To: Civil Procedure Professors

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2020 Update Memo

Thank you for using our casebook in your first-year course in Civil Procedure. Like you, we are facing the challenge of teaching remotely or through a hybrid of in-person and remote teaching in the fall 2020 semester. In a separate blog post published in early June, https://prawfsblawgblogs.com/prawfsblawg/2020/05/providing-real-world-context-for-the-1l-civil-procedure-course.html#more, we discussed how to integrate simulation exercises from the 2020–2021 Rules Supplement—especially the Illustrative Litigation Problem—into a remote classroom. In addition, you might find helpful the assessment tools included with the CasebookPlus platform of our casebook. These tools consist of a bank of multiple-choice questions with feedback, and 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 memo offers additional materials that we hope will enhance your teaching experience. Above all, our goal is to give you materials that can be used as a basis for practice problems, as starting points for examination questions, and as insight into judicial practice. In almost all instances, we do not recommend assigning these cases for students to read. Our aim in this memo is not to be comprehensive, but rather to highlight important issues and in some instances to suggest trends. We have chosen 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. In addition, where appropriate, this memo points out amendments to procedural rules and statutes pertinent to the 1L course.

This Update Memo includes Errata Charts for the Comprehensive and Compact editions that can be distributed to students or attached to a Syllabus (Appendix A). We apologize for these errors; please keep us informed of any that we did not yet catch. We also hope that you will suggest improvements and alert us to decisions or your articles that we might include in future editions of the casebook.

1 The authors thank Edward Eisenman, Michael Kowiak, Robertson “Mac” McAnulty, Leah Motzkin, Yujung “Iris” Ryu, Sabrina Solow, and Skylar Spear for their excellent research assistance in the preparation of this Update Memo; Ian Brydon for his steadfast administrative support; and Gretchen Feltes for her characteristically insightful library assistance.
Also appended to the Update Memo (Appendix B) is an edited version of the U.S. Supreme Court’s decision from the 2018–2019 term in Home Depot U.S.A., Inc. v. Jackson (a summary is included in the Rules Supplement, p. 396) which can be distributed to students or attached to an updated Syllabus.

As discussed later in this memo, Appendix C is a list of secondary materials, excerpted from our Teacher’s Manual, addressing how one might bring to the surface questions of race, gender, and class that often are overlooked in the 1L procedure curriculum but are vital to the students’ professional education.

Finally, we point out that the 2020–2021 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 and a United States Court of Appeals decision; for ease, we list them here:

**Chapter 2 (and 10 and 16): Jurisdiction over the Parties or Their Property (and Class Actions and Appellate Review)**

Mussat v. IQVIA, Inc. (7th Cir. 2020) (Rules Supplement, p. 399)

**Chapter 3: Providing Notice and an Opportunity to Be Heard**


**Chapter 4: Jurisdiction over the Subject Matter of the Action—The Court’s Competency**


Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano (2020) (Rules Supplement, p. 397)

**Chapter 10 (and 18): Class Actions (and Alternative Dispute Resolution)**


Chapter 14: Trial


Chapter 16: Appellate Review


Chapter 17: The Binding Effect of Prior Decisions: Res Judicata and Collateral Estoppel


Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc. (2020) (Rules Supplement, p. 397)

Chapter 18: Alternative Dispute Resolution


Recent Court Decisions of Interest to the 1L Procedure Course

Chapter 1. A Survey of the Civil Action

The Concern and Character of Civil Procedure

The casebook opens by introducing the students to the adversary principle and its role in apportioning power between the parties and the court (Casebook, p. 2). The notes following Case (Casebook, p. 38, Note 3) also emphasize this concept. This term the Supreme Court gave a rousing defense of party presentation, as an aspect of the adversary principle, in United States v. Sineneng-Smith, 590 U.S. ___, 140 S. Ct. 1575 (2020). The case involved the conviction of an immigration consultant who advised unauthorized workers about how to modify their immigration status so that they might be able to work legally in the United States. Respondent was convicted for charging clients to file labor-certification applications, despite knowing they did not meet the application-filing deadline. On appeal, she argued that her conduct was not covered by the relevant statute, and even if it were, the statute violated the Petition and Free Speech Clauses of the First Amendment. The Ninth Circuit invited amici to submit briefs and present arguments on a matter not raised by respondent—whether the statute was invalid under the First Amendment overbreadth doctrine—and relied on this ground in overturning the conviction. The Court, in an opinion written by Justice Ginsburg, unanimously vacated
the circuit court judgment as an abuse of discretion (Justice Thomas concurred, raising questions about the overbreadth doctrine). Justice Ginsburg posited that “as a general rule, our system ‘is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.’” She acknowledged that “the party presentation principle is supple, not ironclad,” and that courts have discretion to rely on arguments not raised by parties to a case, which she called an appropriate but “modest initiating role” (in an appendix, the Court provided a list of recent Supreme Court cases involving either amicus curiae or supplemental briefing). However, the Court found that the appeals court had gone beyond the limits of this acceptable role:

No extraordinary circumstances justified the panel’s takeover of the appeal. Sineneng-Smith herself had raised a vagueness argument and First Amendment arguments homing in on her own conduct, not that of others. Electing not to address the party-presented controversy, the panel projected that [the governing statute] might cover a wide swath of protected speech ** *. Nevermind that Sineneng-Smith’s counsel had presented a contrary theory of the case in the District Court ** *. Notice that the Court assumed that the accused was represented by competent counsel. Many litigants in civil actions are not represented by counsel. A theme that might be explored in class is whether and how the pro se status of a civil litigant might affect the judge’s role and responsibility. For data on pro se case filings in the federal district courts over the last year, see U.S. District Courts, Table C-13 - U.S. District Courts - Civil Pro Se and Non-Pro Se Filings, by District, During the 12-Month Period Ending September 30, 2019, [https://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2019.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2019.pdf).

Incorporating Race, Class, and Gender Inequality into the 1L Course

The increasing incidence of pro se litigants in the state and federal courts is only one of a number of issues raising questions about the role of class, race, and gender in the U.S. judicial system. The opening section of our Teacher’s Manual discusses how a teacher might introduce and encourage discussion about such questions, touching on theories of procedural justice and access to justice. The Manual proceeds chapter-by-chapter, suggesting specific cases and doctrines that can illuminate these issues. The Manual also provides a bibliography of selected articles that we have found helpful in framing questions and eliciting classroom discussion. Our bibliography (attached as Appendix B) is not comprehensive, and we welcome additional recommendations.

COVID and Its Impact on Adjudication

Many of us will be teaching the 1L procedure course remotely. It seems appropriate to address, in some way, how COVID-19 has affected the operation of the court system and the rules governing litigation. Both in the federal and state judicial systems, courts have responded to the pandemic to ensure public health and the well-
being of judicial staff, lawyers, and litigants. Changes have included closing courthouses, resorting to telephonic and virtual oral arguments, delaying filing deadlines, altering traditional paper filing requirements, and transitioning to predominately electronic communications for notice and public announcements. The duration of these measures turns on the persistence and progression of the virus, but it is hard to ignore that some of the changes—such as electronic filings and telephonic oral arguments before the Supreme Court of the United States—are momentous and unprecedented. The success of some of these changes has raised questions about whether courts should adopt them on a permanent basis. The material can be used to introduce a number of important themes in the first-year course: (1) court transparency and public access to judicial proceedings; (2) technological change, efficiency, and fairness; and (3) the differential impact of procedural delay on the resolution of judicial claims.

We list here a few illustrative COVID-related changes that could form the basis for class discussion:

1. Supreme Court notice of oral arguments by telephone and altered filing requirements

Students may be surprised to learn that until the pandemic, the Court’s oral arguments were not televised or made available live to the public. In April 2020, the Court, after delaying argument, announced that it would temporarily hold telephonic oral arguments in which the Justices would participate remotely; that it would “provide a live audio feed of the arguments to FOX News, the Associated Press, and C-SPAN”; and that it would post a transcript and audio recording of the arguments on the Court’s website. Although argument traditionally does not extend beyond an hour, the first virtual session went over by about 15 minutes.²

The Court also announced a temporary change to its paper filing requirements. In particular, the Court encouraged parties to reduce reliance on paper service and to file documents electronically. The notice stated that for “any document filed in a case prior to a ruling on a petition for a writ of certiorari or for an extraordinary writ, or prior to a decision to set a direct appeal for argument, a single paper copy of the document may be submitted on 8.5 x 11 inch paper.” Documents can be formatted in accordance with Rules 33.2 or 33.1. Certain categories of documents may be filed electronically, without any supplemental paper form submission. Those filings include motions for an extension of time under Rule 30.4, waivers of the right to respond to a petition under Rule 15.3, blanket consents to the filing of amicus briefs under Rules 37.2(a) and 37.3(a), and

² See Supreme Court of the United States, News Media, Press Releases, “The Court will hear oral arguments by telephone conferences on May 4, 5, 6, 11, 12 and 13 in a limited number of previously postponed cases.”
motions to delay distribution of a petition for certiorari under the Court’s order of March 19, 2020.³

In the past, the Justices have opposed televising oral arguments on the view that it would distort the Court’s deliberations and cast it in a political light, expressing concerns that audio or video recordings could be edited, displayed on partisan news networks, and result in public misperceptions about the Justices’ role.⁴ Classroom discussion might focus on the pros and cons of making live-streamed or recorded arguments available to the public, and how the practice might affect the Court’s role as an educative institution.

2. Southern District of New York: Temporary Suspension of In-Person Filing of Emergency Applications

As another example, in April 2020, the U.S. District Court for the Southern District of New York temporarily suspended the requirement of the in-person filing of proposed Orders to Show Cause that include a Temporary Restraining Order or other

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proposed orders for emergency relief. The order clearly states that the change is temporary. Classroom discussion might focus on the justifications for the continued retention, post-pandemic, of in-person rather than electronic filing for emergency requests for relief. Would it be appropriate to mandate electronic filing? Should the court’s procedure take account of differential access to technology (commonly referred to as the “digital divide”)—and its impact on access to justice?

3. Motion Practice and Discovery Deadlines

Within the federal system, districts took different steps regarding across-the-board extensions of filing deadlines. Although the issue may be beyond the first-year course, some mention might be made of the distinction between filing deadlines that a court has authority to extend and those that are legislatively prescribed and jurisdictional in nature (a distinction raised, for example, in Chapter 16, p. 1185, Note 5). The District of Maryland extended civil filing deadlines by 84 days, but specifically exempted discovery deadlines from this order. By contrast, the Northern District of Illinois included discovery deadlines. Looking to the state courts, California, for example, did not extend discovery deadlines but did suspend jury trials for 60 days (note that “under California law discovery deadlines are not automatically affected by a change in the trial date”).

4. Trials and the Civil Jury Right

Many states have suspended in-person trials in response to safety concerns associated with the outbreak of COVID-19. Although some localities have started to

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5 U.S. District Court, S.D.N.Y., Notice to the Bar, SDNY Announces Temporary Suspension of In-Person Emergency Applications (April 1, 2020), https://nysd.uscourts.gov/sites/default/files/2020-04/Notice%20to%20Bar%20-%20Suspension%20of%20In-Person%20TROs%20v3.pdf.


devise structural modifications to courtrooms that will hopefully minimize contagion upon the eventual resumption of face-to-face proceedings. Unresolved questions remain about how to reconcile public health measures (like mask-wearing) with many features of judicial process, including constitutional protections for the criminally accused (such as the Confrontation Clause, which may bar witnesses from covering their faces)\(^\text{10}\) and with the civil jury right.\(^\text{11}\)

Video bench trials took place in some courts. Students might be interested to know that in April and May 2020, a federal district court in Florida conducted what may be the longest virtual trial to date—more than a week. The case challenged whether Florida could bar convicted felons who were no longer incarcerated from voting until they paid outstanding “financial obligations” to the state—so-called “pay to vote” rules.\(^\text{12}\) The decision itself highlights the collateral consequences of criminal convictions, and also presents an opportunity for discussing questions of race and class in the 1L course. The district court held that it was unconstitutional for Florida to prevent individuals from voting if they legitimately lacked the financial means to pay outstanding obligations, and that it was unconstitutional for Florida to demand payment if it “cannot be determined with diligence” how much the affected individuals are required to pay to regain voter eligibility. To implement this latter holding, the district court’s injunction permits individuals to seek information from the Florida Division of Elections regarding outstanding obligations, and allows Floridians to proceed with voter registration if they do not receive a response within 21 days. The district court distinguished fines (judge-imposed as a criminal penalty) from fees (imposed on those compelled to access the criminal justice system as a way to generate state funding). The court held it is constitutional to prohibit individuals from voting if they have the means to pay outstanding fines. However, the court treated an unpaid fee as a tax, and held that conditioning the vote on its payment violated the Twenty-Fourth Amendment.

**Attorney Fees and the American Rule**


The casebook briefly discusses the American Rule of attorney fees (Casebook, p. 7). In *Peter v. Nantkwest, Inc.*, 589 U.S. ___, 140 S. Ct. 365 (2019), the Court held that the Patent Act did not authorize the Patent and Trademark Office to recover from a patent applicant a pro rata share of salaries for PTO attorneys and paralegals. The Court relied on the language of the Patent Act stating that a losing applicant must pay “all expenses” of litigation. That language, however, was not sufficiently specific to overcome the background assumption of the American Rule.

Chapter 2. Jurisdiction over the Parties or Their Property

Interpreting and Applying Long-Arm Laws

We include a number of lower court cases involving construction and application of state long-arm statutes. Students often overlook the fact that the personal jurisdiction inquiry is two-fold: a statute must authorize the court’s exercise of power and the plaintiff must meet the requirements of the statute; and the exercise of jurisdiction must comport with the Due Process Clause.

*Carson Optical, Inc. v. RQ Innovation, Inc.*, 2020 WL 1516394 (E.D.N.Y. 2020), involved a dispute between two merchants who sell magnification products throughout the United States. The alleged contacts included sales of products through the Internet, and sometimes through a third-party website, namely, Amazon. The New York long-arm statute—the doing business portion, N.Y. CPLR § 302(a)(1)—requires a showing that a non-domiciliary transacts business within the state or contracts anywhere to supply goods and services in the state if the cause of action stems from such business activity. The court applied a “sliding scale” test based on a website’s interactivity to determine whether the virtual contacts rose to the level of transacting business in New York. The court found sufficient contacts related to the misrepresentation claim because by deceiving New York customers, defendant put plaintiff at a competitive disadvantage, even though these customers were not plaintiffs in the lawsuit.

Another provision of the New York long-arm statute—committing a tort outside New York, N.Y. § 302(a)(3)(ii)—requires a showing that the tort caused injury within New York, that defendant expects or should reasonably expect to have consequences in the state, and that defendant derives “substantial revenue from interstate or international commerce.” In applying the statute, the court found that the harm to plaintiff’s business occurred in New York because it lost New York customers due to the alleged false advertising in the state, and although revenue in New York was minimal, substantial revenue was derived from interstate commerce generally. The court also considered whether it could exercise jurisdiction under the statute over defendant’s corporate officer individually. The court stressed that the individual, the founder and director of the company, was the final decision maker, that he chose to sell the challenged products through Amazon, and that he knew his decision would result in sales in New York where the characteristics of the goods were allegedly misrepresented.
(As to the due process inquiry, the court held that minimum contacts were met by the company’s intentional decision to market and sell its products nationwide, including in New York, through Amazon, and countervailing factors did not make the exercise of such power unreasonable. Although defendants were a Canadian company and citizen, it was not unreasonable to require travel to New York, and the witnesses and documents were in New York.)

Questions might be raised about the constitutionality of § 302(a)(3)(ii) and of the court’s due process analysis.

For another case applying the New York statute, and offering a good practice problem, consider Simmons v. National Railroad Passenger Corp., 2020 WL 2904847 (S.D.N.Y. 2020). Plaintiff purchased an Amtrak ticket to go back and forth from New York to Newport News, in Virginia. On the return trip, the train stopped in Washington, D.C., and permitted passengers to disembark. Plaintiff left the train, entered Union Station, used the public lavatory, and while walking from the stall to a sink, slipped on a puddle. She sued Amtrak, alleging personal injury, and filed her complaint in New York state trial court, Bronx County. Amtrak removed and then moved to dismiss for lack of personal jurisdiction. Amtrak was alleged to be a corporation organized under the laws of the District of Columbia authorized to do business in New York. Plaintiff relied on N.Y. CPLR § 302(a)(1) which permits the exercise of personal jurisdiction over a non-domiciliary as to a cause of action arising from the defendant’s transacting of “any business within the state” or contracting “anywhere to supply goods or services in the state.” The district court noted that the complaint did not allege where plaintiff purchased her ticket, but held that although the complaint met the transacting business requirement, it did not show an “articulable nexus” or “substantial relationship” between the cause of action and defendant’s in-state business. The district court emphasized in its decision that under Second Circuit precedent, “the purchase of a ticket in New York is not sufficient to confer personal jurisdiction where the alleged injury occurred elsewhere.” For possible class discussion, students might consider: What if the facts were different and the train crashed while en route in Virginia? See McConney v. Amtrak, 2020 WL 435366, at *3 n.3 (E.D.N.Y. 2020) (stating that the claim “directly implicates Amtrak’s duty to exercise reasonable care for the safety of its passengers,” and distinguishing the facts from those cases in which personal jurisdiction is not found over an airline related to a spilled cup of coffee during a flight). (The decision also addressed the exercise of supplemental jurisdiction, discussed in connection with Chapter 4.)

