certiorari, and a Justice of the Supreme Court subsequently extends the time for filing the petition, the stay automatically continues for the extended period.

Revised Rule 41(d)(4), which was former subdivision (d)(2)(D), is amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court’s order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. Finally, the reference to the filing of a copy of the Supreme Court’s order is replaced by the court of appeals’ receipt of a copy of the Supreme Court’s order. The Committee Notes explain that although in practice the filing and receipt amount to the same thing, “on receiving copy” is used for clarity.

The Principle of Finality

The final judgment rule (Casebook, p. 1157) was at issue in Wells Fargo v. Allstate, 735 Fed. Appx. 208 (6th Cir. 2018), in which the Sixth Circuit dismissed the appeal for lack of jurisdiction. The merits of the appeal concerned whether an insurance policy covered fire damage to an abandoned building caused by an arsonist. The district court styled its summary judgment order as a final judgment and ruled that the insurance company was liable. But, the district court did not determine damages, and failed to address the building owner’s demand for breach-of-contract damages. The Sixth Circuit looked past the district court’s label of “final” and decided that the order was not a final judgment under 28 U.S.C. § 1291. The appeals court emphasized that a successive appeal on the damages issue would “run[ ] counter to both the letter and spirit of § 1291,” and
“[t]he point of the finality requirement . . . is to make the parties bring all of their issues—liability, damages, and whatever else they choose to litigate—in a single appeal.”

Within the specific context of Social Security claims, the U.S. Supreme Court examined whether the Social Security Appeals Council’s dismissal of a claim is a “final decision . . . made after a hearing,” as to allow judicial review under the Social Security Act, 42 U.S.C. § 405(g). Smith v. Berryhill, 139 S. Ct. 1765 (2019). After the Social Security Appeals Council dismissed Smith’s request for review as untimely and lacking good cause, Smith sought review in federal district court. The Sixth Circuit affirmed the district court’s ruling that “an Appeals Council decision to refrain from considering an untimely petition for review is not a ‘final decision’ subject to judicial review in federal court.” The Supreme Court reversed, holding that a decision of the Appeals Council dismissing a request for review as untimely qualifies as a final decision. Justice Sotomayor, delivering the opinion for a unanimous court, examined both the Social Security Act and the Administrative Procedure Act in determining if the action was “final” as to allow judicial review.

The Notice and Time to Appeal

In Nutraceutical Corp. v. Lambert (Rules Supplement, p. 386), the Supreme Court held that the Ninth Circuit properly characterized Rule 23(f)’s time limitation as a “nonjurisdictional claim processing rule,” but erred in concluding that it was therefore subject to equitable tolling. Writing for a unanimous court, Justice Sotomayor clarified that nonjurisdictional claim-processing rules can be waived or forfeited, but

> [t]he mere fact that a time limit lacks jurisdictional force, however, does not render it malleable in every respect. Though subject to waiver and forfeiture, some claim-processing rules are “mandatory”—that is, they are “unalterable” if properly raised by an opposing party. . . Whether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility.

By looking at the text of Federal Rule 23(f), and the context of the Federal Rules of Appellate Procedure, the Court concluded, “[t]he Rules thus express a clear intent to compel rigorous enforcement of Rule 23(f)’s deadline, even where good cause for equitable tolling might otherwise exist.”

The Seventh Circuit in Hamer v. Neighborhood Hous. Servs. of Chicago, 897 F.3d 835 (7th Cir. 2018), on remand from the Supreme Court (Casebook, p. 1186), found that the timeliness objection to an appeal was waived. Originally, the Seventh Circuit had held that the time limit imposed by Rule 4(a)(5)(C) is jurisdictional, and dismissed Hamer’s appeal, despite the district court’s having granted an extension. The Supreme Court reversed, and held that a court-imposed timing rule could be subject to forfeiture if not properly raised. On remand, Seventh Circuit examined whether the defendants properly raised Rule 4(a)(5)(C). The appeals court held that the defendants did not need
to cross-appeal or appeal from the order granting the extension to challenge Hamer’s appeal as untimely, deepening a circuit split on this question. Compare United States v. Madrid, 633 F.3d 1222 (10th Cir. 2011), with Amatangelo v. Donora, 212 F.3d 776 (3d Cir. 2000); United States v. Burch, 781 F.3d 342 (6th Cir. 2015). However, in the end, the appeals court found that the defendants had waived the timeliness argument in its docketing statement (in which defendants stated, “Plaintiff-Appellant filed a timely Notice of Appeal”).

Issues Subject to Review

The First Circuit’s decision in Sexual Minorities Uganda v. Lively, 899 F.3d 24 (1st Cir. 2018), illustrates well who gets to appeal, which issues are subject to appellate review, and principles of judicial estoppel. A nonprofit organization sued Lively, an American citizen, alleging that he worked in concert with others in the United States and Uganda to persecute the lesbian, gay, bisexual, transgender, and intersex community in Uganda. Claims were alleged under the Alien Tort Statute (ATS) and state law. Lively argued that the ATS did not apply and that diversity jurisdiction did not exist. The district court agreed, granting summary judgment for Lively. Further, after dismissing the ATS claims, the district court declined to exercise supplemental jurisdiction over plaintiff’s state claims, and dismissed them without prejudice.

Despite prevailing, Lively appealed, seeking to retract statements in the district court’s opinion describing defendant’s extreme homophobic conduct, as revealed in discovery during the litigation. The First Circuit held that it lacked jurisdiction over the appeal.

Generally speaking, only a party aggrieved by a final order or judgment may avail himself of the statutory right to appeal embodied in [28 U.S.C. § 1291] * * *. As a practical matter, this means that we typically review appeals by parties who lost in the lower court and confine our inquiry to findings that were necessary to sustain the final judgment. See [Electric Fittings, Casebook, p. 1187]; * * *. It follows that a party—like Lively—who has obtained a favorable final judgment may not “seek review of uncongenial findings not essential to the judgment and not binding upon [him] in future litigation.” * * * A necessary corollary of this proposition is that “a winner cannot appeal a judgment merely because there are passages in the court’s opinion that displease him.” * * *. Such a praxis stems not only from the language and clear intendment of section 1291 itself, but also from prudential considerations. An appellate court’s “resources are not well spent superintending each word a lower court utters en route to a final judgment in the [appellant’s] favor.” [Camreta v. Greene, p. 1204]. * * *

The narrow exception contemplated by Electric Fittings (Casebook, p. 1187) simply did not apply:
The judgment from which Lively appeals simply dismisses [plaintiff’s] action; it does not include any findings adverse to Lively. The Electrical Fittings exception has no application where, as here, the language complained of does “not appear on the face of the judgment” but, rather, appears in the accompanying opinion. * * * In short, there is nothing for us to excise.

Further, the appeals court held that appellant was judicially estopped from arguing that the district court had power to exercise supplemental jurisdiction even after dismissal of the ATS claims because diversity jurisdiction was present. Throughout the litigation, defendant had argued that diversity jurisdiction was not present, and he could not now, on appeal, reverse course and argue an inconsistent position:

When a party makes a representation to a court, there is no unfairness in insisting that he live with its consequences. Accordingly, there is no principled way in which we can now permit Lively to embrace a directly contradictory position “simply because his interests have changed.” * * * Any other outcome would “rais[e] the specter of inconsistent determinations and endanger[ ] the integrity of the judicial process.”

Chapter 17. Preclusion

Stare Decisis

In Knick v. Township of Scott, 139 S. Ct. 2162 (U.S. 2019), the Supreme Court held that a property owner whose property is taken by the government without compensation may bring a Fifth Amendment claim at any time, and need not first exhaust state judicial remedies, overruling prior precedent on this question. In deciding that stare decisis did not require adhering to a past precedent, the Court explained:

We have identified several factors to consider in deciding whether to overrule a past decision, including “the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision.” * * * All of these factors counsel in favor of overruling Williamson County.

Williamson County [Regional Planning Com’n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S. Ct. 3108, 87 L.Ed.2d 126 (1985)] was not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence. * * *

The decision has come in for repeated criticism over the years from Justices of this Court and many respected commentators. * * * Even the academic defenders of the state-litigation requirement base it on
federalism concerns * * * rather than the reasoning of the opinion itself.