Marsalis v. STM Reader, LLC, 806 Fed. Appx. 748 (11th Cir. 2020), applied the Georgia doing business long-arm statute which requires that the defendant “regularly does business or derives substantive revenue from goods used or services rendered in the state.” O.C.G.A. § 9-10-91(1)(3). Plaintiff was a Georgia resident and a former police officer in Chicago. Plaintiff sued defendant for a variety of injuries, including assault, intentional infliction of emotional distress, and racial discrimination, alleged to have arisen from its online publication of an article in Chicago newspapers about Chicago police misconduct during the period Marsalis worked in that city. The appeals court
found that under Georgia law, the claims did not arise out of a business transaction in Georgia because the publication of a single news article did not constitute a business transaction. Moreover, the claim did not occur in Georgia; “where a claim is based on a communication sent through the internet or telephone” the conduct occurs “at the physical place of transmission,” and plaintiff did not show that the Chicago newspapers published the article within Georgia.

Corsi v. Caputo, 2020 WL 1703934 (D.D.C. 2020), involved the District of Columbia long-arm statute, and was a high profile defamation suit in the wake of the Mueller investigation and Roger Stone’s prosecution (and was decided before the President’s grant of clemency). The statute confers personal jurisdiction over “a person, who acts directly or by an agent, as to a claim for relief” arising from the person’s “transacting any business in the District of Columbia.” D.C. Code § 13-423(a)(1). Corsi, a political commentator, sued Caputo and Stone for statements made by Caputo while on MSNBC in New York. The court found that defendants did not conduct sufficient business in the district, and even if they had, the allegedly defamatory comments were not related to that business. The court also held that jurisdiction was not supported by a different provision of the long-arm statute which authorizes jurisdiction over anyone who causes tortious injury in the District of Columbia and engages in a persistent course of conduct or derives substantial revenue from the District. D.C. Code § 13-423(a)(4). Corsi lived in New Jersey and did not show he was injured in the District of Columbia, despite allegations that he published works there.

Pandit v. Pandit, 808 Fed. Appx. 179 (4th Cir. 2020), applied the Maryland long-arm statute in an intra-familial defamation suit commenced by the leader of a ministry in Maryland against relatives who lived in Arkansas. The statute requires any tortious actions to have been taken within the state of Maryland, or for the actor to engage in a “persistent course of conduct in the State.” The challenged conduct involved writing letters and emails, all of which took place in Arkansas. Further, the court found that defendants had not engaged in a “persistent course of conduct in the State,” having only “sent a handful of emails and letters to individuals in Maryland,” which “amounted to no more than isolated and sporadic association with the forum.”

Contemporary Constitutional Developments

The U.S. Supreme Court did not decide any blockbuster, or indeed any, case on personal jurisdiction this term. Because of the pandemic, oral argument in Ford Motor Co. v. Montana Eighth Judicial District Court, consolidated with Ford Motor Co. v. Bandemer, No. 19-368, has been postponed. The question presented in the petition for certiorari is: “Whether the ‘arise out of or relate to’ requirement is met when none of the defendant’s forum contacts caused the plaintiff’s claims, such that the plaintiff’s claims would be the same even if the defendant had no forum contacts.” See Petitioner’s Brief, 2020 WL 1154744 (U.S. 2020).

As a practice problem, students can consider the facts in Bandemer v. Ford Motor Co., 931 N.W.2d 744 (Minn. 2019), cert. granted, 140 S. Ct. 916 (U.S. 2020).
Plaintiff, a Minnesota resident, was a passenger in a 1994 Ford Crown Victoria on a Minnesota road when the driver, a Minnesota resident, rear-ended a Minnesota county snow plow, and the Ford ended up in a ditch. The airbag did not function. Plaintiff was injured and treated for brain injuries by Minnesota doctors in Minnesota. He sued the driver for negligence and Ford for products liability, negligence, and breach of warranty. Ford moved to dismiss for lack of personal jurisdiction. Ford did not dispute the quantity or quality of its contacts with Minnesota, and did not argue that the exercise of jurisdiction would be unreasonable under the circumstances. Instead, Ford argued that “because the Ford car involved in the accident was not designed, manufactured, or originally sold in Minnesota,” the Minnesota court cannot exercise jurisdiction over the company. Relying on Bristol-Myers Squibb (Casebook, p. 157), Ford argued that the Supreme Court now “applies a ‘giving rise to’ standard in place of the ‘arising out of or related to’ standard” and that the Court “consistently [has] applied a causal standard.”

The Minnesota court rejected both arguments.

In a writing exercise, students can be asked to explain whether defendant’s forum-based activities would support personal jurisdiction under the International Shoe test (Casebook, p. 92), or under World Wide Volkswagen (Casebook, p. 112), both of which the Minnesota court relied upon in finding that there was a “substantial connection between the defendant Ford, the forum Minnesota, and the claims.” In particular, what kind of evidence would be persuasive in showing that the Ford car did not serendipitously end up in Minnesota? The Minnesota plaintiff emphasized the fact that Ford sold thousands of the same type of car in Minnesota, that it collected data on car performance through Ford dealerships in Minnesota to design and train mechanics, that it directed marketing and advertisements directly to Minnesota, and that a “Minnesotan bought a Ford vehicle, and it is alleged that the vehicle did not live up to Ford’s safety claims.” Is the Minnesota court’s “totality of the circumstances” approach constitutional?

Oehring v. Spike Brewing, LLC, 2020 WL 3001052 (W.D. Tex. 2020), involved injuries resulting when the lid of a home beer brewing device exploded and damaged the plaintiff’s orbital bone, requiring replacement of his eye with a prosthetic. Plaintiff sued in federal court in Texas, invoking diversity jurisdiction, naming Spike Brewing, the manufacturer of the brewing device, and then amended the complaint to include Clampco, the manufacturer of the clamp used to maintain the fermenter’s lid. Clampco was an Ohio corporation, and the record showed that it distributed products other than the clamp in Texas, which accounted for less than 3 percent of its annual sales. It shipped the clamp for Spike Brewing’s use to Wisconsin, and was aware that Spike Brewing intended to sell the fermenter over the Internet.

The court looked to the law of the forum state, and the long-arm statute ran to the constitutional maximum. The court applied the “continuous and systematic” test to find that general jurisdiction was not present. As to specific jurisdiction, the court relied upon Ainsworth v. Moffett Engineering, Ltd., 716 F.3d 174 (5th Cir. 2013) (included in the 2013-2014 Rules Supplement), to find that defendant delivered its product into the stream of commerce “and could have foreseen, and thus had the expectation, that the Clamp would be purchased by or used by consumers in Texas.” In Ainsworth, the Fifth Circuit
found it irrelevant that defendant, the manufacturer of a forklift, lacked actual knowledge of sales in the forum state, because the forum was the fourth-largest poultry-producing state in the country, and the defective product was designed for poultry-related uses. Clampco’s total sales in the forum were double those of the defendant’s in Ainsworth; moreover, of the 3000 clamps it sold, 256 were shipped to Texas, which is the second-largest consumer of beer in the United States. In a footnote, the court rejected defendant’s argument that there must be “something more,” such as “state-related design” to show purposeful availment, explaining that the Fifth Circuit “has recently affirmed that there is no requirement for anything besides the foreseeability or expectation that the product would be used in the forum state,” citing Zoch v. Magna Seating (Germany) GmbH, ___ Fed. Appx. ___, 2020 WL 1951482 (5th Cir. Apr. 22, 2020), an unpublished decision. The class might be asked how best to reconcile the Fifth Circuit’s approach with Justice O’Connor’s plurality in Asahi (Casebook, p. 132) and with Justice Kennedy’s plurality in Nicastro (Casebook, p. 140).

Turning to whether the claims “stem[med]” from defendant’s forum contacts, the court found that the injuries were a direct result of the dangerous product. The court further rejected arguments that the exercise of jurisdiction would be unfair under the five-factor test (Casebook, p. 136). Among other things, the court found nothing unusual about the inconvenience defendant proffered (e.g., “the burden of exchanging documents can be accomplished electronically and adds no additional burden that would not exist if this suit was litigated in Ohio”). The class might consider how COVID-related adaptations further affect application of the five-factor analysis.

For a personal jurisdiction case involving a toxic attorney-client relationship, consider Pederson v. Frost, 951 F.3d 977 (8th Cir. 2020). Pederson, a lawyer, served as outside counsel to a California company while living in California. He then moved to Minnesota, and was persuaded to continue representing the California company. At some point, plaintiff discovered that his clients were engaged in securities fraud, and he quit. He then filed suit in Minnesota state court for fraud and tortious interference with “prospective economic advantage,” and defendants removed to federal court. The district court dismissed for lack of personal jurisdiction. The court of appeals emphasized that defendants had never visited Minnesota, had no suit-related business there, and had not purposefully availed themselves of the benefits of Minnesota, notwithstanding the fact that defendants knew Pederson lived in Minnesota, and made hundreds of phone calls and sent hundreds of emails to Pederson while he was living there over the course of their attorney-client relationship. The court highlighted that there was no showing that the communications were part of “some broader effort by the defendants to create a connection with Minnesota,” as, for example, by attending in-person meetings or soliciting loan applications. Rather, as in Walden (Casebook, p. 156, Note 9), the only connection between defendants and the forum was with plaintiff, and that was not a sufficient connection.

**General Jurisdiction**
Many of the decisions discussed in the previous section also considered, and rejected, whether general jurisdiction could be exercised over defendant. In so holding, most of the courts applied the *Daimler* “at home” test (Casebook, p. 164), but some also separately inquired whether defendant’s “continuous and substantial” contacts without the “at home” gloss provided an adequate basis for the exercise of general jurisdiction. The impact of *Daimler* (and the continuing vitality of *Perkins* (Casebook, p. 162)), were at issue in *Douglass v. Nippon Yusen Kabushiki Kaisha*, 2020 WL 3001297 (E.D. La. 2020). Defendant was the Japanese corporate owner of a cargo ship that collided in Japanese territorial waters with a U.S. Navy vessel, killing seven persons. Decedents’ relatives filed suit in federal district court, invoking admiralty jurisdiction, and relied upon Federal Rule 4(k)(2) as the long-arm statute. Both parties conceded that defendant was not subject to jurisdiction in any state of the United States, and the question was whether general jurisdiction could be exercised. Plaintiffs argued that the *Daimler* “at home” test did not apply, because the Supreme Court in that case was not considering a non-United States defendant’s nationwide contacts under the Fifth Amendment, and plaintiffs instead urged that the district court apply a “general fairness” test, derived from *International Shoe* (Casebook, p. 92). Plaintiffs alternatively argued that if *Daimler* did apply, defendant’s contacts with the United States were sufficiently “exceptional” (as in *Perkins*) to justify the exercise of general jurisdiction. The district court rejected plaintiffs’ reading of *Daimler*, and held that plaintiffs failed to make out a prima facie showing of jurisdiction. The district court also refused to order limited discovery and refused to hold an evidentiary hearing.

Plaintiffs offered the following evidence to show that the defendant was at home “in a place other than its place of incorporation or principal place of business”:

NYK Line frequently utilizes U.S. ports and airports; NYK Line maintains at least one bank account in the United States; NYK Line allows stock to be purchased by U.S. investors through the use of a U.S. depository in New York; NYK Line dedicated seven vessels exclusively to shipping cargo for one client to the United States; NYK Line indirectly owns shares of corporations that conduct extensive business in the United States; NYK Line signed a deal to manage the shipment of twelve million tons of liquefied natural gas per year from a natural gas facility in Louisiana; the Department of Justice investigated and prosecuted NYK Line; NYK Line is highly regulated by the Federal Maritime Commission; and NYK Line is a frequent litigant in U.S. federal courts.

Defendants countered with the following facts:

[O]nly twenty-four of its 1,732 employees resided in the United States at the end of fiscal year 2018; NYK Line has not had an office in the United States for over twenty-five years; its board of directors and shareholders’ meetings take place in Japan, not the United States; and between 2017 and 2019, port calls made to the United States only represented between six and eight percent of all port calls made worldwide.
The district court held that on these facts defendant was not “essentially at home” in the United States—high-level decision making took place in Japan, port calls made to the United States were less than 10 per cent of all of its worldwide port calls, and U.S. employees are less than 1.5 percent of its personnel. In assessing these contacts, the court, relying upon Daimler, looked at the “magnitude” of the U.S. contacts, and the proportion of those contacts relative to the company’s worldwide contacts, finding the U.S. contacts to be insufficient in quantity and quality.

Students can be asked to discuss whether the district court was correct in applying the Daimler “at home” test for general jurisdiction under the Fourteenth Amendment to the Fifth Amendment when the lawsuit involves a federal claim, an international dispute, a non-U.S. company, and the use of a federal long-arm statute. Among other issues to consider, general jurisdiction has been justified as a back-stop device to ensure plaintiffs with access to at least one forum in the United States (Casebook, p. 168, Note 5). Relatedly, Federal Rule 4(k)(2), as the Advisory Committee Note to the amendment emphasized, was designed to “correct[] a gap” in the enforcement of federal law in international cases. (For a discussion of this language, see In re LIBOR-Based Financial Instruments Antitrust Litigation, 2019 WL 1331830 (S.D.N.Y. 2019), involving the exercise of general jurisdiction under the federal Exchange Act’s nationwide service of process provision.) Does the district court’s reading effectively eliminate general jurisdiction as a base of power under Federal Rule 4(k)(2) even in cases in which defendant has extensive contacts with the United States? Can the students imagine some set of facts that are so exceptional, as in Perkins, as to warrant the exercise of general jurisdiction? For another recent case with a similar set of facts, but without the extended discussion of Daimler, see Nuevos Destinos, LLC v. Peck, 2019 WL 6481441 (D.N.D. 2019).

Internet and Other Technological Contacts (Casebook, p. 173)

We include a number of Internet-related cases that raise questions about when and whether virtual contacts meet the minimum-contacts test, and what it means for a defendant to “target” a state when it maintains a website presence in the forum state. Without guidance from the Supreme Court, the rules governing Internet contacts continue to be made by the lower courts.

Rogers v. Smith Volkswagen, LTD, 2020 WL 1676400 (E.D. Pa. 2020), was a putative class action under the Fair Credit Reporting Act. Defendant was a single-store car dealership that primarily sold cars to customers in Delaware and incorporated in that state. Plaintiff was a Pennsylvania resident who visited the store and inquired about buying a car—but apparently nothing else. Plaintiff did not buy a car, request any services, sign any agreements, or authorize defendant to conduct credit inquiries about her. Nevertheless, defendant allegedly electronically accessed plaintiff’s credit information from Trans Union, which is located in Pennsylvania, on seven separate occasions, and submitted loan applications for plaintiff to various financing companies. Plaintiff received confirming letters from these companies that each had obtained her
credit report from Trans Union. The court easily found the exercise of jurisdiction over defendant in Pennsylvania to be constitutional, analogizing the electronic access through Trans Union to having “reached into” Pennsylvania. Further, defendant was aware that plaintiff was a Pennsylvania resident, so that it knew the harm would primarily be felt in Pennsylvania. The court relied upon *MacDermid* (Casebook, p. 177, Note 6), finding that defendant not only purposefully availed itself of the benefits of Pennsylvania law by accessing the credit report in that state, but also directed the tortious conduct toward a Pennsylvania resident. Finally, it was clear that the claim arose out of the forum contacts.

**LNS Enterprises LLC v. Continental Motors Inc., 2020 WL 2934916 (D. Ariz. 2020),** a products liability case, involved damage to an aircraft forced to make an emergency landing in Arizona after the engine failed. A government post-incident report indicated that the aircraft’s engine had a hole consistent with engine failure. About a year before the accident, plaintiff had purchased the aircraft from an “unidentified individual” to fly within Arizona to work. Plaintiff sued four parties: Leading Edge, an Oregon corporation that serviced the engine; Textron, a Kansas corporation that designed, manufactured, and distributed the engine; Continental Motors, a Delaware corporation with a principal place of business in Alabama that designed, manufactured and distributed the engine; and Kelly Aerospace, a Delaware corporation with is principal place of business in Ohio that designed, manufactured, and distributed the aircraft’s deicer. Plaintiff sued in state court, and defendants removed to federal court.

The district court looked to Arizona law as the law of the forum state governing personal jurisdiction; Arizona’s long-arm statute ran to the “maximum extent permitted” by the state and federal Constitutions. The court accepted the concession that general jurisdiction was not present, applying both the “at home” and “continuous and systematic” tests. As to specific jurisdiction, the court found that defendants were not “meaningfully connected to Arizona”: their “mere, uncalculated prediction” that goods would reach the forum was not a sufficient basis. As to the companies with Internet contacts, Leading Edge’s website offering aviation maintenance services did not show solicitation of services in Arizona or the performance of such services in Arizona; Continental Motors’ website describing its Arizona shops did not rise to purposeful availment, and no evidence showed that the company targeted sales in Arizona.