Because of its shaky foundations, the state-litigation requirement has been a rule in search of a justification for over 30 years. * * *

The state-litigation requirement has also proved to be unworkable in practice. * * * The dissent argues that our constitutional holding in *Williamson County* should enjoy the “enhanced” form of *stare decisis* we usually reserve for statutory decisions, because Congress could have eliminated the * * * preclusion trap by amending the full faith and credit statute. * * * But takings plaintiffs, unlike plaintiffs bringing any other constitutional claim, would still have been forced to pursue relief under state law before they could bring suit in federal court. Congress could not have lifted that unjustified exhaustion requirement because, under *Williamson County*, a property owner had no federal claim until a state court denied him compensation.

Finally, there are no reliance interests on the state-litigation requirement. We have recognized that the force of *stare decisis* is “reduced” when rules that do not “serve as a guide to lawful behavior” are at issue. * * * Our holding that uncompensated takings violate the Fifth Amendment will not expose governments to new liability; it will simply allow into federal court takings claims that otherwise would have been brought as inverse condemnation suits in state court.

Justice Kagan’s dissenting opinion, joined by Justice Ginsburg, Justice Breyer, and Justice Sotomayor, argued that the majority’s opinion “transgresses all usual principles of *stare decisis*”: “*Stare decisis* * * * is ‘not an inexorable command.’ * * * But it is not enough that five Justices believe a precedent wrong. Reversing course demands a ‘special justification—over and above the belief that the precedent was wrongly decided.’ * * * The majority offers no reason that qualifies.”

**Claim Preclusion**

As the Ninth Circuit put it in *Media Rights Technologies, Inc. v. Microsoft Corporation*, 922 F.3d 1014 (9th Cir. 2019), “This case requires that we apply longstanding principles of claim preclusion to a contemporary set of facts.” Boiled down, the question was whether a prior suit for patent infringement claim precluded a later suit for copyright infringement even though the claims have different elements. At issue was Microsoft’s use of a technology, that plaintiff alleged it had developed, to protect electronic files, such as music files, from content piracy. The court of appeals explained:

> We hold that claim preclusion bars the claims in this suit that had accrued at the time of [plaintiff’s] patent-infringement action: namely, (1) copyright infringement claims arising from the sale of Microsoft products
before [plaintiff] filed its patent-infringement suit; (2) the [copyright]
claim; and (3) the breach of contract claims. These claims all arise from
the same events—Microsoft’s alleged misappropriation of [plaintiff]’s
software—as the prior patent infringement claims. They merely offer
different legal theories for why Microsoft’s alleged conduct was wrongful.
We affirm the district court’s dismissal of these claims.

However, we hold, * * * that claim preclusion does not bar [plaintiff] from
asserting copyright infringement claims that accrued after it filed its
patent-infringement suit: namely, claims arising from the sale of Microsoft
products after MRT filed its patent-infringement suit. We reverse the
district court’s dismissal of these copyright infringement claims, and
remand for further proceedings.

In reaching this result, the court considered:

   (1) whether the two suits arise out of the same transactional nucleus of
   facts; (2) whether rights or interests established in the prior judgment
   would be destroyed or impaired by prosecution of the second action; (3)
   whether the two suits involve infringement of the same right; and (4)
   whether substantially the same evidence is presented in the two actions.

The court further held that “[f]or purposes of claim preclusion, the separate-accrual rule
means that a new cause of action for copyright infringement accrued each time Microsoft
sold an allegedly infringing product.”

**Defense Preclusion**

In Marcel Fashions Grp., Inc. v. Lucky Brand Dungarees, Inc., 898 F.3d 232, 238
(2d Cir. 2018), cert. granted sub nom. Lucky Brand Dungarees, Inc. v. Marcel Fashion
Grp., Inc., 2019 WL 826028 (U.S. 2019), the Second Circuit considered “whether a party
can be barred by claim preclusion doctrine from prosecuting a litigation defense. . . .”
discussed in the Casebook (p. 1226). The district court denied Marcel’s argument that
Lucky Brand was precluded from invoking a settlement release of claims as a defense by
res judicata, stating “[c]laim preclusion does not apply because Lucky Brand is not
asserting a claim against Marcel.” The appeals court rejected this analysis, and instead
determined that res judicata applies to both claims and defenses, explaining that:

   defense preclusion bars a party from raising a defense where: (i) a
previous action involved an adjudication on the merits; (ii) the
previous action involved the same parties or those in privity with
them; (iii) the defense was either asserted or could have been
asserted, in the prior action; and (iv) the district court, in its
discretion, concludes that preclusion of the defense is appropriate
because efficiency concerns outweigh any unfairness to the party
whose defense would be precluded.
The court also commented that defense preclusion was particularly justified in this case because the complaint was styled as an action to enforce the judgment. Certiorari has been granted, and students may be interested in following the briefing and arguments in the Supreme Court. Lucky Brand Dungarees, Inc. v. Marcel Fashion Grp., Inc., No. 18-1086, 2019 WL 826028 (U.S. 2019)

**Issue Preclusion and Persons Benefited and Persons Bound by Preclusion**

In *Munson v. Butler*, 2019 WL 2303203 (7th Cir. 2019), Munson, a pro se prisoner, sued prison officials, arguing that a soy-based diet was harmful to his health and violated his religious practice. The district court granted summary judgment for defendants, and on appeal, plaintiff argued that the district court abused its discretion by staying discovery pending the outcome of a similar case then pending in the Central District of Illinois and denying his motion under Rule 56(d) to conduct discovery after the Central District case was decided. The Seventh Circuit vacated and remanded, explaining:

It is true that a district court has inherent power to exercise its discretion to stay proceedings to avoid unnecessary litigation of the same issues. *** In this case, however, we conclude that the combination of the stay of discovery pending a decision in [another pending case in which plaintiff was not a party] and the later denial of [plaintiff’s] Rule 56(d) motion added up to an abuse of discretion. In effect, the district court treated Munson as if he were bound by the results of the [other pending] litigation of the soy-diet issue.

We acknowledge that the court did not refer specifically to collateral estoppel or issue preclusion, but that is the practical effect of the combined rulings. Munson could not properly be estopped from litigating for himself the soy-diet issue, even if he faces an uphill climb in showing that the *** decision [in the other pending case] was incorrect. Discretionary decisions based on an erroneous view of the law can result in an abuse of discretion. ***

Collateral estoppel prevents relitigating an issue when “(1) the party against whom the estoppel is asserted was a party to the prior adjudication, (2) the issues forming the basis of the estoppel were actually litigated and decided on the merits in the prior suit, (3) the resolution of the particular issues was necessary to the court’s judgment, and (4) those issues are identical to issues raised in the subsequent suit.” *** Here the application of collateral estoppel was inappropriate because the party against whom estoppel was being asserted in effect, Munson, was not party to the prior adjudication. The party against whom the issue had been resolved must have had a “full and fair opportunity” to litigate that issue in the prior suit, as well as a “meaningful opportunity” to appeal the resolution of that
Munson was not a party or in privity with the parties in [the other pending case].

Nor was the combination of the discovery stay and denial of the later Rule 56(d) motion a valid application of non-mutual collateral estoppel, which does not require the mutuality of parties. * * * The defensive use of non-mutual collateral estoppel allows a defendant who was not party to the prior suit to block a plaintiff from relitigating an issue that the plaintiff had previously litigated and lost. [Blonder-Tongue Labs, Casebook, p. 1274]. The district court, in effect, allowed the defendants to use defensive non-mutual collateral estoppel against Munson when it granted a discovery stay pending resolution of [the other case] in the Central District of Illinois. This was a legal error. A litigant like Munson, who had not previously litigated this issue in the prior action, is not subject to defensive non-mutual collateral estoppel. * * *

The decision offers a complex but interesting context for evaluating issue preclusion and the day-in-court ideal stressed in *Taylor v. Sturgell* (Casebook, p. 1292).

Chapter 18: Alternative Dispute Resolution

Arbitration

The question of who decides threshold questions of arbitrability was at the forefront of *Henry Schein Inc. v. Archer and White Sales Inc.* (Rules Supplement, p. 385). Justice Kavanaugh, writing his first opinion as a Justice for a unanimous Court, held that courts lack the authority to override an arbitration agreement, even if the court finds that the application of the agreement to the dispute is “wholly groundless.” The Federal Arbitration Act (FAA) does not contain a “wholly groundless” exception, and therefore a district court has no authority to determine such “gateway” questions when the contract has assigned such questions to the arbitrator.

By contrast, in *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019), the Court, eight-to-zero (Justice Kavanaugh did not participate), in an opinion authored by Justice Gorsuch, affirmed the First Circuit Court of Appeals and held that a district court must first determine that an exclusion from the Federal Arbitration Act does not apply before ordering the case to arbitration. At issue was the statute’s exception from arbitration of “contracts of employment” for certain transportation workers; the Court held that the question of the exclusion was a matter for the court and not the arbitrator.

Taken together, these two cases suggest that there is a difference between statutory arbitrability, i.e. subject matter excluded from arbitration as a matter of public policy, which should be decided by a court (New Prime), and contractual arbitrability, i.e. flaws in the arbitration agreement or in the application thereof, which should be decided by an arbitrator (Schein). Justice Gorsuch’s majority opinion in *New Prime* highlights the
presence of a statutory FAA exception as the basis for the district court’s refusal to compel arbitration. This logic squares with Justice Kavanaugh’s emphasis in Schein that the FAA does not contain a “wholly groundless” exception, and therefore the question of arbitrability should be decided by the arbitrator, not a court. 139 S. Ct. at 528.

Nonetheless, it remains unclear how the lower courts should apply these principles. The Sixth Circuit recently upheld an arbitrator’s determination that a statutory exception under 15 U.S.C. § 1226 does not apply to foreign dealerships, but did not directly address the question of who should properly decide the arbitrability question. Arabian Motors Grp., W.L.L. v. Ford Motor Co., 2019 WL 2305313 (6th Cir. 2019). The Second Circuit affirmed a district court’s invalidation of an arbitration clause because “they are designed to avoid federal and state consumer protection laws” and on the grounds of unconscionability, citing the FAA section 2 command to “save upon such grounds as exist at law or in equity for the revocation of any contract.” Gingras v. Think Fin., Inc., 922 F.3d 112 (2d Cir. 2019).

Changing Judicial Attitudes toward ADR: The Example of Binding Arbitration

In Lamps Plus, Inc. v. Varela (Rules Supplement, p. 387), Chief Justice Roberts, delivering a five-to-four opinion for the Court, held that courts may not infer that parties have consented to class arbitration when the agreement is ambiguous. In so holding, the Court displaced a California state law doctrine of contra proferentem which construes ambiguities in a contract against the drafter. The Court reasoned that implying consent to class arbitration is inconsistent with the FAA because it “interferes with fundamental attributes of arbitration.” The Court emphasized that it was not addressing whether the availability of class arbitration is to be decided by the judge or the arbitrator (“This Court has not decided whether the availability of class arbitration is a so-called ‘question of arbitrability,’ which includes these gateway matters. We have no occasion to address that question here because the parties agreed that a court, not an arbitrator, should resolve the question about class arbitration.”) Justice Thomas joined the majority but authored a concurring opinion to argue that the contract was silent rather than unambiguous, and to express skepticism of Chief Justice Robert’s preemption analysis.

There were four dissenting opinions. First, Justice Ginsburg, joined by Justices Breyer and Sotomayor, criticized Justice Robert’s use of consent, commenting, “[t]oday’s decision underscores the irony of invoking ‘the first principle’ that ‘arbitration is strictly a matter of consent,’ . . . to justify imposing individual arbitration on employees who surely would not choose to proceed solo.” (Ginsberg, J., dissenting). Second, Justice Breyer’s dissent argued that the Court of Appeals lacked jurisdiction because the appeal was of an impermissible interlocutory order. (Breyer, J., dissenting). Third, Justice Sotomayor wrote that the majority’s emphasis on the “fundamental changes” wrought by class-action arbitration was overstated and that the “class-action is simply a ‘procedural device.’” (Sotomayor, J., dissenting). She also remarked that the Court’s haste to invalidate a state law principle is inconsistent with its usual “great solicitude when it comes to the possible pre-emption of state law.” Finally, Justice Kagan, joined by
Justices Ginsburg and Breyer and partially joined by Justice Sotomayor, commented that the majority opinion is based only on the policy view that “class arbitration undermine[s] the central benefits of arbitration itself,” which does not justify the displacement of state law.

In late June 2019, the Ninth Circuit pushed back with a series of three cases holding that a different California state law rule, the McGill rule, is not preempted by the FAA. Blair v. Rent-A-Ctr., Inc., 2019 WL 2701333 (9th Cir. 2019); McArdle v. AT&T Mobility LLC, 2019 WL 2718474 (9th Cir. 2019); Tillage v. Comcast Corp., 2019 WL 2713292 (9th Cir. 2019). As the appeals court explained in Blair, the McGill rule provides that private agreements cannot waive the right to seek public injunctive relief, which is “injunctive relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public.” The Ninth Circuit characterized the McGill rule as a “generally applicable contract defense,” which applies “equally to arbitration and non-arbitration agreements.” The court acknowledged the Supreme Court’s statement in Lamps Plus that “‘[t]he general applicability of [a] rule [does] not save it from preemption under the FAA’ if the rule ‘interferes with fundamental attributes of arbitration.’” Nevertheless, as the appeals court explained:

[c]rucially, arbitration of a public injunction does not interfere with the bilateral nature of a typical consumer arbitration. The rules struck down in Concepcion and Epic Systems “impermissibly disfavor[ed] arbitration” because they rendered an agreement “unenforceable just because it require[d] bilateral arbitration.” The McGill rule does no such thing. The McGill rule leaves undisturbed an agreement that both requires bilateral arbitration and permits public injunctive claims. A plaintiff requesting a public injunction files the lawsuit “on his or her own behalf” and retains sole control over the suit. Nothing in the McGill rule requires a “switch from bilateral ... arbitration” to a multi-party action.

The Ninth Circuit acknowledged that requiring a forum for public injunctions opens an avenue for class actions (“It is possible that arbitration of a public injunction will in some cases be more complex than arbitration of a conventional individual action . . .”). But, the court insisted that “[a] state-law rule that preserves the right to pursue a substantively complex claim in arbitration without mandating procedural complexity does not frustrate the FAA’s objectives.”
## Appendix A: Errata

### Twelfth Edition, Errata

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<td>140</td>
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<td>171</td>
<td>Bors v. Johnson &amp; Johnson … (…manifests consent to jurisdiction)</td>
<td>Bors v. Johnson &amp; Johnson … (… manifests consent to general jurisdiction.; court did not address whether “non-consensual jurisdiction” could be based on “principles of general or specific jurisdiction”)</td>
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Appendix B: Home Depot

HOME DEPOT U. S. A., INC. v. JACKSON
Supreme Court of the United States, 2019.
587 U.S. ---, 139 S. Ct. 1743, --- L.Ed.3d ---.

Certiorari to the United States Court of Appeals for the Fourth Circuit.

THOMAS, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and GORSUCH and KAVANAUGH, JJ., joined.

The general removal statute, 28 U.S.C. § 1441(a), provides that “any civil action” over which a federal court would have original jurisdiction may be removed to federal court by “the defendant or the defendants.” The Class Action Fairness Act of 2005 (CAFA) provides that “[a] class action” may be removed to federal court by “any defendant without the consent of all defendants.” 28 U.S.C. § 1453(b). In this case, we address whether either provision allows a third-party counterclaim defendant—that is, a party brought into a lawsuit through a counterclaim filed by the original defendant—to remove the counterclaim filed against it. Because in the context of these removal provisions the term “defendant” refers only to the party sued by the original plaintiff, we conclude that neither provision allows such a third party to remove.

I

A

***

B

In June 2016, Citibank, N. A., filed a debt-collection action against respondent George Jackson in North Carolina state court. Citibank alleged that Jackson was liable for charges he incurred on a Home Depot credit card. In August 2016, Jackson answered and filed his own claims: an individual counterclaim against Citibank and third-party class-action claims against Home Depot U. S. A., Inc., and Carolina Water Systems, Inc.

Jackson’s claims arose out of an alleged scheme between Home Depot and Carolina Water Systems to induce homeowners to buy water treatment systems at inflated prices. The crux of the claims was that Home Depot and Carolina Water Systems engaged in unlawful referral sales and deceptive and unfair trade practices in violation of North Carolina law. * * *. Jackson also asserted that Citibank was jointly and severally liable for the conduct of Home Depot and Carolina Water Systems and that his obligations under the sale were null and void.
In September 2016, Citibank dismissed its claims against Jackson. One month later, Home Depot filed a notice of removal, ***. Jackson moved to remand, arguing that precedent barred removal by a “third-party/additional counter defendant like Home Depot.” *** Shortly thereafter, Jackson amended his third-party class-action claims to remove any reference to Citibank.