**In Kuan Chen v. United States Sports Academy, Inc., 956 F.3d 45 (1st Cir. 2020),** the First Circuit held, as a matter of first impression, that a defendant’s maintenance of a website available in the forum, without evidence that the website targeted the forum or defendant received substantial revenue from forum residents, did not support a finding of purposeful availment. Under this standard, the appeals court affirmed the dismissal of a student’s breach-of-contract claim filed in Massachusetts district court against defendant, an online education company that through its Distance Learning Program awarded various degrees. The contract allowed the student to complete degree requirements within a 10-year period. Toward the end of that period, the student found that he was locked out and unable to log into his account; because of this glitch, the student was required to submit a reenrollment application and initially and erroneously was told he would have to take a comprehensive exam before resuming his studies. When the student then attempted to resume his studies, he again was unable to access his
account and after investigation learned that his entire work portfolio had been deleted from the account. Defendant then informed the student that despite its previous representations, he would be required to sit for an exam to complete his degree.

The student, who had begun his online studies in Alabama, now lived in Massachusetts, and he sued the company in that state. USSA was incorporated and had its primary place of business in Alabama; the online learning platform was accessible from all 50 states. The record showed that the student had paid part of his tuition while in Massachusetts, and that he had sent several emails to USSA from Massachusetts. USSA suspended the account and changed the terms of the contract while the student resided in Massachusetts. The Massachusetts long-arm statute governed, but “any claim that the long-arm statute [was] less elastic than the Due Process Clause” had been waived. In assessing jurisdiction, the court relied upon an affidavit from the defendant’s president about the company’s physical presence, state of incorporation, and plaintiff’s residence during the bulk of his online studies.

As to specific jurisdiction, the appeals court emphasized that purposeful availment could be shown by defendant’s specific targeting of the forum or by a regular course of sales in the forum, or “on a showing of ‘plus’ factors evincing a corporate defendant’s deliberate attempt to serve the forum state.” The court quickly rejected the idea that the corporation was subject to jurisdiction in Massachusetts or in every state where it maintained an informational website, but explained that the maintenance of the interactive learning platform in Massachusetts presented a closer case. There was no evidence that the website either specifically targeted the forum or resulted in the knowing receipt of substantial revenue from forum residents. By the court’s reasoning, a website targeting all 50 states, without more, did not constitute purposeful availment; the student’s moving to Massachusetts did not constitute voluntary action on the part of USSA; USSA did not actively solicit the student, and the broad foreseeability that somebody in Massachusetts might enroll and later sue did not constitute the level of foreseeability that the Court required to find personal jurisdiction.

The court also considered and rejected any basis for general jurisdiction, applying both the “at home” test and “continuous and systematic” tests, and found both unable to support such power. In particular, defendant’s virtual presence in Massachusetts could not support general jurisdiction; the interactive online learning platform, although accessible in Massachusetts, and the evidence that two Massachusetts students were enrolled in a course online, did not “constitute a pattern of general business operations.”

(The appeals court also discussed the parties’ burdens under Federal Rule 12(b)(2) and when evidence outside the four corners of a complaint may be considered on a jurisdictional motion.)

**XMission, L.C. v. Fluent LLC, 955 F.3d 833 (10th Cir. 2020),** involved a suit under the federal CAN-SPAM Act (Controlling the Assault of Non-Solicited Pornography and Marketing) by an Internet service provider against a digital marketer. The Utah long-arm statute, running “to the fullest extent permitted by the due process
clause,” applied to the dispute. Fluent was a Delaware corporation with its principal place of business in New York. XMission was a Utah corporation. Because of its location, any emails sent to a domain hosted by XMission go “through” Utah. XMission alleged that Fluent sent spam emails through XMission’s servers, causing harm to XMission’s clients through Utah.

The decision offers a good discussion of when specific jurisdiction may be based on harmful effects (Casebook, p. 123). The court reasoned that the harmful effects theory applies only to situations in which defendant has calculated its behavior to have a harmful impact specifically within the forum state (illustrated by Calder (Casebook, p. 123), involving the writing and publishing of a defamatory article about somebody who lived in the forum state, knowing that the article would mainly be read in that state). Defendant did not direct the harmful material at Utah, and did not know that any email recipient resided in Utah. Rather, it placed its material generally on the Internet, which could incidentally be accessed in Utah. The court also declined to base jurisdiction on a market-exploitation theory, finding that although defendant made $3 million in revenue from Utah customers, there was no evidence that defendant made revenue from the offending emails. Thus, the revenue was not shown to be connected to the conduct challenged in the complaint.

Modulus Financial Engineering, Inc. v. Modulus Data USA Inc., 2020 WL 2512785 (D. Ariz. 2020), sets out a fact pattern that allows for further discussion of Mavrix (Casebook, p. 176, Note 4) and the “purposeful direction” test where the contacts involve a website accessible in the forum state. Plaintiff was a software design company based in Arizona that provided services internationally. Defendants included a New York corporation with its principal place of business in Massachusetts, and a Canadian entity. Plaintiff brought a suit for trademark infringement, unfair competition, and cancellation of trademarks, claiming that personal jurisdiction in Arizona was available because defendants had purposefully targeted plaintiff and its trademarks in that state. The court first determined that the scope of the Arizona long-arm statute ran the length of the Due Process Clause. It then assessed whether defendants had purposefully directed their activity at the forum, which required a showing of more than mere foreseeability. Plaintiff argued that defendants expressly targeted Arizona through online advertisements. However, the court found that express targeting was not shown because defendants had not specifically encouraged Arizona consumers to use the website and did not have clients in Arizona. Moreover, even if defendant knew that plaintiff was headquartered in Arizona, any harm in that state was only “foreseeable,” and not “expressly aimed at” the state. The court reasoned that focusing only on the harm felt by the plaintiff in the state would distort and effectively nullify the “minimum contacts” requirement. The court distinguished the facts of this case from those in Mavrix; in Mavrix a significant amount of defendant’s revenue came from the forum in question, but in this case any business coming from Arizona residents clicking Internet ads was merely incidental.

Consent as Another Basis of Jurisdiction
For a fact pattern involving a consent-by-registration statute (Casebook, p. 170), consider *Kraus v. Alcatel Lucent, 2020 WL 951082 (E.D. Pa. 2020)*. A Pennsylvania worker sued the defendant–manufacturer, a Delaware corporation based in Virginia, in Pennsylvania, alleging exposure to asbestos dust in products manufactured by its predecessor in interest. Plaintiff argued that general jurisdiction existed because defendants’ predecessors-in-interest consented to jurisdiction when they registered to do business as foreign corporations. 42 Pa. C.S. § 5301(a)(2). The court agreed, finding that consent jurisdiction arises at the time the suit is filed, not when the cause of action arose. Thus, it was not relevant that plaintiff alleged exposure in 1965, and defendants registered in Pennsylvania in 1966.

The constitutionality of the consent statute would be an excellent topic for class discussion. The court rejected defendants’ argument that under *Daimler* (Casebook, p. 164, Note 1), requiring consent to jurisdiction is coercive, and not knowing and voluntary, and so violates the Due Process Clause (the conclusion reached by the district court in *Sullivan v. A.W. Chesterton, Inc.*, 384 F. Supp. 3d 532 (E.D. Pa. 2019)). The court in *Kraus* held that *Daimler* did not address the question of consent to jurisdiction, and mentioned consent “only to distinguish jurisdiction based on consent from jurisdiction based on a corporation’s activities in the forum.” At the time of decision, the constitutionality of the consent statute was pending before an en banc panel of the Pennsylvania Superior Court. *See Murray v. American LaFrance, 2018 Pa. Super. 267 (Pa. Super. Ct. Sept. 25, 2018), appeal no. 2105 EDA 2016.*

Chapter 3. Providing Notice and an Opportunity to be Heard

The Requirement of Reasonable Notice

*Smith v. Blanchard Intercounty Drainage Board, 2020 WL 619613 (E.D. Mich. 2020)*, concerned the constitutionality of notice of property tax assessments for improvements to an intercounty drain. Plaintiff owned property subject to the assessment, and alleged that he did not receive notice. He conceded that he jointly owned the property with his parents, who did receive notice and had attended a public hearing about the improvement. The statute authorizing notice provided that when a new drainage board is created and meets for the first time, the board shall provide “public notice” of its meetings, and may provide such notice by “[s]ervice by first class mail on each person” on the town’s tax roll owning land within the district, and the board’s affidavit of mail is deemed “conclusive proof” of such mailing. The same notice requirement governed later meetings held to discuss the drain. The district court rejected the argument that due process entitled plaintiff to individualized personal notice—indeed, under *Jones v. Flowers* (Casebook, p. 222), even “actual notice” was not required, only notice “reasonably calculated” to reach the intended recipient was required. The district court also held that, where property is jointly owned, notice to one of the owners is sufficient as constructive notice to the other owners.
Nnebe v. Daus, 931 F.3d 66 (2d Cir. 2019), challenged the constitutionality of procedures used by the New York Taxi and Limousine Commission (TLC), including the notice provided when summarily suspending the taxi licenses of drivers pending the outcome of criminal proceedings. The Second Circuit held that the letter used to notify the drivers of the suspension and informing them of their right to request a hearing violated due process (Casebook, p. 211). While emphasizing that the notice was not required to provide the drivers with a “roadmap to a successful defense,” this notice did not inform the drivers of the actual issue to be considered at the hearing. However, as the court dryly noted, “This conclusion is largely academic, in light of the more fundamental problem that the hearing in question was constitutionally insufficient, regardless of the content of the notice.” (We discuss the constitutionality of the hearing in the section on Opportunity to Be Heard.)

The Mechanics of Notice

Specific Applications of the Service Provisions

Bunker v. Cigna Health Management, Inc., 2020 WL 3448224 (D.S.D. 2020), illustrates the interplay between Federal Rule 4(e) and state service rules in determining whether constructive service may be permitted on a limited liability company. Plaintiff sought an order to serve defendant LLC under South Dakota law allowing service by publication in cases in which a foreign company owns property within the state. The district court determined that the provision required prior attachment, garnishment, or other process, and would apply only if the cause of action arose in the state. Further, plaintiff would have to establish exhaustion of “all reasonable means available” to locate the defendant. The court did not find the requisite diligence because plaintiff had failed to look at filings with the Secretary of State to confirm ownership and management. Moreover, it was not clear whether plaintiff was seeking to serve by publication in New Jersey or South Dakota. The court observed that while constructive service in personal actions did not per se violate due process, the form of service must be “reasonably calculated under the circumstances to apprise interested parties” of the pendency of an action against them (citing Mullane, Casebook, p. 211), and expressed concerns about the reliability of notice through publication. The validity of constructive notice through publication during a time of pandemic might be discussed.

If you teach Tickle v. Barton (Casebook, p. 30), Ewing v. State Automobile Insurance Co., No. 2018AP2265 (Wis. Ct. App. June 30, 2020), https://law.justia.com/cases/wisconsin/court-of-appeals/2020/2018ap002265.html, offers a fun set of facts for a classroom hypothetical. Ewing was a passenger in a car driven by Davis and allegedly was injured when Davis attempted to pass in a no-pass zone. The trial court entered summary judgment for Davis for lack of personal jurisdiction due to insufficient service of process and the Wisconsin appeals court affirmed. The decision recited that an individual attempted to serve Davis in a baseball stadium where he was preparing to participate in a minor league game. Specifically, the process server threw the legal document at Davis from the stands as Davis left the field of play through an exit in the right corner of the outfield. The court noted that while Davis was “exiting the field
down the right field line to retrieve items from the clubhouse [which was not situated within the stadium], the process server tossed a manila envelope containing the summons and complaint down at Davis from approximately twenty feet above him in the fan seating areas. As the server did so, he yelled, ‘You have been served!’” The appeals court held that this attempt at personal service was insufficient because process papers “should be physically placed in the hands of the party to be served, if possible,” and if the person refuses to accept the papers after the process server has identified the documents and attempted service in a “civil and proper manner,” the documents may be “deposited in an appropriate place in the presence of the party or in a place where they will most likely come into his or her possession.”

Mention also might be made of the on-going efforts to effect service of process upon President Trump in a defamation suit filed against him in New York state court. The New York state court ordered that he could be served at the White House and by mail. In later rejecting the President’s motion to dismiss the suit for lack of personal jurisdiction, the state court judge stated that the papers in opposition failed to provide “even a tweet, much less an affidavit” to support the motion. See *Carroll v. Trump*, 66 Misc.3d 1208(A) (N.Y. Sup. Ct. 2020).

**Note on “Sewer” Service**

*Rotkiske v. Klem*, 589 U.S. __, 140 S. Ct. 355 (2019), indirectly illustrates a problem related to “sewer” service (Casebook, p. 241): when a creditor sues a consumer after the state law limitations period has expired on the lawful ability to collect the debt, but nevertheless obtains a default judgment without having personally served the consumer. In 2014, plaintiff applied for a mortgage and was denied; he learned at that point that a law firm had obtained a state court default judgment against him on an unpaid credit card debt. Within the year, plaintiff sued the law firm under the Fair Debt

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Collection Practices Act, which authorizes private actions against debt collectors who engage in certain prohibited practices and carries a one-year statute of limitations. The complaint alleged that the default judgment was based on service at an address where plaintiff no longer lived, and on an individual who did not fit his description, and was filed outside the applicable statute of limitations. The Court, eight-to-one, held that the suit was untimely because the statute began to run when the alleged violation took place, not when plaintiff discovered the violation. Justice Ginsburg dissented, and argued that the statute should not begin to run when the debt collector’s fraud has delayed the consumer’s ability to file suit within the one-year period.

Fraudulently obtained default judgments are a serious problem.\textsuperscript{15} We note that when teaching this subject, some students have objected to the phrase “sewer” service. Although the term colloquially describes the process server’s act of throwing a summons down the sewer, the students stated their view that the expression resonates with treating Black and poor people as garbage to be thrown down the sewer.

\textbf{Opportunity to be Heard}

\textit{Nnebe v. Daus, 931 F.3d 66 (2d Cir. 2019)}, challenged the constitutionality of procedures used by the New York Taxi and Limousine Commission (TLC) when summarily suspending the taxi licenses of drivers pending the outcome of criminal proceedings. The facts of the case provide an excellent vehicle for discussing due process and as the basis for a writing exercise. It also could be the springboard for introducing questions of race and class into the curriculum. Many drivers in New York have immigrant backgrounds and face dire financial pressures, which the pandemic has exacerbated.\textsuperscript{16}

The governing rule allowed for summary suspension “based upon an arrest or citation if the [TLC] Chairperson believes that the charges, if true, would demonstrate that continued licensure would constitute a direct and substantial threat to public health or safety.” The Rule listed all felonies and certain misdemeanors as sufficient to trigger summary suspension. The Rule also provided for a post-suspension hearing at which the sole issue to be determined was “whether the charges underlying the Licensee’s arrest, if true, demonstrate that the continuation of the License while awaiting a decision on the criminal charges would pose a direct and substantial threat to public health or safety.”


The record showed that when a driver was arrested, the NY Division of Criminal Justice alerted the TLC about the event. TLC would then confirm that the arrested person was a driver and determine whether the charged offense was a listed offense upon which suspension could be based. At that point, TLC would send the driver a letter notifying the person of the suspension and stating that the driver could schedule a hearing to challenge the suspension. The letter identified the Rule governing the process (but otherwise did not state the standard to be applied at the hearing), and stated that the suspension could be lifted after the hearing.

In practice, TLC automatically lifted the suspension when the criminal case was resolved without a conviction and the driver provided that information to the TLC. The record showed that nine out of ten suspended drivers requested a hearing, and 75 percent had the suspensions lifted because of a favorable disposition in their underlying criminal case. Otherwise, only three out of hundreds of drivers ever had a license reinstated after a hearing, and the presiding Administrative Law Judge who had ordered reinstatement was reprimanded.

The district court granted summary judgment for defendants, and on an initial appeal, the Second Circuit remanded, questioning the district court’s premise that additional procedures would be too costly because they would have to involve a “mini-trial on the criminal charges.” A trial followed. On the second appeal, the appeals court considered whether the hearings violated due process because they did not afford the drivers a “meaningful” opportunity to show that they are not a threat; the appeals court also considered whether the letter notifying the drivers of their right to request a post-suspension hearing violated due process because it denied the drivers “fair warning of the law.”