The District Court granted Jackson’s motion to remand, and the Court of Appeals for the Fourth Circuit granted Home Depot permission to appeal and affirmed. 880 F. 3d 165, 167 (2018) ***. Relying on Circuit precedent, it held that neither *** § 1441(a), nor CAFA’s removal provision, *, *, allowed Home Depot to remove the class-action claims filed against it. ***.

We granted Home Depot’s petition for a writ of certiorari to determine whether a third party named in a class-action counterclaim brought by the original defendant can remove if the claim otherwise satisfies the jurisdictional requirements of CAFA. *** We also directed the parties to address whether the holding in Shamrock Oil (Casebook, p. 350)—that an original plaintiff may not remove a counterclaim against it—should extend to third-party counterclaim defendants.1 ***

II

A

We first consider whether * * * § 1441 permits a third-party counterclaim defendant to remove a claim filed against it. * * * Home Depot contends that because a third-party counterclaim defendant is a “defendant” to the claim against it, it may remove pursuant to § 1441(a). The dissent agrees, emphasizing that “a ‘defendant’ is a ‘person sued in a civil proceeding.’” * * * (opinion of ALITO, J.). This reading of the statute is plausible, but we do not think it is the best one. Of course the term “defendant,” standing alone, is broad. * * * “It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” * * * Considering the phrase “the defendant or the defendants” in light of the structure of the statute and our precedent, we conclude that § 1441(a) does not permit removal by any counterclaim defendant, including parties brought into the lawsuit for the first time by the counterclaim.3

Home Depot emphasizes that it is a “defendant” to a “claim,” but the statute refers to “civil action[s],” not “claims.” This Court has long held that a district court, when determining

1 In this opinion, we use the term “third-party counterclaim defendant” to refer to a party first brought into the case as an additional defendant to a counterclaim asserted against the original plaintiff.

3 Even the dissent declines to rely on the dictionary definition of “defendant” alone, as following that approach to its logical conclusion would require overruling Shamrock Oil.
whether it has original jurisdiction over a civil action, should evaluate whether that action could have been brought originally in federal court. * * * This requires a district court to evaluate whether the plaintiff could have filed its operative complaint in federal court, either because it raises claims arising under federal law or because it falls within the court’s diversity jurisdiction. * * * Section 1441(a) thus does not permit removal based on counterclaims at all, as a counterclaim is irrelevant to whether the district court had “original jurisdiction” over the civil action. And because the “civil action ... of which the district court[ ]” must have “original jurisdiction” is the action as defined by the plaintiff’s complaint, “the defendant” to that action is the defendant to that complaint, not a party named in a counterclaim. It is this statutory context, not “the policy goals behind the [well-pleaded complaint] rule,”* * * that underlies our interpretation of the phrase “the defendant or the defendants.”

The use of the term “defendant” in related contexts bolsters our determination that Congress did not intend for the phrase “the defendant or the defendants” in § 1441(a) to include third-party counterclaim defendants. For one, the Federal Rules * * * differentiate between third-party defendants, counterclaim defendants, and defendants. Rule 14, which governs “Third-Party Practice,” distinguishes between “the plaintiff,” a “defendant” who becomes the “third-party plaintiff,” and “the third-party defendant” sued by the original defendant. Rule 12 likewise distinguishes between defendants and counterclaim defendants by separately specifying when “[a] defendant must serve an answer” and when “[a] party must serve an answer to a counterclaim.” * * *

Moreover, in other removal provisions, Congress has clearly extended the reach of the statute to include parties other than the original defendant. For instance, [28 U.S.C.] § 1452(a) permits “[a] party” in a civil action to “remove any claim or cause of action” over which a federal court would have bankruptcy jurisdiction. And §§ 1454(a) and (b) allow “any party” to remove “[a] civil action in which any party asserts a claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights.” Section 1441(a), by contrast, limits removal to “the defendant or the defendants” in a “civil action” over which the district courts have original jurisdiction.

Finally, our decision in Shamrock Oil suggests that third-party counterclaim defendants are not “the defendant or the defendants” who can remove under § 1441(a). Shamrock Oil held that a counterclaim defendant who was also the original plaintiff could not remove under § 1441(a)’s predecessor statute. * * * We agree with Home Depot that Shamrock Oil does not specifically address whether a party who was not the original plaintiff can remove a counterclaim filed against it. And we acknowledge, as Home Depot points out, that a third-party counterclaim defendant, unlike the original plaintiff, has no role in selecting the forum for the suit. But the text of § 1441(a) simply refers to “the defendant or the defendants” in the civil action. If a counterclaim defendant who was the original plaintiff is not one of “the defendants,” we see no textual reason to reach a different conclusion for a counterclaim defendant who was not originally part of the lawsuit. In that regard, Shamrock Oil did not view the counterclaim as a separate action with a new plaintiff and a new defendant. Instead, the Court highlighted that the original plaintiff was still “the plaintiff.” * * * Similarly here, the filing of counterclaims that included class-action
allegations against a third party did not create a new “civil action” with a new “plaintiff” and a new “defendant.”

Home Depot asserts that reading “the defendant” in § 1441(a) to exclude third-party counterclaim defendants runs counter to the history and purposes of removal by preventing a party involuntarily brought into state-court proceedings from removing the claim against it. But the limits Congress has imposed on removal show that it did not intend to allow all defendants an unqualified right to remove. E.g., § 1441(b)(2) (preventing removal based on diversity jurisdiction where any defendant is a citizen of the State in which the action is brought). Moreover, Home Depot’s interpretation makes little sense in the context of other removal provisions. For instance, when removal is based on § 1441(a), all defendants must consent to removal. * * *. Under Home Depot’s interpretation, “defendants” in § 1446(b)(2)(A) could be read to require consent from the third-party counterclaim defendant, the original plaintiff (as a counterclaim defendant), and the original defendant asserting claims against them. Further, Home Depot’s interpretation would require courts to determine when the original defendant is also a “plaintiff” under other statutory provisions. * * *. Instead of venturing down this path, we hold that a third-party counterclaim defendant is not a “defendant” who can remove under § 1441(a).

B

We next consider whether CAFA’s removal provision, § 1453(b), permits a third-party counterclaim defendant to remove. * * * Home Depot contends that even if it could not remove under § 1441(a), it could remove under § 1453(b) because that statute is worded differently. It argues that although § 1441(a) permits removal only by “the defendant or the defendants” in a “civil action,” § 1453(b) permits removal by “any defendant” to a “class action.” (Emphasis added.) Jackson responds that this argument ignores the context of § 1453(b), which he contends makes clear that Congress intended only to alter certain restrictions on removal, not expand the class of parties who can remove a class action. Although this is a closer question, we agree with Jackson.

The two clauses in § 1453(b) that employ the term “any defendant” simply clarify that certain limitations on removal that might otherwise apply do not limit removal under § 1453(b). Section 1453(b) first states that “[a] class action may be removed ... without regard to whether any defendant is a citizen of the State in which the action is brought.” There is no indication that this language does anything more than alter the general rule that a civil action may not be removed on the basis of diversity jurisdiction “if any of the ... defendants is a citizen of the State in which such action is brought.” * * *. Section 1453(b) then states that “[a] class action ... may be removed by any defendant without the consent of all defendants.” This language simply amends the rule that “all defendants who have been properly joined and served must join in or consent to the removal of the action.” * * *. Rather than indicate that a counterclaim defendant can remove, “here the word ‘any’ is being employed in connection with the word ‘all’ later in the sentence—‘by any ... without ... the consent of all.’” * * * Neither clause—nor anything else in the statute—alters § 1441(a)’s limitation on who can remove, which suggests that Congress intended to leave that limit in place. * * *
Thus, although the term “any” ordinarily carries an “‘expansive meaning,’” * * * the context here demonstrates that Congress did not expand the types of parties eligible to remove a class action under § 1453(b) beyond § 1441(a)’s limits. If anything, that the language of § 1453(b) mirrors the language in the statutory provisions it is amending suggests that the term “defendant” is being used consistently across all provisions. * * *

To the extent Home Depot is arguing that the term “defendant” has a different meaning in § 1453(b) than it does in § 1441(a), we reject its interpretation. Because §§ 1453(b) and 1441(a) both rely on the procedures for removal in § 1446, which also employs the term “defendant,” interpreting “defendant” to have different meanings in different sections would render the removal provisions incoherent. * * * Interpreting the removal provisions together, we determine that § 1453(b), like § 1441(a), does not permit a third-party counterclaim defendant to remove.

Finally, the dissent argues that our interpretation allows defendants to use the statute as a “tactic” to prevent removal, * * * but that result is a consequence of the statute Congress wrote. Of course, if Congress shares the dissent’s disapproval of certain litigation “tactics,” it certainly has the authority to amend the statute. But we do not.

* * *

Because neither § 1441(a) nor § 1453(b) permits removal by a third-party counterclaim defendant, Home Depot could not remove the class-action claim filed against it. Accordingly, we affirm the judgment of the Fourth Circuit.

It is so ordered.

Justice ALITO, with whom THE CHIEF JUSTICE, Justice GORSUCH, and Justice KAVANAUGH join, dissenting.

The rule of law requires neutral forums for resolving disputes. Courts are designed to provide just that. But our legal system takes seriously the risk that for certain cases, some neutral forums might be more neutral than others. Or it might appear that way, which is almost as deleterious. For example, a party bringing suit in its own State’s courts might (seem to) enjoy, so to speak, a home court advantage against outsiders. Thus, from 1789 Congress has opened federal courts to certain disputes between citizens of different States. Plaintiffs, of course, can avail themselves of the federal option in such cases by simply choosing to file a case in federal court. But since their defendants cannot, the law has always given defendants the option to remove (transfer) cases to federal court. * * *

But defendants cannot remove a case unless it meets certain conditions. Some of those conditions have long made important (and often costly) consumer class actions virtually impossible to remove. Congress, concerned that state courts were biased against defendants to such actions, passed a law facilitating their removal. The Class Action Fairness Act of
2005 (CAFA) allows removal of certain class actions “by any defendant.” 28 U.S.C. § 1453(b). Our job is not to judge whether Congress’s fears about state-court bias in class actions were warranted or indeed whether CAFA should allay them. We are to determine the scope of the term “defendant” under CAFA as well as the general removal provision, * * *

All agree that if one party sues another, the latter—the original defendant—is a “defendant” under both removal laws. But suppose the original defendant then countersues, bringing claims against both the plaintiff and a new party. Is this new defendant—the “third-party defendant”—also a “defendant” under CAFA and § 1441? There are, of course, some differences between original and third-party defendants. One is brought into a case by the first major filing, the other by the second. The one filing is called a complaint, the other a countercomplaint.

But both kinds of parties are defendants to legal claims. Neither chose to be in state court. Both might face bias there, and with it the potential for crippling unjust losses. Yet today’s Court holds that third-party defendants are not “defendants.” It holds that Congress left them unprotected under CAFA and § 1441. This reads an irrational distinction into both removal laws and flouts their plain meaning, a meaning that context confirms and today’s majority simply ignores.

I

A

To appreciate what Congress sought to achieve with CAFA, consider what Congress failed to accomplish a decade earlier with the Private Securities Litigation Reform Act of 1995 (Reform Act), 109 Stat. 737 (codified at 15 U.S.C. §§ 77z–1 and 78u–4). The Reform Act was “targeted at perceived abuses of the class-action vehicle in litigation involving nationally traded securities,” including spurious lawsuits, “vexatious discovery requests, and ‘manipulation by class action lawyers of the clients whom they purportedly represent.”” * * * (quoting H. R. Conf. Rep. No. 104–369, p. 31 (1995). As a result of these abuses, Congress found, companies were often forced to enter “extortionate settlements” in frivolous cases, just to avoid the litigation costs—a burden with scant benefits to anyone. * * *. To curb these inefficiencies, the Reform Act “limit[ed] recoverable damages and attorney’s fees, ... impose[d] new restrictions on the selection of (and compensation awarded to) lead plaintiffs, mandate[d] imposition of sanctions for frivolous litigation, and authorize[d] a stay of discovery pending resolution of any motion to dismiss.” * * *

But “at least some members of the plaintiffs’ bar” found a workaround: They avoided the Reform Act’s limits on federal litigation by “avoid[ing] the federal forum altogether” and heading to state court. * * * Once there, they were able to keep defendants from taking them back to federal court (under the rules then in force) simply by naming an in-state defendant. * * * And the change in plaintiffs’ strategy was marked: While state-court litigation of such class actions had been “rare” before the Reform Act’s passage, * * *, within a decade state courts were handling most such cases, see S. Rep. No. 109–14, p. 4
Some in Congress feared that plaintiffs’ lawyers were able to “‘game’ the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests.” * * *. The result, in Congress’s judgment, was that “State and local courts” were keeping issues of “national importance” out of federal court, “acting in ways that demonstrate[d] bias against out-of-State defendants” and imposing burdens that hindered “innovation” and drove up “consumer prices.” * * *

So Congress again took action. But rather than get at the problem by imposing limits on federal litigation that plaintiffs could sidestep by taking defendants to state court, Congress sought to make it easier for defendants to remove to federal court: thus CAFA.

B

***

To [the] general removal regime, CAFA made several changes specific to class actions. Instead of allowing removal by “the defendant or the defendants,” see § 1441(a), § 5 of CAFA allowed removal by “any defendant” to certain class actions, § 1453(b), even when the other defendants do not consent, the case was filed in a defendant’s home forum, or the case has been pending in state court for more than a year. * * *.

Of course, these changes would be of no use to a class-action defendant hoping to remove if there were no federal jurisdiction over its case. So CAFA also lowered the barriers to diversity jurisdiction. While complete diversity of parties is normally required, CAFA eliminates that rule for class actions involving at least 100 members and more than $ 5 million in controversy. In such cases, CAFA vests district courts with diversity jurisdiction anytime there is minimal diversity—which occurs when at least one plaintiff and defendant reside in different States. * * *

We were asked to decide whether these loosened requirements are best read to allow removal by third-party defendants like Home Depot. The answer is clear when one considers Home Depot’s situation against CAFA’s language and history.

C

This case began as a garden-variety debt-collection action: Citibank sued respondent George Jackson in state court seeking payment on his purchase from petitioner Home Depot of a product made by Carolina Water Systems (CWS). Jackson came back with a counterclaim class action that roped in Home Depot and CWS as codefendants. (Until then, neither Home Depot nor CWS had been a party.) Citibank then dismissed its claim against Jackson, and Jackson amended his complaint to remove any mention of Citibank. So now all that remains in this case is Jackson’s class-action counterclaims against Home Depot and CWS.
Invoking CAFA, Home Depot filed a notice of removal; it also moved to realign the parties to make Jackson the plaintiff, and CWS, Home Depot, and Citibank the defendants (just before Citibank had dropped out entirely). The District Court denied the motion and remanded the case to state court, holding that Home Depot cannot remove under CAFA because CAFA’s “any defendant” excludes defendants to counterclaim class actions. The Court of Appeals affirmed, citing Circuit precedent that hung on this Court’s decision in Shamrock Oil ***.

All agree that the one dispute that now constitutes this lawsuit—Jackson’s class action against Home Depot and CWS—would have been removable under CAFA had it been present from the start of a case. Is it ineligible for removal just because it was not contained in the filing that launched this lawsuit?

Several lower courts think so. In holding as much, they have created what Judge Niemeyer called a “loophole” that only this Court “can now rectify.” Palisades Collections LLC v. Shorts, 552 F. 3d 327, 345 (CA4 2008) (dissenting from denial of rehearing en banc). The potential for that “loophole” was first spotted by a civil procedure scholar writing shortly after CAFA took effect. See Tidmarsh, Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action, 35 W. St. U. L. Rev. 193, 198 (2007). The article outlined a “tactic” for plaintiffs to employ if they wanted to thwart a defendant’s attempt to remove a class action to federal court under CAFA: They could raise their class-action claim as a counterclaim and “hope that CAFA does not authorize removal.” * * * In a single stroke, the article observed, a defendant’s routine attempt to collect a debt from a single consumer could be leveraged into an unremovable attack on the defendant’s “credit and lending policies” brought on behalf of a whole class of plaintiffs—all in the very state courts that CAFA was designed to help class-action defendants avoid. * * *.