Turning first to the constitutionality of the hearings, the Second Circuit found that the district court had failed to balance the factors set out in the Mathews v. Eldridge test (Casebook, pp. 255–56, Note 6). Rather, the district court merely “briefly noted the private interest at stake” before concluding “that the facts the drivers wanted an opportunity to prove—namely that their particular licensure did not pose a risk to the public health or safety—were not relevant.” The appeals court found this latter conclusion to be inconsistent with the governing statute, which put the specific licensure, and not the charges, at issue (unlike, for example, sex offender statutes that look exclusively at the nature of the offense as a marker of public threat). The appeals court also assessed the hearing’s constitutionality in light of its post-suspension, and not pre-suspension, role: a post-deprivation hearing “provides the necessary inquiry into the propriety of the suspension in light of the fuller record that can be compiled in the aftermath of the arrest, which might confirm or dispel the initial impressions that the driver’s continued licensure would pose a threat to the safety of the public.”

Balancing the Mathews factors, the Second Circuit first considered the private interest in even the temporary loss of a license and found that it is “extremely strong,” for an erroneous deprivation can be “financially devastating” in a city such as New York where the cost of living is high. As to the risk of erroneous deprivation, the Second
Circuit found the risk to be unacceptably high—as already mentioned, statistics showed that at least 75 percent of the drivers had their licenses reinstated because the charges were dismissed, meaning the initial suspension as a response to a potential public threat was erroneous. As to the government’s interest, the appeals court observed that the government had not presented evidence to show that it would be financially or administratively burdensome to conduct a circumscribed factual inquiry. On balance, the Second Circuit held the process to be inadequate, and remanded for the district court to devise a remedy in which the hearing “encompasses some level of conduct-specific findings based upon the facts underlying the complaint and the driver’s history and characteristics, for example.”

**Doe v. Harvard University, 2020 WL 2769945 (D. Mass. 2020)**, involved a multi-claim complaint challenging a student’s discipline for an alleged sexual assault following the private university’s internal investigation under Title IX, 20 U.S.C. § 1681(a). The district court rejected a due process challenge to the university’s internal investigation rules on the ground that state action was not present. However, consider changing the facts so that the defendant is a public university. Would its procedural rules governing the charges, investigation, hearing, and standard of proof pass muster under the *Mathews v. Eldridge* test (Casebook, pp. 255–56, Note 6)? In *Doe*, plaintiff also alleged that the University applied its disciplinary rules differently depending on the race of the complainant and alleged assailant.

**Chapter 4. Jurisdiction over the Subject Matter of the Action—The Court’s Competency**

**Subject-Matter Jurisdiction in State Courts**

In *Atlantic Richfield Co. v. Christian*, 590 U.S. ___, 140 S. Ct. 1335, 206 L. Ed. 2d 516 (2020), the Supreme Court relied on the “deeply rooted presumption” of concurrent jurisdiction (Casebook, p. 273, Note 4) in deciding that the federal Comprehensive Environmental Response, Compensation, and Liability Act did not by implication oust the Montana state court of jurisdiction over state law claims by adjacent property owners against a smelter ordered by the Environmental Protection Agency to do clean-up.

**The Subject-Matter Jurisdiction of the Federal Courts—Diversity of Citizenship**

For a compact problem involving 28 U.S.C. § 1332(a) and distinguishing between “diversity” and “alienage” jurisdiction (Casebook, p. 277), consider *Tagger v. Strauss*, 951 F.3d 124 (2d Cir. 2020). Plaintiff, a citizen of Israel and lawful permanent resident domiciled in New York, sued an Israeli corporation. Generally, citizenship is determined by domicile, but permanent resident status does not confer U.S. citizenship. Thus, the court could not exercise diversity jurisdiction; as the Second Circuit explained, “federal courts do not have diversity jurisdiction over lawsuits between two foreign parties.” The
appeals court also rejected the argument that the Treaty of Friendship, Commerce and Navigation between the United States and Israel created an independent jurisdictional basis by providing Israeli nationals “access to the courts of justice” within the United States.

Note 2, page 293, asks the student to consider when a court can find to a legal certainty that a party’s claim does not meet the amount-in-controversy requirement. Some teachers may find it helpful to go beyond the basic rule and to discuss the distinction between a factual and a facial challenge to jurisdiction, compactly illustrated by Travelers Indemnity Co. of America v. Harris, 2020 WL 1905173 (S.D. Ill. 2020). The insurance company brought a diversity action seeking (1) to declare that a landlord insurance policy issued to defendant was void, (2) to recover insurance proceeds previously paid, and (3) to clarify that it has no future obligations. Defendant moved to dismiss on the ground that the amount in controversy did not exceed $75,000, submitting an affidavit that he did not seek more than that amount to resolve a fire loss claim. Plaintiff countered that the amount in controversy was at least the face value of the policy applicable to fire loss, which exceeded the statutory amount. The court held that because the insurance company sought a declaration that the entire policy was void, and to recoup amounts already paid, the validity of the entire insurance policy was at issue, and the face value was the amount in controversy of the suit. As the court explained, a facial challenge contends that a complaint lacks sufficient factual allegations to establish jurisdiction, and courts must accept as true the allegations of the complaint; a factual challenge contends “there is in fact no subject matter jurisdiction,” and the court looks “beyond the pleadings and may consider any evidence submitted to determine whether subject matter jurisdiction exists.”

The Subject-Matter Jurisdiction of the Federal Courts—Federal Questions

City of Oakland v. BP PLC, 2020 WL 2702680 (9th Cir. 2020), provides an opportunity to discuss the Grable factor-approach to “arising under” jurisdiction (Casebook, p. 312) in a factual context of interest to many students—local efforts to mitigate the effects of climate change. Two California cities sued in state court challenging the corporate defendants’ production and promotion of fossil fuels as a public nuisance under California law. Defendants removed. The district court dismissed the state law claim for failure to state a claim. On appeal, the Ninth Circuit Court of Appeals held that the state-law claim did not arise under federal law for purposes of 28 U.S.C. § 1331, emphasizing that the claim did not raise a substantial federal issue, and instead was “fact-bound and situation specific.” (Note that the Cities had amended their complaint to include a public-nuisance claim under federal common law, and the appeals court remanded to determine whether an alternative basis for federal jurisdiction existed.)

Wullschleger v. Royal Canin U.S.A., Inc., 953 F.3d 519 (8th Cir. 2020) offers another accessible fact pattern for application of the Grable factors (Casebook, p. 312). Plaintiffs sued in Missouri state court, alleging that defendants, manufacturers of pet food, had falsely implied that their products had approval from the U.S. Food and Drug Administration. The complaint alleged a violation of the Food, Drug and Cosmetic Act
(FDCA), but requested relief only under state law. Defendants removed to federal court, and the district court remanded for lack of “arising under” jurisdiction. On appeal, the Eighth Circuit reversed, rejecting plaintiffs’ argument that the case was analogous to *Merrell Dow* (Casebook, p. 310), which also involved a state tort claim and non-compliance with FDCA requirements. In *Merrell Dow*, the court explained, jurisdiction did not exist because the complaint alleged only a “violation of [federal law] as an element of a state cause of action.” By contrast, in the court’s view, “dependence on federal law permeates the allegations [of the pet food complaint,] such that the [state law claims of] antitrust and unjust enrichment cannot be adjudicated without reliance on and explication of federal law,” and “necessarily require[] the interpretation and application of federal law.” Although the Eighth Circuit’s opinion did not discuss all of the *Grable* factors in-depth (for example, it gave the “federal-state balance” factor the back of the hand), it affirmed that all four factors were satisfied, so removal was proper.

**The Subject-Matter Jurisdiction of the Federal Courts—Supplemental Claims and Parties**

For a practice problem focused on whether a court should exercise supplemental jurisdiction after the federal claims are dismissed (Casebook, p. 347, Note 2), consider the facts in *Simmons v. National Railroad Passenger Corp.*, 2020 WL 2904847 (S.D.N.Y. 2020). Plaintiff slipped and fell in a puddle while using the bathroom facilities in Union Station, Washington, D.C. She sued Amtrak and private companies, including a private cleaning service, in state court, asserting federal and state law claims. Defendants removed on the basis of federal question jurisdiction. Diversity jurisdiction was not present. After the district court dismissed Amtrak from the suit for lack of personal jurisdiction, plaintiff requested remand of the action. The district court, sua sponte, addressed whether to exercise supplemental jurisdiction, but declined—the federal basis for jurisdiction had been extinguished, discovery had not yet ended, no dispositive motions on the merits had been decided, and the case was largely that of state law.

For those of you who teach the challenging issue of supplemental jurisdiction and the distinction between permissive and compulsory counterclaims (Casebook p. 333, Note 2), consider *Dotson v. Ally Financial Inc.*, 2019 WL 5847848 (W.D. Tenn. 2019). Plaintiff bought a car at a car dealership and signed an agreement consenting to be contacted in various ways, including by telephone. The dealership assigned the contract to Ally. At some point, plaintiff stopped making payment, and Ally contacted him by telephone about 100 times about the unpaid balance. Some of the calls were prerecorded. Plaintiff alleged that he told Ally to stop calling him, but it persisted. Plaintiff sued under the federal Telephone Consumer Protection Act (TCPA), and Ally filed counterclaims for repossession and breach of contract under Tennessee law. Plaintiff moved to dismiss the counterclaims for lack of subject matter jurisdiction, and the district court granted the motion.

The district court posited that a court’s power to hear a counterclaim under 28 U.S.C. § 1367(a) “is broader and more encompassing” than that under Federal Rule 13(a)’s “arise from the same transaction or occurrence” standard. Rather, the claims are
part of the same case or controversy if “found to arise out of facts bearing some relationship to the main claim,” and the fact that the claims “require different evidence or proof does not mean they cannot or do not derive from a common nucleus of operative facts.” Under this standard, power was present: the federal claim and state counterclaims were related to the same car purchase agreement. However, the district court declined to exercise its discretion under § 1367(c)(2), because it found that Ally’s state law claims “substantially predominate” over plaintiff’s federal claims. They required different evidence and would result in different remedies. Moreover, public policy concerns cut against exercising supplemental jurisdiction given the role of the TCPA in protecting consumers; the court reasoned that the consumer’s exercise of its statutory rights would be chilled were the debt collector able to counterclaim in the federal action. On the other hand, the debt collector would not suffer prejudice if required to file its state claims in state court; it could use any state judgment as a set-off to any federal judgment.

Finally, the district court considered whether the state counterclaims constituted a “defensive set-off” over which supplemental jurisdiction could be exercised even without an independent jurisdictional ground. Having found that “§ 1367 abolished the compulsory/permissive counterclaim distinction,” the court held that the previously recognized exception for defensive set-offs is “no longer viable,” but even if the set-off met the case-and-controversy standard, as a matter of discretion the court would decline to exercise supplemental jurisdiction.

**The Subject-Matter Jurisdiction of the Federal Courts—Removal**

**Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano, 589 U.S. ____, 140 S. Ct. 696 (2020) (Rules Supplement, p. 397)**, reaffirmed the basic principle that a court cannot act without jurisdiction. In this case, the problem was that the state trial court issued an order seizing the defendant-church’s property before the matter had been remanded by the federal district court. The facts of the case are complicated and involve rights to pension benefits. Defendants removed the case as a related matter to a federal bankruptcy proceeding. When the bankruptcy proceeding was dismissed, the district court remanded. In between the dismissal and the remand, the state court issued its seizure orders. In a per curiam opinion, the Supreme Court held that the state trial court lacked jurisdiction, and rejected the argument that the defendant-church’s continued filings in state court after removal were a concession that cured the jurisdictional defect. (The Court also discussed the limits of nunc pro tunc orders, an issue that likely is beyond the 1L course.)

**Cline v. Dart Transit Co., 804 Fed. Appx. 307 (6th Cir. 2020)** provides an approachable fact pattern about complete diversity and the fraudulent joinder doctrine. A truck driven by an independent contractor hired by defendant-Dart crashed into the Clines’ car. The truck driver died. The Clines sued Dart and the driver’s estate, invoking diversity jurisdiction. The Clines were citizens of Ohio. Although the appeals decision did not state this fact, the defendant-corporation was a citizen of Minnesota. The estate was a citizen of Ohio. On appeal, the Sixth Circuit held that the joinder of the non-diverse estate did not defeat complete diversity, because joinder was fraudulent in that plaintiffs
lacked a “colorable cause of action” against the estate. The fact pattern allows for discussion of complete diversity (Casebook, p. 276), the rules governing the citizenship of an estate (Casebook, p. 285), and collusive joinder (Casebook, p. 287).

We also include a number of cases addressing whether an in-state defendant may remove an action to federal court prior to service of process—a practice known as “snap removal.” The topic poses a number of questions of statutory interpretation and could form the basis for an excellent, if challenging, writing exercise. The provisions in play are 28 U.S.C.A. §§ 1441(a), (b)(2), and (d).

In Castro v. Colgate-Palmolive Co., 2020 WL 2059741 (W.D.N.Y. 2020), the district court, applying Second Circuit precedent, Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699 (2d Cir. 2019), held that “snap removal” was proper when defendant, waiting “[n]o more than 24 hours” after plaintiff’s filing of a complaint in New York state court, filed for removal before being served. The case was a products liability suit, one of the many against defendant for injuries allegedly caused by use of Johnson & Johnson’s talcum products. In Gibbons, the Second Circuit read the “plain text” of § 1441(b)(2) to set out “a bright-line rule keyed on service”; the circuit found the rule to be not absurd, even if, perhaps, “unwise.” Do the students see any problems with the bright-line rule? The Second Circuit acknowledged, in dicta, that it could produce “anomalous” results, for example, giving in-state defendants the ability to remove through snap removal any suit brought against them in states that “require a delay between filing and service, like Delaware.” However, the circuit concluded that the rule’s relative “administrability” meant that even that “anomaly” was not an absurdity. Even if not an anomaly, is the Second Circuit’s approach consistent with the purposes of diversity jurisdiction?

Assuming removal can take place before service, what does 28 U.S.C. § 1441(b)(2) mean by the clause “properly joined and served”? Martha Barotz 2006-1 Insurance Trust v. Barotz, 2020 WL 1819942 (S.D.N.Y. 2020) provides a compact fact pattern to address this question. Plaintiff filed an insurance claim in New York state court. Plaintiff was a citizen of Delaware; defendant, a citizen of New York. Students should consider: could defendant have removed—clearly not, for the statute bars removal by an in-state defendant. The next question is whether removal could take place despite the forum rule because effected prior to service. Plaintiff initially filed a Summons with Notice. Did this filing constitute the required service? Looking to New York law, the district court found that filing a Summons with Notice in lieu of a complaint commences an action; further, other district courts had held that such a filing “suffic[iently constitutes that the Defendant was properly joined.” Thus, Gibbons did not apply, and under the in-state bar on removal, remand was required.

To complicate the removal question more, consider bringing 28 U.S.C. § 1446(d) into the picture. Procedurally, removal requires defendant to file in the district court. But defendant also has a statutory duty with respect to the state court—defendant “shall give written notice” of the removal “to all adverse parties” and “shall file a copy of the notice with the clerk of such State court.” In Brown v. Teva Pharmaceuticals, Inc., 414 F.
Supp. 3d 738 (E.D. Pa. 2019), the district court acknowledged that under Third Circuit precedent (as in the Second Circuit) removal is proper if the notice of removal is filed prior to service on defendant. But remand was required because defendant had failed to file in state court until after service:

Plaintiff filed in state court at 10:06 a.m.
Defendant removed to federal court at 1:55 p.m.
Plaintiff served defendant at 2:15 p.m.
Defendant filed in state court at 4:11 p.m.

Is the requirement of § 1446(d) a mere technicality, or is it one of power and judicial federalism? The district court explained that “state court jurisdiction continues until the notice of removal is filed with that court” and that “[n]o federal jurisdiction vests during this interim timeframe.” (Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano, Rules Supplement, p. 397, discussed earlier in this memo, affirmed this basic principle.)

Students can be asked to counter the statutory interpretation put forward by the Second and Third Circuits of the “properly joined and served” language in § 1441(b)(2). The Second and Third Circuits purported to follow the “plain meaning” rule, and held that the text’s clear meaning did not produce absurd results. In Bowman v. PHH Mortgage Corp., 423 F. Supp. 3d 1286 (N.D. Ala. 2019), the district court read the statute to be “more ambiguous than other courts have supposed,” and then proceeded to the question, “which of two permissible constructions of the text best effectuates Congress’ intent.” The case itself presented a further wrinkle on snap removal: “The precise question is whether it violates the forum defendant rule for out-of-state defendants to remove a case for diversity jurisdiction, even though there are two in-state defendants, if none of the defendants has been properly served.” The district court read § 1441(b)(2) as potentially requiring that for a removal action to take place there must as a precondition have been proper service on at least one defendant. Having read that ambiguity into the text, the district court, taking a purposivist approach, held that “the second reading—i.e., requiring at least one defendant to have been properly joined and served before removal when an in-state defendant is involved—emerges as the better interpretation.” Students can be asked to defend the district court’s approach. Relevant arguments might include: (1) the forum defendant rule supports the rationale for diversity jurisdiction of protecting out-of-state defendants from potential bias in state court, but an in-state defendant suffers no such bias; (2) deference is owed to plaintiff’s forum choice; (3) the service rule combats the problem of fraudulent joinder and gamesmanship by plaintiff; (4) the forum defendant rule counters gamesmanship by defendant.