The article is right to call this approach a tactic; it subverts CAFA’s evident aims. I cannot imagine why a Congress eager to remedy alleged state-court abuses in class actions would have chosen to discriminate between two kinds of defendants, neither of whom had ever chosen the allegedly abusive state forum, all based on whether the claim against them had initiated the lawsuit or arisen just one filing later (in the countercomplaint). Of course, what finally matters is the text, and in reading texts we must remember that “no legislation pursues its purposes at all costs,” * * *; Congress must often strike a balance between competing purposes. But a good interpreter also reads a text charitably, not lightly ascribing irrationality to its author; and I can think of no rational purpose for this limit on which defendants may remove. Even respondent does not try to defend its rationality, suggesting instead that it simply reflects a legislative compromise. Yet there is no evidence that anyone thought of this potential loophole before CAFA was enacted, and it is hard to believe that any of CAFA’s would-be opponents agreed to vote for it in exchange for this way of keeping some cases in state court. The question is whether the uncharitable reading here is inescapable—whether, unwittingly or despite itself, Congress adopted text that compels this bizarre result.
There are different schools of thought about statutory interpretation, but I would have thought this much was common ground: If it is hard to imagine any purpose served by a proposed interpretation of CAFA, if that reading appears nowhere in the statutory or legislative history or our cases on CAFA, if it makes no sense as a policy matter, it had better purport to reflect the best reading of the text, or any decision embracing it is groundless. Indeed, far from relegating the text to an afterthought, our shared approach to statutory interpretation, “as we always say, begins with the text.” ** After all, as we have unanimously declared, a “plain and unambiguous” text “must” be enforced “according to its terms.” ** And yet, though the text and key term here is “any defendant,” 28 U.S.C. § 1453(b), the majority has not one jot or tittle of analysis on the plain meaning of “defendant.”

Any such analysis would have compelled a different result. According to legal as well as standard dictionary definitions available in 2005, a “defendant” is a “person sued in a civil proceeding,” Black’s Law Dictionary 450 (8th ed. 2004), and the term is “opposed to” (contrasted with) the word “plaintiff,” Webster’s Third New International Dictionary 591 (2002) (Webster). See also 4 Oxford English Dictionary 377 (2d ed. 1989) (OED) (“[a] person sued in a court of law; the party in a suit who defends; opposed to plaintiff”). What we have before us is a civil proceeding in which Home Depot is not a plaintiff and is being sued. So Home Depot is a defendant, as that term is ordinarily understood.

The fact that Home Depot is considered a “third-party defendant” changes nothing here. ** Adjectives like “third-party” “modify nouns—they pick out a subset of a category that possesses a certain quality.” ** They do not “alter the meaning of the word” that they modify. ** And so, just as a “critical habitat” is a habitat, ** and “full costs” are costs, ** zebra finches are finches and third-party defendants are, well, defendants.

If further confirmation were needed, it could be found in CAFA’s use of the word “any” to modify “defendant.” Unlike the general removal provision, which allows removal by “the defendant or the defendants,” § 1441(a), CAFA’s authorization extends to “any defendant.” § 1453(b) (emphasis added). As we have emphasized repeatedly, “the word “any” has an expansive meaning, that is, “one or some indiscriminately of whatever kind.”” **. In case after case, we have given effect to this expansive sense of “any” **. So too here: Contrary to the Court’s analysis, Congress’s use of “any” covers defendants of “whatever kind,” **, including third-party defendants like petitioner. **

For these reasons, unless third-party defendants like Home Depot differ in some way that is relevant to removal (as a matter of text, precedent, or common sense), they fall within 2 That is true only of counterdefendants—original plaintiffs who are countersued by their original defendant. For one thing, it is hard to say that these plaintiffs fall under the plain meaning of “defendant,” when the word “defendant” is defined in opposition to the word “plaintiff.” See Webster 591; 4 OED 377. Moreover, as original plaintiffs, these parties chose the state forum (unlike original or third-party defendants), so it makes less sense to give them a chance to remove the case from that same forum. Finally, our decision in
CAFA’s coverage of “any defendant.”

III

Respondent and the majority contend that Congress meant to incorporate into CAFA a specialized sense of “defendant,” derived from its use in the general removal statute, § 1441. And in § 1441, they assert, “defendant” refers only to an original defendant—one named in the plaintiff’s complaint. As I will show, they are mistaken about § 1441. But even if that general removal law were best read to leave out third-party defendants, there would be ample grounds to conclude that such defendants are covered by CAFA. And the majority’s and respondent’s objections to this reading of CAFA, based on comparisons to other federal laws, are unconvincing.

A

1

The first basis for reading CAFA to extend more broadly than § 1441 is that CAFA’s text is broader. As discussed, CAFA sweeps in “any defendant,” in contrast to § 1441’s “the defendant or the defendants.”

Respondent scoffs at the idea that the word “any” could make the difference. In his view, “any defendant” in CAFA means “any one of the defendants,” not “any kind of defendant.” Thus, he contends, if § 1441 covers only one kind of defendant—the original kind, the kind named in a complaint—CAFA must do the same. On this account, CAFA refers to “any defendant” only because it was meant to eliminate (for class actions) § 1441’s requirement that all the defendants agree to remove. Respondent is right that the word “any” in CAFA eliminated the defendant-unanimity rule. But the modifier’s overall effect on the plain meaning of CAFA’s removal provision is what counts in a case interpreting CAFA; and that effect is to guarantee a broad reach for the word “defendant.”

Nor is it baffling how “any” could be expansive in the way respondent finds so risible. In ordinary language, replacing “the Xs” with “any X” will often make the term “X” go from covering only paradigm instances of X to covering all cases. Compare:

• “Visitors to the prison may not use the phones except at designated times.”

• “Visitors to the prison may not use any phone except at designated times.”

On a natural reading, “the phones” refers to telephones provided by the prison, whereas “any phone” includes visitors’ cellphones. Likewise, even if the phrase “the defendant” reached only original defendants, the phrase “any defendant” would presumptively encompass all kinds. Again, putting the word “any” into a “phrase ... suggests a broad meaning.”

Shamrock Oil confirms this reasoning and result.
In fact, the text makes it indisputable that CAFA’s “any defendant” is broader in some ways. CAFA reaches at least two sets of defendants left out by § 1441: in-state (or “forum”) defendants, and nondiverse defendants. * * * So respondent and the majority are reduced to claiming that when CAFA says “any defendant,” it is stretching farther than § 1441’s “the defendant” in some directions but not others—picking up forum defendants and nondiverse defendants while avoiding all contact with third-party defendants. But the shape of “any” is not so contorted. If context shows that “any defendant” covers some additional kinds, common sense tells us it presumptively covers the others.

2

Respondent’s answer from precedent backfires. Against our many cases reading the word “any” capaciously (which is to say, naturally), * * * he cites two cases that assigned the word a narrower scope. But in both, context compelled that departure from plain meaning. * * *

Indeed, our presumptions in this area cut against the majority and respondent’s view. That view insists on reading CAFA’s “any defendant” narrowly, to match the allegedly narrower scope of “the defendant” in § 1441. * * * While removal under § 1441 is presumed narrow in various ways out of respect for States’ “rightful independence,” we have expressly limited this “antiremoval” presumption to cases interpreting § 1441. As Justice GINSBURG recently wrote for the Court:

“[N]o antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court. See Standard Fire Ins. Co. v. Knowles (Casebook, p. 822) (‘CAFA’s primary objective’ is to ‘ensur[e] “Federal court consideration of interstate cases of national importance.”’ * * *; S. Rep. No. 109–14, p. 43 (2005) (CAFA’s ‘provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.’).” Dart Cherokee (Casebook p. 353 & p. 823) (emphasis added).

So the strongest argument for reading § 1441 to exclude third-party defendants is an interpretive canon that we have pointedly refused to apply to CAFA. Our precedent on this point is thus a second basis—apart from the plain meaning of “any defendant”—for holding that CAFA covers third-party defendants even if § 1441 does not.

B

Respondent and the majority object that this reading ignores the backdrop against which CAFA was enacted and the significance of CAFA’s contrast with the language of other (subject-matter-specific) removal statutes. And to these objections, respondent adds a third and bolder claim: that CAFA does not empower petitioner to remove because it does not create removal authority at all, but only channels removals already authorized by § 1441 (on which petitioner cannot rely in this case). All three objections fail.
In respondent’s telling, it has been the uniform view of the lower courts that a third-party defendant is not among “the defendants” empowered to remove under § 1441. Since those courts’ decisions studded the legal “backdrop” when Congress enacted CAFA, respondent contends, we should presume CAFA used “defendant” in the same narrow sense. But this story exaggerates both the degree of lower court harmony and the salience of the resulting “backdrop” to Congress’s work on CAFA.

**First**, though respondent repeatedly declares that the lower courts have reached a “consensus,” * * * they have not. “Several cases ... have permitted removal on the basis of a third party claim where a separate and independent controversy is stated.” * * * Before CAFA, at least a half-dozen district courts took this view. * * * And though courts of appeals rarely get to opine on this issue (because § 1447(d) blocks most appeals from district court orders sending a removed case back to state court), two Circuits have actually allowed third-party defendants to remove under § 1441. * * * Even a treatise cited by respondent destroys his “consensus” claim, as it admits that courts take “myriad and diverging views on whether third-party defendants may remove an action.” 16 J. Moore, D. Coquillette, G. Joseph, & G. Vario, Moore’s Federal Practice § 107.41[6] (3d ed. 2019).

**Second**, even if the lower courts all agreed, the “legal backdrop” created by their decisions would matter only insofar as it told us what we can “safely assume” about what Congress “intend[ed].” * * * So the less salient that backdrop would have been to Congress, the less relevant it is to interpreting Congress’s actions. And I doubt the backdrop here would have been very salient. For one thing, it consisted mostly of trial court decisions; and the lower the courts, the less visible the backdrop. Indeed, I can find no case where we have read a special meaning into a federal statutory term based mainly on trial court interpretations.

But even if several higher courts had spoken—and spoken with one voice—there would be a problem: We have no evidence Congress was listening. In preparing and passing CAFA, Congress never adverted to third-party defendants’ status. By respondent’s admission, Congress was “silen[t]” on them in the seven years of hearings, drafts, and debates leading up to CAFA’s adoption. * * * Yet if Congress was not thinking about a question, neither was it thinking about lower courts’ answer to the question. So we cannot presume it adopted that answer.

Respondent also thinks we should read CAFA to exclude third-party defendants in light of the contrast between CAFA’s “any defendant” and the language of two other removal laws that more clearly encompass third-party defendants. The America Invents Act (AIA), for example, allows “any party” to remove a lawsuit involving patent or copyright claims. 28 U.S.C. §§ 1454(a), (b)(1). The Bankruptcy Code likewise allows “[a] party” to remove in cases related to bankruptcy. § 1452(a). Thus, respondent says, when Congress wanted to include more than original defendants, it knew how. It used terms like “any party” and “a
party”—as CAFA did not.

Note, however, that the cited terms would have covered even original plaintiffs, whom no one thinks CAFA meant to reach (and for good reason * * *). So CAFA’s terms had to be narrower than (say) the AIA’s “any party,” regardless of whether CAFA was going to cover third-party defendants. Its failure to use the AIA’s and Bankruptcy Code’s broader terms, then, tells us nothing about third-party defendants’ status under CAFA. Only the meaning of CAFA’s “any defendant” does that. And it favors petitioner. * * *

3

Respondent’s final and most radical argument against petitioner’s CAFA claim is that CAFA’s removal language does not independently authorize removal at all. On this view, all that § 1453(b) does is “make a few surgical changes [in certain class-action cases] to the procedures that ordinarily govern removal,” while the actual power to remove comes from the general removal provision. * * * And so, the argument goes, removals under CAFA are still subject to § 1441(a)’s restriction to “civil action[s]” over which federal courts have “original jurisdiction.” Since this limitation is often read to mean that federal jurisdiction must have existed from the start of the civil action, * * * and that was not the case here, no removal is possible.

The premise of this objection is as weak as it is audacious. If CAFA does not authorize removal, then neither does § 1441. After all, they use the same operative language, with the one providing that a class action “may be removed,” § 1453(b), and the other providing that a civil action “may be removed,” § 1441(a). So § 1453(b) must, after all, be its own font of removal power and not a conduit for removals sourced by § 1441(a).

Respondent argues that this reading of CAFA’s § 1453(b) would render it unconstitutional. The argument is as follows: Section 1453(b) provides that a “class action” may be removed, but it does not specify that the class action must fall within federal courts’ jurisdiction. So if § 1453(b) were a separate source of removal authority, it would authorize removals of class actions over which federal courts lacked jurisdiction, contrary to Article III of the Constitution. By contrast, § 1441(a) limits itself to authorizing removal of cases over which federal courts have “original jurisdiction.” Thus, only if § 1441(a)—including its jurisdictional limit—governs the removals described in CAFA will CAFA’s removal language be constitutional.

This argument fails. Section 1453 implicitly limits removal to class actions where there is minimal diversity, thus satisfying Article III. After all, § 1453(a) incorporates the definition of “class action” found in the first paragraph of § 1332(d). * * * But the very next paragraph, § 1332(d)(2), codifies the part of CAFA that created federal jurisdiction over class actions involving minimal diversity. This proves that the class actions addressed by CAFA’s removal language, in § 1453(b), are those involving minimal diversity, as described in § 1332(d). In fact, respondent effectively concedes that § 1453(b) applies only to actions described in § 1332(d), since the latter is also what codifies those CAFA-removal rules that respondent does acknowledge, * * *—the requirements of more than $ 5 million

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in controversy but only minimal diversity * * *. Because CAFA’s removal language in § 1453(b) applies only to class actions described in § 1332(d), it raises no constitutional trouble to read § 1453(b) as its own source of removal authority and not a funnel for § 1441(a).

IV

So far I have accepted, arguendo, the majority and respondent’s view that third-party defendants are not covered by the general removal provision, § 1441. But I agree with petitioner that this is incorrect. On a proper reading of § 1441, too, third-party defendants are “defendants” entitled to remove. Though a majority of District Courts would disagree, their exclusion of third-party defendants has rested (in virtually every instance) on a misunderstanding of a previous case of ours, and the mere fact that this misreading has spread is no reason for us to go along with it. Nor, contrary to the majority, does a refusal to recognize third-party defendants under § 1441 find support in our precedent embracing the so-called “well-pleaded complaint” rule, which is all about how a plaintiff can make its case unremovable, not about which defendants may seek removal in those cases that can be removed.

A

Look at lower court cases excluding third-party defendants from § 1441. Trace their lines of authority—the cases and sources they cite, and those they cite—and the lines will invariably converge on one point: our decision in Shamrock Oil. But nothing in that case justifies the common reading of § 1441 among the lower courts, a reading that treats some defendants who never chose the state forum differently from others.

As a preliminary matter, Shamrock Oil is too sensible to produce such an arbitrary result. That case involved a close ancestor of today’s general removal provision, one that allowed removal of certain state-court actions at the motion of “the defendant or defendants therein.” * * *. And our holding was simple: If A sues B in state court, and B brings a counterclaim against A, this does not then allow A to remove the case to federal court. As the original plaintiff who chose the forum, A does not get to change its mind now. That is all that Shamrock Oil held. The issue of third-party defendants never arose. And none of the Court’s three rationales would support a bar on removal by parties other than original plaintiffs.

Shamrock Oil looked to statutory history, text, and purpose. As to history, it noted that removal laws had evolved to give the power to remove first to “defendants,” then to “either party, or any one or more of the plaintiffs or defendants,” and finally to “defendants” again. The last revision must have been designed to withdraw removal power from someone, we inferred, and the only candidate was the plaintiff. *** Second, we said there was no basis in the text for distinguishing mere plaintiffs from plaintiffs who had been countersued, so we would treat them the same; neither could remove. *** Third, we offered a policy rationale: “[T]he plaintiff, having submitted himself to the jurisdiction of the state court, was not entitled to avail himself of a right of removal conferred only on a
defendant who has not submitted himself to the jurisdiction.” * * * In this vein, we quoted a House Report calling it “just and proper to require the plaintiff to abide his selection of a forum.” * * * (quoting H. R. Rep. No. 1078, 49th Cong., 1st Sess., 1 (1886)). So history, language, and logic demanded that original plaintiffs remain unable to remove even if countersued.