Finally, students can be asked how technology fits into removal practice. The district court in Bowman observed that the availability of services providing “automatic docket alerts for new case filings” makes it easy to monitor dockets, and “would allow cunning defendants to further the practice of snap removal to harmful effect.” Similarly, dicta in Castro suggested that snap removals “likely are a creature of modern technology. Back when new cases could be filed only in hard copy by physically appearing at the Clerk’s Office window, snap removals were logistically impossible. In the era of paper
filing, filing removals as quickly as Johnson & Johnson did here would have required posting a paralegal” in every state courthouse. Technology obviates the need for such staffing.

Chapter 5: Venue, Transfer, and Forum Non Conveniens

Venue

For a basic fact pattern under the general venue statute, consider Rogers v. Smith Volkswagen, LTD, 2020 WL 1676400 (E.D. Pa. 2020), discussed earlier in this memo, in which the court held that venue was proper under 28 U.S.C. §§ 1391(b)(1) and 1391(c)(2).

Transfer under 28 U.S.C. § 1404

Rodriguez Aragones v. Pompeo, 2019 WL 6133957 (D. R.I. 2019) illustrates a Rule 12(b)(3) motion in the context of a special statutory venue provision, namely that of Title VII (Casebook, p. 374, Note 6). Plaintiff alleged that the challenged conduct took place while he resided in Rhode Island. Title VII provides for four different venue options, but plaintiff’s residence is not one of them. Rather than dismiss the action for improper venue, the court transferred to a proper venue in Washington, D.C., as the district in which the State Department is headquartered and which had a “greater nexus with the case” than Massachusetts, where venue also was proper.

Grubb v. BNSF Railway Co., 2019 WL 5862975 (D. Mont. 2019) likewise applied the Title VII venue provision. Plaintiff, living in Montana, sued in Montana district court challenging his job termination as alleged disability discrimination and retaliation under Title VII. The court held that the Title VII venue provision controlled, even if non–Title VII claims were included in the complaint. The court determined that venue was not proper in Montana, applying the rule that an unlawful employment practice occurs either where the employment decision is made, or where its effects will be felt. The decision to terminate plaintiff was made in Kansas, and plaintiff was assigned to work in multiple states and only temporarily in Montana. Because the complaint did not allege temporary suspension as an unlawful employment action, that employment action could not support venue in Montana. However, the court gave plaintiff leave to amend the complaint to include the additional claim (and so provide a basis for venue in Montana).

Forum Non Conveniens

The adequacy of an alternative forum typically is established by defendant’s agreement to submit to the jurisdiction of the foreign forum. However, in some circuits, at the first step, plaintiff may bring forth evidence to show that the forum is in fact not adequate. And if plaintiff meets its burden, defendant then has the burden to show
adegacy. We present a handful of cases that can provide the basis for teaching hypotheticals about assessing the adequacy of the alternative forum.

In Inamura v. General Electric Co., 957 F.3d 98 (1st Cir. 2020), Japanese citizens and businesses filed a putative class action in Massachusetts federal court against the designer of a nuclear power plant, seeking damages for injuries caused by an earthquake-induced tsunami and a resulting nuclear disaster at the Fukushima Daiichi Nuclear Power Plant in Japan. The district court dismissed on grounds of forum non conveniens, and the First Circuit affirmed, relying on Piper (Casebook, p. 386) to find, at the first step in its analysis, that Japan was an adequate alternative forum, even though disaster claims were required to be litigated through a judicial and administrative compensation scheme—the Act on Compensation for Nuclear Damage—which potentially insulated General Electric (but not other companies involved in the disaster) from liability. Boiled down, GE had conceded amenability to service and so the forum was adequate. At the second step in the analysis, the First Circuit performed a balancing test to determine whether the mix of factors relative to the public and private interests “strongly favored dismissal.” Plaintiffs conceded the propriety of the district court’s balancing, and the First Circuit treated the concession as a waiver on appeal. Significantly, the appeals court held that dismissal for forum non conveniens is not improper when the alternative forum “offers adequate remedies for the exact same injuries alleged by the plaintiff in U.S. court but channels liability for those injuries to a third party who is not the same defendant in the U.S. case,” analogizing the situation to one in which a plaintiff recovers “one hundred percent” from one tortfeasor but “none” from a joint tortfeasor. Japanese law, as applied by a federal district court in the United States, might have required dismissal of the action, and the fact that the decision maker would be administrative and not judicial did not render the scheme inadequate. One line of discussion might focus on the treatment of a nonjudicial forum as an adequate substitute for a judicial forum, and the reasons that might cut against this conclusion.

By contrast, the district court denied defendant’s motion to dismiss for forum non conveniens in British Telecommunications PLC v. Fortinet Inc., 424 F. Supp. 3d 362 (D. Del. 2019), finding there was no adequate alternative forum, and rejecting the argument that the parties’ contractual forum-selection clause, designating England as the exclusive forum, ought to control. The suit was brought by an international telecommunications company for “patent infringement ** based on five patents issued by the United States Patent and Trademark Office.” The court acknowledged that typically when the parties have agreed in advance to a forum the clause should be given “controlling weight,” no deference ought to be given to plaintiff’s forum choice, and plaintiff bears the burden of showing exceptional circumstances to “deprive a defendant of its bargained-for forum.” The court found exceptional circumstances because it questioned whether “an English court could or would exert jurisdiction over Plaintiffs’ United States patent claims.” The court ultimately found that there was no evidence that English courts had jurisdiction over United States patent claims, which provided for the exceptional circumstances required to override a forum selection clause. In reaching this conclusion, the court declined to read Atlantic Marine (Casebook, p. 396) as making irrelevant an inquiry into the adequacy of the alternative forum when the parties have
agreed to select a forum. The court also rejected the suggestion that plaintiff’s burden required it to “to prove a negative—i.e., the absence of jurisdiction in the foreign tribunal.”

In *Hersh v. CKE Restaurant Holdings, Inc.*, 403 F. Supp. 3d 755 (E.D. Miss. 2019), the district court dismissed on grounds of forum non conveniens a wrongful death action brought by parents of a child who was electrocuted while playing outside defendant’s restaurant in Jordan. Defendant was a U.S.-based restaurant chain franchisor. The court rejected plaintiff’s argument that Jordan was not an adequate alternative forum because its courts did not have jurisdiction over foreign corporations. Rather, the court found that because the accident took place in Jordan, Jordanian law recognized consent as a valid basis for jurisdiction, and the defendant’s senior vice president attested that the company would accept service, submit to jurisdiction, and waive statute of limitations defenses. The court further held that the balancing of private and public factors tilted in favor of Jordan. Students might consider whether defendant’s amenability to suit in the alternative forum ought to be given such strong weight in the court’s assessment of adequacy.

Plaintiffs proffered significant evidence that defendant’s proposed alternative forum was not adequate in *Acuña-Atalaya v. Newmont Mining Corp.*, 2020 WL 1154783 (D. Del.), but the court held that defendants met their ultimate burden. The decision illustrates the kinds of proof a court might consider in making the adequacy determination, as well as conditions imposed on defendants to support dismissal. Plaintiffs were indigenous farmers in Peru seeking to hold a U.S. mining company liable for their violent eviction from land by its Peruvian subsidiary. The district court dismissed the action on forum non conveniens, subject to conditions: that defendant submit to jurisdiction in Peru; that the Peruvian court accept jurisdiction; that defendant stipulate that any judgment entered by a Peruvian court qualified as legally adequate under Delaware law; and that defendant agree not to object to its agents’ testimony in any Peruvian action. Defendant agreed to these conditions. While the appeal was pending, Peru went through political crises and both its judiciary and Congress declared a state of emergency. The circuit court vacated the dismissal order, and remanded for the district court to consider the question of adequacy. The district court again dismissed and reinstated the conditions. The court found that plaintiffs satisfied their burden by presenting evidence of specific and general corruption, but defendant ultimately met its burden of persuasion. Although the court stated it found Peruvian political developments “concerning,” it emphasized that the U.S. Department of State had not declared Peru’s legal system “dysfunctional”; the Peruvian government had brought swift anti-corruption prosecutions; and “the specific instances of historic corruption perpetrated by Newmont are unlikely to recur.” Looking at the conditions imposed by the district court, students might consider whether a U.S. court has power to insist that a foreign court hear a proceeding upon consent jurisdiction. Moreover, is it troubling that the conditions oust a Delaware court of later determining the adequacy of a judgment entered by a foreign court?
For another possible teaching hypothetical, consider In re Air Crash over the Southern Indian Ocean on Sunday March 8, 2014, 946 F.3d 607 (D.C. Cir. 2020) (rejecting arguments Malaysia was not an adequate alternative forum because the government had enacted a statute making the defendant national airline judgment-proof by transferring all assets of the prior national airline to the current national airline without deeming it a successor; claims under the Montreal Convention were likely covered by insurance; and a U.S. forum would not provide any greater likelihood of relief).

The district court in Accent Delight International Ltd. v. Sotheby’s, 394 F. Supp. 3d 399 (S.D.N.Y. 2019) offered a helpful distinction between “genuine convenience” and forum shopping. Genuine convenience is manifested by such factors as plaintiff’s residence, the availability of witnesses, and the availability of counsel. Forum shopping involves the use of local law for tactical advantage and exploitation of such factors as U.S. juries, plaintiff’s popularity in the U.S. or abroad, and increased expense to defendant. The suit was “a small part of a larger international saga” involving art buyers acting on behalf of a Russian art collector claiming they were defrauded by more than a billion dollars through inflated art prices. Actions pertinent to the claims (some filed by defendant) were pending outside the United States in Singapore, Switzerland, France, and Monaco. The district court denied the motion to dismiss on forum non conveniens. At step one, the court found that plaintiffs’ forum choice was entitled to “some” but not “strong” deference considering the different convenience factors. At step two, defendant clearly established that Switzerland was an adequate alternative forum: defendant had submitted to jurisdiction, the court had power to litigate the core claims, and the court likely would exercise jurisdiction and hear the claims. At step three, the court balanced the private and public interests, and found that defendant failed to carry the burden of showing New York to be “genuinely inconvenient” and that Switzerland was “significantly preferable”—after all, New York was defendant’s home forum. (The court also addressed whether dismissal was warranted on the basis of the doctrine of international adjudicative comity, but found that the pendency of a parallel foreign proceeding did not “negate the district courts’ virtually unflagging obligation to exercise the jurisdiction given them.”)

Chapter 6. Ascertaining Applicable Law

The Erie Doctrine: The Rules of Decision Act and the Rules Enabling Act

If you teach Gasperini (Casebook, p. 453), the challenge in Suero-Algarín v. CMT Hospital Hima San Pablo Caguas, 957 F.3d 30 (1st Cir. 2020) to a post-verdict ruling on remittitur under Puerto Rico law “is déjà vu all over again,” as the appeals court put it. The suit involved a medical malpractice claim. Defendants argued that the Puerto Rico Supreme Court had adopted a more rigorous standard than the federal courts, that Puerto Rico courts were required to use a comparative approach and to adjust awards to the present value using the consumer price index, and that this approach reflected a substantive and not procedural rule of decision. In finding that the district court correctly applied the federal standard in its remittitur analysis, the appeals court concluded that
Puerto Rico’s “exaggeratedly high” standard did not depart from the federal “grossly excessive” standard. The appeals court paid special attention to whether developments in Puerto Rico law governing remitter showed “a restatement that stresse[d] relevant considerations” or rather a “meaningful change of direction,” and, further, whether a federal court’s review of “awards granted in prior similar cases to determine whether an award is ‘exaggeratedly high’ would necessarily upgrade the Puerto Rico standard from procedural to substantive law.”

For a post–Shady Grove (Casebook, p. 462) problem, consider Phillips v. Hobby Lobby Stores, Inc., 2019 WL 8229168 (N.D. Ala. 2019), a class action alleging violation of the Alabama Deceptive Trade Practices Act (ADTPA), which barred class actions. In Lisk v. Lumber One Wood Preserving, LLC, 792 F.3d 1331 (11th Cir. 2015), the Eleventh Circuit held that Federal Rule 23 trumped the ADTPA’s ban on class actions. In response, the Alabama legislature amended its statute to include language denominating the statute as “substantive.” Nevertheless, the district court continued to follow Lisk and held that Federal Rule 23 controlled in federal court.

Many states now require some kind of expert certificate as a condition of filing a medical malpractice suit. Whether this requirement is substantive or procedural has been considered in an increasing number of lawsuits under the Federal Tort Claims Act (FTCA), and these fact patterns may be adapted in 1L courses when teaching Hanna (Casebook, p. 429) and later developments such as Shady Grove (Casebook, p. 462). As an example, consider Brusch v. United States, 2019 WL 5261105 (M.D. Tenn. 2019), which addressed the applicability of the Tennessee Health Care Liability Act (THCLA) to medical malpractice claims under the FTCA. Under the THCLA, any health care liability action requiring expert testimony must include in its pleading a certificate attesting that there is a good faith basis to the action. The THCLA also requires that any complaint without such a certificate be dismissed with prejudice. Plaintiff’s complaint failed to include this document. Plaintiff filed a motion either to amend her complaint, or to dismiss her complaint without prejudice. The court found that the THCLA was a mandatory, substantive law, and that any complaints filed in federal court under the THCLA must follow the state certification requirements. Would a court reach the same result under Justice Scalia’s plurality approach in Shady Grove? See Shields v. United States, 2020 WL 497644 (D. Conn.) (“For diversity cases, the extent to which state law applies in federal court turns on consideration of the choice-of-law rules announced in the famous case of Erie *** and its progeny. By contrast, the FTCA itself instructs the federal courts about the law that they should apply.”).

**Federal “Common Law”**

Professor Meltzer’s 1986 article on federal common law stated that the “proper scope of federal common lawmaking is a matter of considerable uncertainty” (Casebook, p. 484). In Rodriguez v. FDIC, 589 U.S. ___, 140 S. Ct. 713, 206 L. Ed. 2d 62 (2020), the Supreme Court emphasized the highly constrained nature of such judicial conduct, holding that state law of its own force applied in a federal tax refund dispute because the federal interest was too weak to support the creation of a federal common law rule of
decision. The facts, although complex, can be simplified. Members of a corporate tax group were battling each other over which member was entitled to a tax refund when they had not contractually agreed to any particular allocation. The Tenth Circuit resolved the dispute by applying a federal common law rule that assigned the money to the party that suffered the losses leading to the refund. The Supreme Court vacated. Writing for a unanimous Court, Justice Gorsuch emphasized the limited nature of federal common law, and the lack of any federal interest in which corporate affiliate was entitled to the tax refund. Justice Gorsuch concluded by advising that “We took this case only to underscore the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking.”

Chapter 8. Modern Pleading

Early in 1L, students may not fully appreciate the distinction between a Federal Rule 12(b)(6) motion and a Federal Rule 56 summary judgment motion, and what it means for a court to decide a motion only on the pleadings or only after discovery. If at the Rule 12(b)(6) stage the court considers matters that are outside the pleadings, it has a duty to convert the motion to that of a Rule 56 summary judgment and provide notice, opportunities for discovery and so forth. We invite attention to a few cases in which district courts ignored the distinction between the two motions and were reversed on appeal.

In Palin v. New York Times Co., 940 F.3d 804 (2d Cir. 2019), a former Vice Presidential candidate appealed the dismissal of her defamation claim, and the Second Circuit reversed, finding that the district court had relied on information outside of the pleadings to reach its decision and failed to convert the motion to that of summary judgment. Students may recall that Sarah Palin was John McCain’s running mate in the 2008 presidential election. Years later, Palin’s political action committee published an image that superimposed crosshairs on certain congressional districts. In 2017, following violent attacks on politicians, including an assassination attempt on Rep. Gabrielle Giffords, whose district was a target on Palin’s crosshairs map, the New York Times published an editorial suggesting that the “link” between Palin’s map and “political incitement was clear.” Palin sued for defamation, and the New York Times moved to dismiss under Rule 12(b)(6). In an unusual procedural turn, the district court held an evidentiary hearing to determine whether the complaint sufficiently pleaded “actual malice” as required under the First Amendment when defamation is alleged against a public figure. Based on the hearing, the district court granted the Rule 12(b)(6) motion. The Second Circuit held that the allegations of the complaint were plausible and that it was error for the district court to have gone outside the pleadings.

For another example of the circuit court reversing a district court’s order as improperly converting a motion to dismiss into a motion for summary judgment, see Allen v. Hays, 2020 WL 2182085 (5th Cir. 2020), a civil rights action arising from a police officer’s fatal shooting of a driver during a traffic stop. At a pretrial scheduling conference, defendants produced a compact disc containing their initial disclosures,
including such matters as the officers’ body-camera videos. Although defendants intended to produce the CD to plaintiff, the judge instructed defendants to give him the CD and instructed plaintiff to respond to a motion to dismiss. In deciding that motion, the court relied on evidence in the CD and other materials not shared with plaintiff nor filed under Federal Rule 5(d). The Fifth Circuit called the district court’s procedure “fundamentally unfair.”

The reverse situation was at issue in Ríos-Campbell v. U.S. Department of Commerce, 927 F.3d 21 (1st Cir. 2019). After discovery, defendant moved for summary judgment. The district court, sua sponte, converted the motion to that of Rule 12(b)(6) and granted it. The First Circuit vacated, holding it was an abuse of discretion for the district court to convert the Rule 56 motion into a Rule 12(b)(6) motion. As the court explained, the motion to dismiss comprised a threshold inquiry, early in the litigation, and before discovery. After the discovery period has closed, a party seeking to end an action short of trial must meet the standard applicable to summary judgment, and not the plausibility standard of a motion to dismiss. The decision is an excellent explanation of the different purposes of the two motions.

Swierkiewicz v. Sorema N.A. (Casebook, p. 570)

We include two discrimination cases (involving gender and race) that present useful fact patterns for discussing and applying the Swierkiewicz “fair notice” pleading standard, which some commentators have argued survives, notwithstanding the Supreme Court’s articulation of a plausibility standard in Twombly (Casebook, p. 573) and Iqbal (Casebook, p. 584).


illustrates how female workers have tried to redress gender discrimination in the wake of the denial of class certification in Wal-Mart (Casebook, p. 834). Almost a decade ago, plaintiff was a member of the class; she then was a member of a regional class; and still later was a member of a 33–plaintiff complaint. In this most recent case, she sought individual relief alleging disparate treatment and disparate impact with respect to compensation and promotion opportunities. The court dismissed all claims other than that for pay disparity. The district court stated that Swierkiewicz did not require the allegation of facts establishing a prima facie case, but it did require allegations that plaintiff herself had suffered gender discrimination, which required a showing of discriminatory animus. On this standard, the court held, the complaint failed, for in its view, “every single one” of plaintiff’s allegations was “nothing more than legal conclusions,” which “might have survived a motion to dismiss prior to Twombly and Iqbal. But now they do not.” However, the pay disparity claim survived dismissal because the complaint alleged, “liberally construed, actual evidence of discriminatory intent”: the allegation that a supervisor told plaintiff that a “male counterpart” received a raise when she did not because he had a ‘family to raise.’” As the court explained, “although a slender reed, this allegation, if true, nonetheless indicates a plausible gender-based animus conveyed by an apparent decision maker at Walmart: a male was being paid more because of the apparent assumption that, based on his gender, he had more familial responsibilities than a female

**Doe v. Harvard University, 2020 WL 2769945 (D. Mass. 2020),** involved a multi-claim complaint challenging a student’s discipline for an alleged sexual assault following the private university’s internal investigation under Title IX, 20 U.S.C. § 1681(a). One of the claims alleged that defendants, by refusing to grant the joint request of plaintiff and his accuser for an informal disposition of the charges, engaged in unlawful racial discrimination under 42 U.S.C. § 1981 because informal disposition was made available in cases in which the parties were white. The court found that this allegation was sufficient to withstand a motion to dismiss: “Plaintiff has provided a comparator group—Caucasian students accused of similar sexual misconduct—coupled with the allegation that the comparator group was treated differently due to their race...At this stage of litigation, Plaintiff does not need to do more.”

**Post-Twombly Conspiracy Allegations**

In *Twombly* (Casebook, p. 573), the Supreme Court held that allegations of parallel conduct by defendants, unless “placed in a context that raises a suggestion of a preceding agreement,” do not plausibly allege a conspiracy in violation of the antitrust statute. Students can be asked to consider what additional allegations might move the complaint “across the line from conceivable to plausible.” Two recent district court cases provide helpful fact patterns for this exercise. Like *Twombly*, the facts may be challenging for 1L students who have not yet studied antitrust or corporate law. However, one of the disputes involved credit card fees, which may be sufficiently familiar to students as consumers to make the facts somewhat accessible.

In *Barry’s Cut Rate Stores Inc. v. Visa, Inc.*, 2019 WL 7584728 (E.D.N.Y. 2019), a putative class of over 12 million merchants paying uniform fees on credit card transactions sued Visa, Mastercard, and the issuing and acquiring banks for imposing anticompetitive fees, such as no-surcharge rules, honor-all-card rules, and no-discount rules, that prevented the merchants “from using price signals at the point of sale to steer customers to less costly forms of payment.” During the course of the litigation Visa and Mastercard became publicly traded companies. The banks moved to dismiss. Although the facts of the initial public offerings likely are beyond the ken of most 1Ls, the banks argued that the complaint failed to allege ongoing conduct in furtherance of a conspiracy after the card companies went public; after the IPOs the banks no longer owned the credit card companies and did not participate in a continuing scheme to restrain fees.

The district court found evidence of an ongoing conspiracy despite the corporate restructuring that followed after the IPOs. Those allegations included: even after the IPOs the banks were represented on the Visa and/or Mastercard Boards of Directors when the boards collectively imposed the fees; they continued to agree to receive or to apply uniform fee schedules, and those fees had increased several times; the banks expected...
that their control over the card companies would effectively continue after the IPOs and that their control was needed to ensure that the card-issuing business would remain successful (evinced, for example, through statements that the IPO would create “little-to-no-change”). Boiled down, the court explained, “these factual allegations plausibly suggest that the preference of all involved — Visa, Mastercard, and Bank Defendants — was that the benefits to everyone continue exactly as they did prior to the IPOs.”

In addition, the district court found that the complaint sufficiently alleged a “hub-and-spoke” conspiracy and unlawful agreement by which the banks, post IPO, effectively hired Visa and Mastercard to be the managers of a cartel, and agreed among themselves to adhere to the managers’ terms. As in Twombly, mere parallel conduct would not be sufficient to show the agreement. However, the district court pointed to “plus factors” which, when viewed in conjunction with parallel acts, plausibly allowed the inference of a conspiracy. Specifically, the complaint alleged that even after the corporate restructuring, the banks agreed that they would adhere to the credit card companies’ fee deals, and that “it would be disadvantageous for Bank Defendants to adhere to the restraints unless they possessed knowledge that all others similarly situated would also adhere to those same restraints that allegedly prevent competition that might affect interchange fee rates.” Moreover, the banks were previously represented on the Boards of Directors of the networks, and were active in approving the corporate structure after the IPOs.

Unlike Twombly, in which the Court spoke of anticompetitive behavior in the telecommunications industry as a sort of vestigial “government-sanctioned…norm,” in Barry’s the challenged conduct was taken in response to an open Department of Justice investigation, and the banks consciously changed the corporate structure to avoid antitrust liability. These “plus factors” together constituted enough “factual context” for plaintiffs’ claims to survive a motion to dismiss. The district court did acknowledge the plausibility of casting the banks’ actions as conduct taken out of independent self-interest without knowledge. However, when faced with two alternative plausible explanations, the court explained, the court’s role is not to choose between them at the motion to dismiss stage. Rather, the role is to determine “whether there are sufficient factual allegations to make the complaint plausible,” and “[p]lausibility is a standard lower than probability.”

For another antitrust case finding plus factors sufficient to meet the plausibility standard, see Tera Group, Inc. v. Citigroup, Inc., 2019 WL 3457242 (S.D.N.Y. 2019), involving allegations Citi and other banks conspired to drive plaintiff’s “unique” credit default swap trading platform out of the market. The district court relied as a plus factor on evidence of a “high level of inter-firm communications.” Moreover, although defendants argued that the product failed to attract “trading volume,” which through network effects would keep counterparties off the platform, the complaint was found to have alleged sufficient “market enthusiasm” for the platform and its features, providing context for the conspiracy claim to go forward.

Ashcroft v. Iqbal (Casebook, p. 584)
**Hernandez v. Mesa, 589 U.S. ___, 140 S. Ct. 735** involved the intentional shooting and death of a boy playing on the Mexican side of the U.S.–Mexico border by a U.S. Border Patrol Agent. The child’s estate sued, alleging a violation of the Fourth and Fifth Amendments, and sought damages. The district court dismissed for failure to state a claim, and the Supreme Court affirmed, five-to-four, that as a matter of law a constitutional damages remedy did not extend to a cross-border shooting. Most teachers will want to leave discussion of the *Bivens* action to Constitutional Law. However, *Hernandez* illustrates the role of the Rule 12(b)(6) motion as a law-making device; at the pleading stage, the Court held that a damages remedy will not be implied to redress an alleged constitutional violation if the claim presents a “new context” and special factors, such as international relations or extraterritoriality, counsel hesitation.

**Note on Pleading Standards and Pro Se Litigation**

Some teachers may wish to discuss *Erickson v. Pardus* (Casebook, p. 600) in the context of the Prison Litigation Reform Act of 1995, 28 U.S.C.A. § 1915(g), its implications during the pandemic for ensuring the health and safety of prisoners, and its disparate negative effects upon Black, Brown, and poor people. The Supreme Court sees the PLRA as an efficiency-grounded statute, designed “to help staunch a flood of nonmeritorious prisoner litigation.” *Lomax v. Ortiz-Marquez, 590 U.S. ___, 140 S. Ct. 1721 (2020)*. The PLRA includes a “three-strike” rule that bars a prisoner from filing a new lawsuit if the prisoner has previously filed three lawsuits dismissed as frivolous, malicious, or failing to state a claim. In *Lomax*, an inmate in a Colorado state prison sued pro se to challenge “expulsion” from a “sex-offender treatment program.” Plaintiff sought and was denied in forma pauperis status under the three-strike rule. On appeal to the Supreme Court, the question was what kind of dismissals count as a strike, and the Court held that a dismissal for failure to state a claim, whether with or without prejudice, counts as a strike. Justice Kagan wrote that plaintiff had “struck out.” Students might consider the political significance of the Court’s rhetorical treatment of the lawsuit as a game, given the deplorable conditions in many prisons, the need for health and counseling services, and the plaintiff’s pro se status. Moreover, is a complaint dismissed without prejudice—when the possibility of amendment is recognized—the kind of “nonmeritorious” suit that ought to be discouraged? To be sure, § 1915(g) has a limited exception for claims involving “imminent danger of serious physical injury,” but courts have taken a narrow approach to that provision. See, e.g., *Belyew v. Pallares, 2020 WL 3412660 (E.D. Cal. 2020)* (dismissing a challenge to bunking arrangements under three-strike rule).

In *Haas v. Noordeloos, 792 Fed. Appx. 405 (7th Cir. 2020)*, the district court dismissed a pro se constitutional damages claim under the First Amendment for failing to state a claim. On appeal, petitioner sought in forma pauperis relief. The Seventh Circuit summarily vacated the district court’s order, certified that the appeal was taken in good faith, granted poor person’s relief, and waived the filing fee. The appeals court found that the law in the circuit was unsettled as to whether a constitutional damages remedy was available to redress violations of the First Amendment. Moreover, the appeals court found that it was premature to treat the claim as an anticipatory challenge to a pending
criminal prosecution. The appeals court remanded, presumably to permit the district court to develop a record on whether a constitutional damages remedy was available and whether counsel ought to be appointed.\(^17\)

**Johnson v. City of Shelby (Casebook p. 599, Note 11)**

The Court made plain in *Johnson* that the sufficiency of a complaint does not require setting out a legal theory for the claim. For a fact pattern applying this principle, consider *Shippitsa Ltd. v. Slack*, 2020 WL 3304890 (N.D. Tex. 2019). The manufacturer of dietary supplements brought a suit for trademark infringement and related claims including unfair competition against participants in its multi-level marketing scheme. Defendant moved to dismiss on the ground that the complaint failed to “specify the type of unfair competition claim”—which could include trade secret misappropriation, passing off, or common law misappropriation. The court rejected this argument, finding that the failure to identify “a specific legal theory” was not fatal. (The decision also presents a good fact pattern for personal jurisdiction over a foreign defendant based on Internet contacts in the forum and for the applicability of Federal Rule 9 to allegations of RICO conspiracy.)

A teacher may want students to consider how the *Johnson* rule ought to apply to actions removed to federal court, illustrated by *Phillips v. Exact Sciences*, 2020 WL 419369 (W.D. La. 2020). The state court complaint alleged sexual harassment and retaliation, and “invoked Louisiana law but did not cite any federal laws or specifically allege a claim under federal law,” although it did state that plaintiff had timely filed a complaint with the EEOC and was waiting for a right to sue letter. Defendants removed under diversity jurisdiction. After plaintiff received her right to sue letter, she moved to amend the complaint—four months after the deadline for doing so under the court’s scheduling order—and the court declined to find good cause for an extension. In a footnote, the court found that *Johnson* did not allow plaintiff to proceed on a Title VII claim that had not been asserted in the original state court complaint. “In a removed case such as this one,” the court explained, “the well-pleaded complaint rule provides that a plaintiff is the master of her petition and may rely solely on state law even when federal claims might [be] available. *Johnson* is not viewed as a silent, summary reversal of the well-pleaded complaint rule.”

**Affirmative Defenses**

The issue of whether the Twombly and Iqbal pleading standard applies to plaintiffs’ motions to strike affirmative defenses under Federal Rule 12(f) (Casebook, p. 638, Note 3) continues to divide the lower courts, and presents a good topic for discussing the different role that a complaint and answer play in litigation. The Second Circuit Court of Appeals has held that the plausibility standard does apply to the motion to strike. See GEOMC Co. Ltd. v. Calmare Therapeutics Inc., 918 F.3d 92 (2d Cir. 2019). By contrast, various district courts this year held that it does not: Tuggle v. Mamaroneck Capital, LLC, 2019 WL 3782818 (M.D. Ga. 2019); Ross v. Sharp One, Inc., 2019 WL 5188673 (D. Kan. 2019); Goldsby v. City of Henderson Police Department, 2019 WL 5963996 (D. Nev. 2019); Tornincasa v. Liberty Life Assurance Co. of Boston, 2020 WL 2556905 (E.D. Cal. 2020); Secretary of U.S. Department of Labor v. Kavalec, 2020 WL 1694560 (N.D. Ohio 2020); Liles v. Wyman, 2019 WL 5677930 (E.D.N.C. 2019); Drapkin v. Mjalli, 2020 WL 2737036 (M.D.N.C. 2020); Wester Tippman Engineering, LLC v. Innovative Refrigeration Systems, Inc., 2020 WL 1644985 (W.D. Va. 2020). These district courts generally have held that an affirmative defense is not subject to the same standard as the pleading of a complaint. In part, they rely on the absence of the word “showing” from Rule 8(c)(1) which appears in Federal Rule 8(b)(1)(A). Students can discuss whether they find this textual distinction persuasive.

Many of the decisions in this section focus on the factual sufficiency of the complaint. However, a complaint also may be insufficient as a matter of law because under no set of facts will the law provide relief. This latter situation is illustrated by Doe v. Indyke, 2020 WL 3430192 (S.D.N.Y. 2020). The complaint alleged a pattern of sexual abuse of a highly disturbing nature. Boiled down, plaintiff sued the executors of the estate of Jeffrey Epstein asserting tort claims for sexual assault, sexual battery, and negligent and intentional infliction of emotional distress under the laws of New York or the United States Virgin Islands (USVI). Plaintiff sought compensatory and punitive damages. The executors filed a Rule 12(b)(6) motion to dismiss the claim for punitive damages, arguing that neither New York nor USVI law authorized such relief against an estate, for such damages are “conduct-regulating.” The district court granted the motion (the decision includes a long discussion of choice of law).

**Amendments**

The interaction between amendment of the complaint (Casebook, p. 643) and subject-matter jurisdiction is illustrated by Gale v. Chicago Title Insurance Co., 929 F.3d 74 (2d Cir. 2019). Plaintiffs filed state law claims in federal court alleging jurisdiction under the Class Action Fairness Act (CAFA). The fourth amended complaint—filed after 12 years of litigation—did not include the class action allegations. The Second Circuit affirmed dismissal of the suit on the ground that the elimination of the class action allegations from the amended complaint divested the court of power. The time-of-filing rule, which states that jurisdiction “depends upon the state of things at the time of the action brought” (compare Casebook p. 293, Note 2, with respect to the amount in controversy) did not change the result: “The time-of-filing rule applies to changes of the ‘state of things,’ but not to changes of the ‘alleged state of things.’” Therefore, because the court can look only to the amended complaint to determine
jurisdiction, withdrawal of CAFA allegations when they were the only basis for the court’s power divested the court of jurisdiction.

**Provisions to Deter Frivolous Pleadings**

Lee v. Pow! Entertainment, Inc., 2020 WL 3470501 (C.D. Cal. 2020), involved a dispute over the intellectual property of Stan Lee, the comic book author who created X-Men, Iron Man, and Spider-Man. The decision sets out the procedural and substantive requirements of Rule 11 sanctions on an attorney and the client. In particular, the court very clearly discussed the kind of papers needed to trigger the safe-harbor provision of Federal Rule 11(c)(2) (Casebook, p. 669). Central District Local Rule 7-5 defines a “file ready” motion as including “evidence upon which the moving party will rely.” Defendant provided plaintiff with a “notice of motion” and “memorandum of points and authorities,” but omitted any declaration and request for judicial notice. The court held these documents were sufficient for Rule 11 purposes, and noted that courts had denied motions for sanctions on this ground only “where the party seeking sanctions completely failed to provide notice of the motion before filing it with the court.”