None of these considerations applies to third-party defendants. If anything, all three point the other way. First, the statutory history cited by the Court shows that Congress (and the Shamrock Oil Court itself) took “the plaintiffs or defendants” to be jointly exhaustive categories. By that logic, since third-party defendants are certainly not plaintiffs—in any sense—they must be “defendants” under § 1441. Cf. Webster 591 (defining “defendant” as “opposed to plaintiff”); 4 OED 377 (same). Second, and relatedly, the text of the general removal statute, then and now, does not distinguish original from third-party defendants when it comes to granting removal power—any more than it had distinguished plaintiffs who were and were not countersued when it came to withdrawing the right to remove, as Shamrock Oil emphasized. And finally, Shamrock Oil’s focus on fairness—reflected in its point that plaintiffs may fairly be stuck with the forum they chose—urges the opposite treatment for third-party defendants. Like original defendants, they never chose to submit themselves to the state-court forum.

Thus, all three grounds for excluding original plaintiffs in Shamrock Oil actually support allowing third-party defendants to remove under § 1441.

B

Respondent leans on his claim that District Courts to address the issue have reached a “consensus” that Shamrock Oil bars third-party defendants from removing. But as we saw above, rumors of a “consensus” have been greatly exaggerated. * * * And in any case, no interpretive principle requires leaving intact the lower courts’ misreading of a case of ours.

Certainly there is no reason to presume that Congress embraces the lower courts’ majority view. For one thing, the cases distorting § 1441 postdate the last revision of the relevant statutory language, so they could not have informed Congress’s view of what it was signing onto. And it would be naive to assume that Congress now agrees with those lower court cases just because it has not reacted to them. Congress does not accept the common reading of every law it leaves alone. Because life is short, the U. S. Code is long, and court cases are legion, it normally takes more than a court’s misreading of a law to rouse Congress to issue a correction. That is why “‘Congressional inaction lacks persuasive significance’ in most circumstances.” * * * In particular, “it is inappropriate to give weight to ‘Congress’ unenacted opinion’ when construing judge-made doctrines, because doing so allows the Court to create law and then ‘effectively codif[y]’ it ‘based only on Congress’ failure to address it.” * * * Because the decisions misreading Shamrock Oil are not a reliable indicator of Congress’s intent regarding § 1441, we owe them no deference.

C
Finally, according to the majority, reading § 1441 to include third-party defendants would run afoul of our precedent establishing the “well-pleaded complaint” rule (WPC rule). Assuming that I have been able to reconstruct the majority’s argument from this rule accurately, I think it rests on a non sequitur. The WPC rule is all about a plaintiff’s ability to choose the forum in which its case is heard, by controlling whether there is federal jurisdiction; the rule has nothing to do with the division of labor or authority among defendants.

Under the WPC rule, we consider only the plaintiff’s claims to see if there is federal-question jurisdiction. Whether the defendant raises federal counterclaims (or even federal defenses) is irrelevant. * * * Likewise, in a case involving standard diversity jurisdiction (based on complete diversity under § 1332(a) rather than minimal diversity under CAFA), it is “the sum demanded ... in the initial pleading” that determines whether the amount in controversy is large enough. § 1446(c)(2). In both kinds of cases, a federal court trying to figure out if it has “original jurisdiction,” as required for removal of cases under § 1441(a), must shut its eyes to the defendant’s filings. Only the plaintiff’s complaint counts. So says the WPC rule.

But that is all about jurisdiction. The majority and respondent would take things a step further. Even after assuring itself of jurisdiction, they urge, a court should consult only the plaintiff’s complaint to see if a party is a “defendant” empowered to remove under § 1441. Since third-party defendants (by definition) are not named until the countercomplaint, they are not § 1441 “defendants.”

I cannot fathom why this rule about who is a “defendant” should follow from the WPC rule about when there is federal jurisdiction. And the majority makes no effort to fill the logical gap; it betrays almost no awareness of the gap, drawing the relevant inference in two conclusory sentences. * * * But since this Court’s reasons for the WPC rule have sounded in policy, the argument could only be that the same policy goals would support today’s restriction on who is a § 1441 “defendant.”§ What are the policy goals behind the WPC rule? We have described them as threefold. * * *

First,

since the plaintiff is ‘the master of the complaint,’ the well-pleaded-complaint rule enables him, ‘by eschewing claims based on federal law, ... to have the cause heard in state court.’ * * *. [Allowing a defendant’s counterclaims or defenses to create federal-question jurisdiction], in contrast, would leave acceptance or rejection of a state forum to the master

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4 The Court insists that its position is based on “statutory context,” not the logic behind the well-pleaded complaint rule. * * * But the only context to which the Court points is our precedent establishing the well-pleaded complaint rule. * * * It is that rule—the rule that federal jurisdiction over an action turns entirely on the plaintiff’s complaint—that leads the Court to think furthermore that “the defendant to [an] action is the defendant to that complaint.” * * *
of the counterclaim. It would allow a defendant to remove a case brought in state court under state law, thereby defeating a plaintiff’s choice of forum, simply by raising a federal counterclaim.” **

But this concern is not implicated here; adopting petitioner’s reading of “defendant” would in no way reduce the extent of a plaintiff’s control over the forum. Plaintiffs would be able to keep state-law cases in state court no matter what we held about § 1441, and any cases removable by third-party defendants would have been removable by original defendants anyway. In other words, the issue here is who can remove under that provision, not which cases can be removed. However we resolved that “who” question, removability under § 1441(a) would still require cases to fall within federal courts’ “original jurisdiction,” ** *, and that would still turn just on the plaintiff’s choices—on whether the plaintiff had raised federal claims (or sued diverse parties for enough money). So a case that a plaintiff had brought “in state court under state law,” ** *, would remain beyond federal jurisdiction, and thus unremovable under § 1441(a), even if we held that third-party defendants are “defendants” under that provision.

By the same token, such a holding would not undermine [a] second policy justification ** * for the WPC rule: namely, to avoid “radically expand[ing] the class of removable cases, contrary to the ‘[d]ue regard for the rightful independence of state governments.’” ** **. As noted, our decision on the scope of § 1441’s “defendants” would not expand the class of removable cases at all, because it would have no impact on whether a case fell within federal courts’ jurisdiction. It would only expand the set of people (“the defendants”) who would have to consent to such removal: Now third-party and original defendants would have to agree.

The majority declares that treating third-party defendants as among “the defendants” under § 1441 “makes little sense.” ** ** Perhaps its concern is that such a ruling would make no meaningful difference since third-party defendants would still be powerless to remove unless they secured the consent of the original defendants, who are their adversaries in litigation. But for one thing, there may be cases in which original defendants do consent. Though original and third-party defendants are rivals as to claims brought by the one against the other, they may well agree that a federal forum would be preferable. After all, neither will have chosen the state forum in which both find themselves prior to removal. 5

More to the point, even if third-party defendants could not secure the agreement needed to remove an entire civil action under § 1441(a), counting them as “defendants” under § 1441 would make a difference by allowing them to invoke § 1441(c)(2), which would permit them to remove certain claims (not whole actions) without original defendants’ consent. *

5 Or perhaps the majority fears that petitioner’s position would make it harder for original defendants under § 1441(a), by requiring them to get the consent of the third-party defendants against whom they have just brought suit. But this is an illusory problem. Original defendants hoping to remove under § 1441(a) without having to get their adversaries to agree could simply remove the case before roping in any third-party defendants.
* * * Being able to remove claims under § 1441(c)(2) has, in fact, been the main benefit to third-party defendants in those jurisdictions that have ruled that they are “defendants” under § 1441. *** But this effect of such a ruling is immune to the objection that it would “radically expand the class of removable cases” since § 1441(c)(2) does not address the removal of a whole case (a “civil action”) at all, but only of some claims within a case—and only those that could have been brought in federal court from the start, “in a separate suit from that filed by the original plaintiff.” * * * Notably, then, any claims that were raised by the original plaintiff would get to remain in state court. Here too, the WPC rule’s concern to avoid “radically expand[ing] the class of removable cases” is just not implicated.

This leaves [a] final rationale for the WPC rule: that it promotes “clarity and ease of administration” in the resolution of procedural disputes. * * * But petitioner’s and respondent’s views on who is a “defendant” are equally workable, so this last factor does not cut one way or the other.

In sum, the actual WPC rule, which limits the filings courts may consult in determining if they have jurisdiction, is based on policy concerns that do not arise here. There is, therefore, no justification for inventing an ersatz WPC rule to limit which filings may be consulted by courts deciding who is a “defendant” under § 1441.

***

All the resources of statutory interpretation confirm that under CAFA and § 1441, third-party defendants are defendants. I respectfully dissent.