Turning to the merits of the motion, the court, having dismissed the action on grounds of claim preclusion, observed that many courts have held that suits barred by res judicata are “baseless,” and that plaintiff’s statements to the court that no court had found a prior agreement to be unenforceable was a “direct misrepresentation to the Court.” Moreover, the court found that as an objective matter plaintiff did not undertake a reasonable inquiry prior to filing suit, and that it was “completely unreasonable to file a suit premised on an issue debated and analyzed in more than five federal district courts over the last decade.” Finally, the court found that the filing of the complaint was taken for the improper purpose of generating negative media publicity, evidenced by its including allegations that were “sensational and inflammatory” and “extraneous” and by the fact that counsel were experienced attorneys, raising an inference that the filing of a meritless case was for an improper purpose. The decision also explained its reason for imposing sanctions on the client and counsel, and the relatively large amount of the sanction: the court imposed a fine of $1 million on the client and held counsel liable for $250,000, given the “egregiousness” of the conduct, the “burden” on the court, and the client’s substantial wealth (she did not contest having inherited more than $50 million from the Stan Lee estate).

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

**Identifying Parties Who May Sue and Be Sued**

Some teachers introduce the topic of constitutional standing in connection with the real-party-in-interest rule. The Supreme Court this term addressed whether legal title is a condition of standing, relying on Sprint (Casebook, p. 674, Note 4), which had suggested that “naked legal title” can support a party’s real-party-in-interest status. In Thole v. U.S. Bank N.A., 590 U.S. ___, 140 S. Ct. 1615 (2020), the Court, five-to-four,
held that participants in a defined-benefit pension plan lacked standing under Article III of the federal Constitution to challenge a breach of duties of loyalty and prudence under the Employee Retirement Income Security Act. In reaching that decision, the majority relied on the fact that the participants lacked legal or contractual title to plan-wide claims or legal title to plan assets other than their own, refusing to accept any analogy to the assignee in *Sprint* or to cases in which third-parties such as guardians represent the interests of others. By contrast, Justice Sotomayor dissenting, joined by Justices Ginsburg, Breyer, and Kagan, relied on *Sprint* to argue that the right to bring suit under Article III could be based on “naked legal title.” The question of whether a party may assert the rights of others also was addressed in *June Medical Services L.L.C. v. Russo, 2020 WL 3492640 (U.S. 2020)*, concerning the advanced constitutional law topics of third-party standing and reproductive choice.

**Claims Involving Multiple Parties: Permissive Joinder of Parties**

The question of when severance of claims involving multiple parties should be ordered is illustrated by *Adolf v. Weber, 332 F.R.D. 467 (S.D.N.Y. 2019)*. This case involved claims under the Trafficking Victims Protection Act against Bruce Weber, said to be the “most powerful and influential fashion photographer in the male modeling industry” and “hired by magazines, designers, brands, and other clients to manage and control the entire casting process and directing of photoshoots and other modeling campaigns.” The facts are disturbing. Plaintiffs, three male models, alleged that defendant sexually molested them during photoshoots. Defendant moved to dismiss or, in the alternative, to sever the claims, but the district court denied the motions. The court explained that the claims are “logically related, in large part, because they are all against the same Defendant,” all the plaintiffs claimed that they were injured by the same “general policy” and same pattern of defendant’s behavior, and denial of severance would not prejudice the defendant but would hinder judicial economy. Discussion might explore the question of prejudice. Defendant argued that the failure to sever would limit his right to discovery to 10 depositions and 25 interrogatories, and that he would be entitled to five times that amount if the claims were not handled in one action. The court stated that it would entertain a good faith motion to enlarge discovery “provided that said application articulates exactly how much more separate discovery is reasonably necessary,” pointing out that there was an overlap of at least 32 witnesses in the individual cases. Discussion also might focus on whether the logical relation and commonality shown in *Weber* would have supported class certification under Rule 23 and if not, why not. Finally, discussion can draw out the role of aggregation in securing redress for other types of recurring acts that result in gender or race discrimination (note that the court cited to *Mosley* (Casebook, p. 697), involving race discrimination).

**Joinder of Required Parties Under Rule 19**

For those who teach *Pimentel* (Casebook, p. 715, Note 5 & p. 737), consider looking at *De Csepel v. Republic of Hungary, 2020 WL 2343405 (D.D.C. 2020)*. The dispute is long-running and procedurally complex. Descendants of the Hungarian Jewish art collector Baron Mór Lipót Herzog sued to recover artworks initially seized by the
Nazis during the Holocaust and then, under the 1947 Peace Treaty between Hungary and the Allies, taken into custody by Hungary as trustee but not returned to the family. After unsuccessfully trying to recover the artwork in Hungary, the heirs commenced litigation in the United States in 2010. Multiple motions to dismiss, amendments to the complaint to add parties and claims, and appeals ensued. The D.C. Court of Appeals eventually dismissed Hungary from the lawsuit because it was immune from suit. Defendants, including parties that exhibited the artwork on behalf of Hungary, then moved under Federal Rule 12(b)(7) to dismiss the case, arguing that Hungary was an indispensable party, relying on Pimentel. The appeals court rejected the motion. At the outset, the court emphasized that for purposes of Federal Rule 19, complete relief does not mean all relief: “[E]ven if one were to assume arguendo that in the absence of Hungary, the remaining parties cannot turn over the artworks, as they claim only to display and manage them on behalf of Hungary, a court is not required to provide all forms of relief in order to provide sufficiently complete relief to the parties.” Moreover, the appeals court insisted on the need to separate the Rule 19(a) inquiry, focusing on the policy of bringing all parties together in one lawsuit, with the “equity and good conscience” analysis under Rule 19(b), assessing whether it is possible for the lawsuit to go forward notwithstanding the nonjoinder of a party whose presence is “desirable” but not feasible. The appeals court found that Pimentel did not require it to give dispositive weight to Hungary’s sovereign immunity under the Rule 19(b) factors, emphasizing the fact that Hungary’s interests in the lawsuit could be adequately protected by the remaining defendants because their interests were “aligned in all respects,” and, indeed, identical. By contrast, in Pimentel, the interests of the sovereign were “distinct” from those of the remaining parties. Moreover, prejudice could be reduced by limiting relief to damages, rather than ordering injunctive or declaratory relief that might result in the alienation of the art without Hungary’s permission (the court rejected the argument that a damages award paid from the treasury of Hungary raised further immunity issues tipping in favor of dismissal, grounding its decision in the structure of the Foreign Sovereign Immunities Act). Included below, a historical photo shows Baron Herzog’s study and four El Greco paintings—all at issue in the heirs’ litigation—on a single, pre-war wall (from far left, “The Holy Family with Saint Anne,” “Saint Andre,” “Agony in the Garden,” and “The Espolio”):
Chapter 10. Class Actions

Overview and Themes

Some discussion might be given to the continuing vitality of the class action as a way to protect constitutional rights. In light of concerns about mass incarceration and prison conditions, consider these decisions: Stuart v. Global Tel*Link Corp., 956 F.3d 555 (8th Cir. 2020) (affirming decertification of class of inmates who alleged that cost of prison telephone service constituted unjust enrichment and violated Federal Communications Act, because predominance requirement no longer met); Orr v. Shicker, 953 F.3d 490 (7th Cir. 2020) (reversing certification of class of inmates who alleged inadequate treatment for hepatitis C, due to failure to establish typicality and adequacy); Mays v. LaRose, 951 F.3d 775 (6th Cir. 2020) (reversing district court certification of class of Ohioans who were arrested after deadline for absentee ballot requests had passed and who were detained through election day, rendering them unable to vote, because of lack of commonality and typicality); Irvin v. Harris, 944 F.3d 63 (2d Cir. 2019) (finding representation of class of prisoners inadequate during reassessment of consent decree that had been meant to ensure quality medical care in prison).

Note on the NFL Concussion Litigation

Students may be interested in knowing about developments in the NFL concussion litigation (Casebook, p. 818). In re National Football League Players' Concussion Injury Litigation, 962 F.3d 94 (3d Cir. 2020) is an important coda to that litigation. The Third Circuit affirmed the district court’s “clarifications and revisions” to the settlement agreement, in particular regarding players’ access to qualified Monetary Award Fund physicians for diagnoses and geographic restrictions on that access. Players had appealed the revised rules and argued that they either constituted an amendment to the settlement or, in the alternative, an abuse of the district court’s discretion. The Third Circuit instead emphasized efficiency: the district court’s “revised rules aided the proper
administration of the settlement agreement” and would combat observed instances of “clients of a [certain] law firm traveling thousands of miles to see the same physician rather than those available to them in their hometowns and excessively high numbers and rates of payable diagnoses from” out-of-town physicians.

*Marshall* (Casebook, p. 803, Note 1) involved a settlement in the context of an offshoot of the concussion litigation, of another class of players’ claims of a proposed settlement’s inadequacy. Relying on Rule 23(e) and citing to the district court’s initial (and, at the time, effective) rejection of the broader class action settlement, *In re National Football League Players’ Concussion Injury Litigation*, 961 F.Supp.2d 708 (E.D. Pa. 2014), the Eighth Circuit in *Marshall* applied a multifactor test and held the proposed settlement to be adequate.

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

*Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020) (Rules Supplement, p. 399), contains a discussion of both Federal Rule 23(f) interlocutory appeal and the effect of *Bristol-Myers Squibb* (Casebook, p. 157) on class certification decisions. Plaintiff filed a putative class action under the Telephone Consumer Protection Act after defendant sent unwanted “junk” faxes that did not include the statutorily required opt-out instruction. The district court granted defendant’s motion to strike the definition of the proposed nationwide class, taking the position that under *Bristol-Myers Squibb*, “not just the named plaintiff, but also the unnamed members of the class, each had to show minimum contacts between the defendant and the forum state,” and that it had no jurisdiction over the claims of unnamed class members who were harmed outside of the forum state of Illinois. The Seventh Circuit applied the Supreme Court’s holding in *Microsoft v. Baker* (Casebook, p. 799) and held that it had jurisdiction because the motion to strike was the functional equivalent of a denial of class certification. The fact that plaintiff continued to be able to seek class certification did not affect the analysis.

The Seventh Circuit further held that to support class certification, the named representatives—but not the unnamed class members—were required to establish personal jurisdiction over defendant, and reversed the district court’s order. It emphasized that *Bristol-Myers Squibb* did not address class actions at all. Nor did *Bristol-Myers* expressly apply to questions of personal jurisdiction in federal courts. Having recognized the limited reach of *Bristol-Myers*, the Seventh Circuit further emphasized that the treatment of personal jurisdiction should be the same as with subject-matter jurisdiction and venue, where only the named representative’s situation is taken into account (Casebook, p. 821).

Relatedly, in *Molock v. Whole Foods Market Group, Inc.*, 952 F.3d 293 (D.C. Cir. 2020), the district court denied defendant’s motion to dismiss the claims of nonresident class members for lack of personal jurisdiction. On interlocutory appeal, the District of Columbia Circuit, like the Seventh Circuit in *Mussat*, emphasized the limited scope of *Bristol-Myers Squibb*, and held that the motion was premature because the putative class members were not parties to the litigation until after class certification.
Dancel v. Groupon, Inc., 940 F.3d 381 (7th Cir. 2019) joins together two topics that may be covered in some first-year courses: the Class Action Fairness Act and its authorization of removal of a proposed class as long as there is minimal diversity; and Federal Rule 23(f) which permits an interlocutory appeal from the district court’s denial of class certification. In Dancel, after the circuit court granted the Rule 23(f) petition, plaintiff pointed out a jurisdictional defect in the notice of removal—namely, the failure “to allege the citizenship of even one diverse member of the putative class,”; students will find the factual context of the lawsuit entertaining and familiar: Dancel sued Groupon for alleging that it used a photograph culled from her Instagram account without permission to promote a voucher for a restaurant. She sought damages under the Illinois Right to Publicity Act, and sued on behalf of a class of all Illinois residents similarly situated. The parties litigated in state court for two years, and then Dancel moved to certify a class that, unlike the class identified in the complaint, was not defined by the members’ residence. In response, Groupon filed a notice of removal. Groupon is a Delaware corporation with its principal place of business in Illinois. The notice of removal stated that the new class “undoubtedly would include at least some undetermined number of non-Illinois and non-Delaware citizens as class plaintiffs,” but did not identify any one of these class members. The record on appeal did not contain the requisite evidence of minimal diversity, and the court ordered a limited remand for the district court to permit discovery to the extent it deemed necessary for Groupon to make out the jurisdictional allegation. Discussion might focus on Groupon’s argument that Dancel had waived the opportunity to contest its jurisdictional allegations. Why was it proper for the appeals court to reject that argument? Was it appropriate for the court to permit discovery to enable Groupon to invoke federal jurisdiction?

Jurisdiction and Venue

In Nessel ex rel. Michigan v. AmeriGas Partners, L.P., 954 F.3d 831 (6th Cir. 2020), the Sixth Circuit held that a representative suit by the Michigan Attorney General under Section 10 of the Michigan Consumer Protection Act did not qualify as a class action for purposes of removal under the Class Action Fairness Act (CAFA) (Casebook, pp. 822–23, Note 4). The Supreme Court previously had held in Mississippi ex rel. Hood v. AU Optronics, 571 U.S. 161, 134 S. Ct. 736, 187 L. Ed. 2d 754 (2014), that a state’s parens patria suit on behalf of its residents was not a “mass action” under CAFA, even if the suit involved one hundred or more unnamed persons who were the real parties in interest as beneficiaries to the state’s claims. In Nessel, the state attorney general sued in state court, defendant removed, the district court remanded, and the Sixth Circuit affirmed. In particular, the appeals court stated, the consumer action was not removable under CAFA because it was not similar to a class action under Federal Rule 23 and failed to meet the rule’s “core requirements,” particularly, typicality and adequacy of representation.

The Preclusive Effect of a Class Action
For courses that have discussed *Shutts* (Casebook, p. 824) and its implications for the due process rights of unnamed plaintiff class members, consider *Faber v. Ciox Health, LLC, 944 F.3d 593 (6th Cir. 2019)*, raising questions about class certification and preclusion (Casebook, p. 834). In *Faber*, a class of patients sued a provider of medical records for alleged violations of the Health Insurance Portability and Accountability Act (HIPAA). The plaintiffs asserted that defendant charged unlawfully high prices to those who sought access to their medical records. Defendant moved for summary judgment before the district court certified the Rule 23(b)(3) class. After certifying the class, the district court then granted defendant’s motion for summary judgment, before the absent class members received notice that the class had been certified. As a matter of first impression, the Sixth Circuit held that absent class members were not bound by the summary judgment, because they had not had an opportunity to be heard. To justify its holding, the court of appeals discussed the ways in which Rule 23(c) and Rule 23(d) presume that notice to and participation of absent plaintiffs will be meaningful. Such meaningful engagement would be impossible after a summary judgment for the defendant made the certified class a “nullity,” and only the named representative was bound.

Chapter 11. Pretrial Devices for Obtaining Information: Depositions and Discovery

**The Scope of Discovery: Relevance and Proportionality**

In *In re Williams-Sonoma, Inc., 947 F.3d 535 (9th Cir. 2020)*, the Ninth Circuit considered whether a party may seek discovery to find a lead plaintiff for a putative class action that had not yet been certified. The facts of the case are quite straightforward. A citizen of Kentucky sued Williams-Sonoma individually and on behalf of a putative class. The plaintiff alleged that the bedding products that he purchased had a thread count markedly below the 600 threads per square inch that was promised. The district court ruled that this individual could not sue under California law. However, the district court also ordered discovery, requiring Williams-Sonoma to turn over a list of people who had purchased the type of bedding in question in California (and could serve as a lead plaintiff in a California class action). The Ninth Circuit granted Williams-Sonoma’s petition for a writ of mandamus and vacated the discovery order. Relying on *Oppenheimer Fund* (Casebook, p. 795), the appeals court emphasized that the requested discovery was not “relevant to any party’s claim or defense” as required by Federal Rule 26(b)(1).

**Discovery and Production of Property**

*Smith v. TFI Family Services, Inc., 2020 WL 42316 (D. Kan. 2020)* illustrates a current problem in the production of documents in electronic format: does a request for records entitle plaintiff to the electronically stored information (ESI) in its native format with associated metadata? In this case, the subpoena issued to defendant (seeking foster care files) requested documents “in electronic format,” and defendant produced them in Portable Document Format (PDF). The district court rejected the argument that Federal
Rule 45 mandates production of ESI with metadata. Rather, the subpoena did not specify the form for producing ESI and so production could be in a form in which it is ordinarily maintained. Further, the district court held that the magistrate court was justified in requiring the plaintiff to demonstrate a specific need for metadata if requested during future discovery.

Judicial Supervision of Discovery and Sanctions

In Evans v. Griffin, 932 F.3d 1043 (7th Cir. 2019), the Seventh Circuit held the district court abused its discretion by dismissing a prisoner’s civil rights suit with prejudice as a sanction for his refusal to submit to a deposition, where the inmate in fact appeared for the deposition, but declined to testify because he had not received notice of the deposition, there was no evidence that he had received notice, he did not know why he was meeting with the opposing party’s counsel, he was feeling ill, and the district court failed to consider lesser sanctions than dismissal. The lawsuit alleged an Eighth Amendment violation stemming from the state prison’s refusal to schedule surgery to treat the inmate’s nasal polyps. Defendant requested and received court permission to take plaintiff’s deposition, but plaintiff received notice by mail the day after the deposition was scheduled. Defendant then moved for and the district court granted dismissal as a Federal Rule 37(d) sanction for plaintiff’s failing to take part in the deposition. On appeal, the Seventh Circuit reversed, explaining that a Rule 37(d) sanction for refusal to participate in a deposition applies to parties only “after being served with proper notice,” which plaintiff in this case did not receive. Rule 37(b) also did not provide a basis for the sanction, because it comes into play only after a party has failed to comply with an order under Rule 37(a), but here the court had not issued the requisite order. Rather, the district court had issued only a standard form order used in prisoner lawsuits as part of a case-management schedule, and not “the targeted order requiring compliance with a particular discovery request contemplated by Rule 37(a).” Finally, the appeals court also rejected the argument that the dismissal and sanction were appropriate as a matter of the district court’s inherent authority. As the appeals court emphasized, despite the known “sluggishness” of prison mail, defendant’s counsel allowed only five days for the notice to reach plaintiff; indeed, even if the prisoner had received the notice before the deposition (and he did not), the court questioned whether notice that does not allow time to prepare would be considered reasonable under Federal Rule 30(b)(10).

Use of Discovery at Trial

For those of you who wish to discuss the impact of COVID-19 on judicial court process, consider focusing on how district courts have applied Federal Rule 43(a) and its relation to Federal Rule 32. These materials also could be introduced when discussing trial practice.

The trial in In re RFC & ResCap Liquidating Trust Action, 2020 WL 1280931 (D. Minn. 2020), began in February 2020, and was scheduled to resume on March 12. On March 10, defendant informed the court that the law firm representing the company had temporarily closed after it learned that one of its lawyers, who was not a member of the
litigation team, had contracted COVID. In addition, two of defendant’s expert witnesses who were scheduled to testify requested that they not be required to travel to the court. Plaintiff requested that the trial proceed either with safety measures allowing in-person testimony or by videoconference. Defendant objected to the use of videoconferencing, stating it would be unfair, and further objected to submitting testimony by deposition—anticipating that the witness would testify live at trial, “it had no reason to ask him questions on redirect during his deposition.” Plaintiff sought a continuance. The court held that under Rule 43 it had discretion to order contemporaneous remote video; that COVID presented unexpected and compelling circumstances for the witnesses not to travel; that the use of videoconferencing was preferable over delay; and that appropriate safeguards could be devised.

By contrast, in *Graham v. Dhar, 2020 WL 3470507 (S.D. W. Va. 2020)*, defendant’s counsel moved to permit its medical expert to testify by contemporaneous remote video, and the court denied the request. The court found that compelling circumstances were not present, only mere inconvenience, unpersuaded by the argument that the doctor had a backlog of surgical cases and that traveling from Boston to Charleston, West Virginia, would put patients at risk. Unlike *In re RFC & ResCap Liquidating Trust Action*, in which the request came in the middle of trial, the court found that there was “adequate time” for defendants and their expert to schedule activities in a way that would allow for live testimony and minimize risk to patients and disruption to the court. The court emphasized its “strong preference for live testimony.”

Chapter 12: Case Management

The Operation of Rule 16

Case management, amendment, mandamus, and multidistrict litigation (MDL) are all at work in *In re National Prescription Opiate Litigation, 956 F.3d 838 (6th Cir. 2020)*, in which the Sixth Circuit held it was an abuse of the MDL court’s discretion to grant a motion to amend the complaint to add claims and to order discovery on those claims almost 19 months after the Rule 16 scheduling deadline had passed. The decision also could be mentioned in connection with the overall character of civil litigation (Casebook, p. 1), MDL (Casebook, p. 382) or mandamus (Casebook, p. 1174). The appeals court found that plaintiffs had failed to show diligence as required by Rule 16(b) to alter the scheduling order; to the contrary, they had “expressly” chosen not to assert the claims, which the appeals court characterized as a waiver, and emphasized that “under these circumstances” amendment would not be permitted by any circuit court. The district court nevertheless had found that good cause existed for the amendment because in the context of an MDL, efficiencies would be achieved. The appeals court emphasized that it was a “mistake” for the MDL judge “to think it had authority to disregard” the Federal Rules “in favor of enhancing the efficiency of the MDL as a whole.” To the contrary, as the Supreme Court made plain in *Gelboim* (Casebook, p. 748), cases within an MDL “retain their separate identities.” Mandamus relief was appropriate because the decision was wrong as a matter of law; defendants would have “no other adequate means” to obtain relief from the decision, defendants would suffer prejudice that could

50
not be cured on appeal; and the decision reflected a disregard of the Federal Rules, presenting an “important problem[[]]” that otherwise would evade appellate review.

Chapter 13. Adjudication without Trial or by Special Proceeding

The Motion for Summary Judgment under Rule 56

_Gilmore v. Ormond, 2019 WL 8222518 (6th Cir. 2019)_ illustrates the interplay between the Federal Rule 56 requirement of a “genuine dispute as to any material fact” and the evidentiary burden of the weight of the evidence. Plaintiff, a prisoner and pro se litigant, sued to challenge a prison guard’s alleged use of excessive force. Defendant moved to dismiss, arguing that plaintiff had not exhausted his administrative remedies as required under the Prison Litigation Reform Act (it may be necessary to explain that before filing a lawsuit in federal court, the prisoner must first file a claim with the prison’s grievance process and obtain a denial of the claim). In support of the motion, defendant included a certified copy of plaintiff’s grievance record, which included no record of plaintiff’s having filed a grievance for the excessive-force challenge. The district court converted the Rule 12(b)(6) motion to one for a summary judgment. Plaintiff countered in an unsworn statement that he had not been given access to the grievance process, claiming, for example, that he had not been given the required form. The court found some of these statements to be contradictory and granted summary judgment for defendant. On appeal, the Sixth Circuit held that whether the statements in opposition to the motion were contradictory went “to the weight of the evidence” and not to the existence of a “genuine dispute as to any material fact” under Rule 56, and vacated and remanded.

_Babb v. Wilkie, 589 U.S. ___, 140 S. Ct. 1168, 206 L. Ed. 2d 432 (2020)_ illustrates the operation of Rule 56 in the context of an age discrimination suit against the federal government. The government moved for summary judgment offering non-discriminatory reasons for the challenged job action. The district court granted the motion, finding that plaintiff had established a prima facie case, that the government had proffered legitimate reasons for the challenged actions, and that no jury could reasonably conclude the reasons were pretextual. On appeal, the Eleventh Circuit rejected plaintiff’s argument that the district court’s requirement that age be a but-for cause of the job action was inappropriate. The Supreme Court, eight-to-one, reversed and remanded, holding that federal personnel actions must be untainted by any consideration of age, although a showing of but-for causation could affect the remedy.

_Intel Corp. Investment Policy Committee v. Sulyma, 589 U.S. ___, 140 S. Ct. 768, 206 L. Ed. 2d 103 (2020)_ illustrates the operation of Rule 56 in the context of a suit involving the Employee Retirement Income Security Act. Plaintiff sued Intel for breaching its fiduciary duty when managing its employees’ retirement funds. Plaintiff specifically alleged that Intel had invested an inappropriately large portion of its employees’ retirement contributions into “alternative assets” instead of more traditional financial products. ERISA specifies that a “suit must be filed within three years of ‘the
earliest date on which the plaintiff had actual knowledge of the breach or violation.” The district court granted summary judgment for Intel, because Intel established that respondent had received numerous notices from Intel describing the company’s allocation of retirement funds into products including “alternative assets.” Because some of these notices were sent more than three years before respondent brought his action, Intel argued that the action was not timely. The Ninth Circuit reversed the grant of summary judgment and the Supreme Court unanimously affirmed. In his opinion for the Court, Justice Alito explained that the term “actual knowledge” in the relevant ERISA provision does not encompass per se “information contained in disclosures that he receives but does not read or cannot recall reading.”

Brown v. Stored Value Cards, Inc., 953 F.3d 567 (9th Cir. 2020) illustrates the operation of Rule 56 in the context of a Takings case. Plaintiff was arrested during a protest, and the local jail confiscated her money. She was released several hours later. Rather than returning the plaintiff’s money in cash, the jail gave her a prepaid card containing an amount equivalent to the money it had taken. However, the private company administering the cards deducted fees from plaintiff’s card account (some of which did not even depend on use of the card). These fees consumed nearly seven dollars of the card’s original $30.97 value. Plaintiff sued, alleging state and federal law claims including a Takings claim. The card company moved for summary judgment, which the district court granted and the Ninth Circuit reversed. The district court erred in treating a prepaid card as a “functional equivalent of cash”—it was not, given the card’s automatic loss of value due to defendant’s fees.

Nature of Affidavits on Rule 56 Motion

A key question on summary judgment is whether the evidentiary record establishes a genuine issue of material fact for trial. In making that assessment, the district court is permitted to disregard an affidavit that attempts to create a sham issue by contradicting prior deposition testimony or a statement made under penalty of perjury, even if the statement was not made during the litigation. The sham affidavit rule, which exists in every circuit, is illustrated by James v. Hale, 959 F.3d 307 (7th Cir. 2020), in which plaintiff submitted an affidavit that incorporated by reference statements from his amended complaint, contradicting his deposition testimony. Can students think of relevant exceptions to the rule (for example, should the court credit an affidavit that “clarifies ambiguous or confusing deposition testimony”?)?

Whether evidence must be in an admissible form at the summary judgment stage was a central issue in Celotex (Casebook, p. 966) and at issue in Patel v. Texas Tech University, 941 F.3d 743 (5th Cir. 2019). Patel brought an action against the university after it sanctioned him for alleged academic dishonesty. The district court granted summary judgment for defendant, and the Fifth Circuit affirmed, although it found it was an abuse of discretion for the district court not to have considered expert reports submitted on Patel’s behalf. Although the expert’s submission was not sworn, the district court failed to consider whether the unsworn opinions were capable of being presented in admissible form as required under Rule 56(c). As the circuit court explained, “the district
court mistakenly relied on a prior version” of Rule 56 which, in 2010, “was amended to clarify and streamline” Rule 56 procedures and “permits a party to support or dispute summary judgment through unsworn declarations, provided their contents can be presented in admissible form at trial.”

**Note on the Timing of a Rule 56 Motion (Casebook, p. 983)**

In *Smith v. OSF HealthCare System, 933 F.3d 859 (7th Cir. 2019)*, the Seventh Circuit vacated the district court’s grant of summary judgment for defendants as an abuse of discretion in light of plaintiff’s Rule 56(d) motion to defer the motion and to allow further discovery, The case arose under ERISA and concerned the statute’s exemption for “church plans.” As the appeals court emphasized, the dispute was “high stakes,” and involved the pension “benefits of thousands of hospital and health-care employees.” In support of its decision, the appeals court carefully reviewed the proceedings in the district court. Acknowledging that the “mere fact that discovery is incomplete is not enough to prevent summary judgment,” the appeals court emphasized that in this case not only had defendant moved for summary judgment well in advance of the Rule 16 scheduling order’s cut off for discovery, but also plaintiff showed diligence in pursuing discovery and that additional discovery would not have been futile. Although plaintiff had failed early in the litigation to seek through deposition details of plan administration, which were available early in the lawsuit, the appeals court found that the district court itself had delayed plaintiff’s efforts at discovery by staying depositions while the Supreme Court considered whether the exemption applied only if the church itself originally established such a plan. Moreover, the appeals court emphasized that it would have been premature to depose witnesses before plaintiff had “relevant documents in hand.” Moreover, in assessing futility, the district court took a narrow approach to relevance in failing to consider whether discovery about plan administration would show that defendants did not actually administer the plan as ERISA required. As the court explained, defendant “is not necessarily entitled to summary judgment just because it has produced documents showing how the Plans are supposed to be run.”

To similar effect, in *Doe v. City of Memphis, 928 F.3d 481 (6th Cir. 2019)*, the Sixth Circuit held it was an abuse of discretion for the district court to deny plaintiff’s discovery request before granting defendant’s motion for summary judgment. Plaintiffs showed the need for discovery, what material facts they hoped to discover, and why the information was not previously discovered. The suit was brought by victims of sexual assault against the City of Memphis for failing to timely test sexual assault kits, leading to evidence spoliation, evincing unconstitutional discrimination based on sex. After two years of discovery, the district court did not grant the plaintiffs’ request for additional discovery, and granted the defendant’s motion for summary judgment. The Sixth Circuit reversed on appeal. The appeals court’s decision offers a concise application of the relevant criteria used in that circuit to assess when additional discovery should be permitted prior to the Rule 56 motion. The Sixth Circuit specifically noted plaintiffs’ diligence in pursuing discovery, defendants’ relatively dilatory approach, and the fact that additional discovery could well change the district court’s summary judgment decision.
Default Judgment

The standard for setting aside a default judgment was front and center in Johnson v. Leonard, 929 F.3d 569 (8th Cir. 2019), a civil rights action brought by a pretrial detainee alleging that jail contractor’s employees and dentist were deliberately indifferent to his medical needs. The original complaint did not correctly spell defendant’s name, and the defendant did not respond. A default judgment was entered and defendant learned about the action from his insurance company. The appeals court set aside the default, finding defendant was not blameworthy—he had erroneously believed plaintiff would correct the spelling error and re-serve him; defendant immediately sought counsel when he learned about the suit; defendant had a meritorious defense; and plaintiff would not suffer a concrete harm needed to show prejudice because proceeding to the merits would not require “significant discovery.”


Chapter 14. Trial

Expansion of Unanimous Jury Verdict Requirement

In Ramos v. Louisiana, 590 U.S. ___, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020), the Supreme Court held that the Sixth Amendment right to a criminal jury trial, as incorporated by the Fourteenth Amendment in state court, requires a unanimous verdict to convict a defendant of a serious offense. The decision abrogated two prior decisions, and could usefully be mentioned in discussions about stare decisis (Casebook, p. 1214, Note 1). The case involved a man in Louisiana who was sentenced to life in prison after being convicted at a trial in which ten jurors found him guilty, but two did not. At the time, Louisiana and Oregon were the only two states that allowed nonunanimous jury verdicts for “serious” criminal offenses. Writing for the majority, Justice Gorsuch detailed the Anglo-American history, state constitutions and common law doctrines that understood the right to trial by jury to imply a unanimity requirement. The fact that an earlier draft of the Sixth Amendment included a unanimity requirement which was
omitted from the final text was considered to be insignificant. Justice Gorsuch also noted that the Court itself recognized that the Sixth Amendment required jury unanimity in more than ten different opinions. Further, the majority opinion noted the blatantly racist motivations that motivated the original adoption of states’ nonunanimous jury rules; allowing nonunanimous verdicts facilitated nominal inclusion but practical disempowerment of black jurors. “When the American people chose to enshrine that right in the Constitution, they weren’t suggesting fruitful topics for future cost-benefit analyses,” Justice Gorsuch wrote, explaining it was not the judge’s role to assess whether this condition is sufficiently important to preserve. Students might consider whether the justifications for a unanimity requirement differ in the civil context.

The Right to a Jury Trial (Casebook, p. 997)

TCL Communication Technology Holdings Ltd. v. Telefonaktiebolaget LM Ericsson, 943 F.3d 1360 (Fed. Cir. 2019), petition for cert. filed (U.S. May 6, 2020), presents a compact fact pattern for considering when a party is entitled to a civil jury, whether relief is legal or equitable, and what conduct constitutes a waiver of the jury right. The procedural history is complicated, but boiled down, a dispute arose between a cellphone manufacturer and an owner of patents that are crucial to wireless communication. After licensing agreement negotiations broke down, the manufacturer (TCL) alleged that the patent owner (Ericsson) did not offer “fair, reasonable, and non-discriminatory” licensing fees, as required by the organization that certified the “essential” nature of Ericsson’s patents to the telecommunications industry. TCL brought an action alleging that Ericsson breached these contractual obligations, and Ericsson counter-claimed that TCL had violated its patents. Ericsson requested a jury trial, but the district court conducted a bench trial to determine, among other things, whether Ericsson’s licensing offer to TCL was “fair, reasonable and non-discriminatory,” and if TCL owed a “release payment” to Ericsson for past infringement on patents. At the trial, the court rejected the parties’ proffered methodologies and employed his own, and then issued an injunction ordering “‘fair, reasonable and non-discriminatory’ (FRAND) rates in a binding worldwide license” for a “portfolio of standard-essential patents (SEPs) incorporated into * * * mobile communication standards.” The license had two key terms: a prospective royalty rate; and a release payment based on closely related retrospective rate for past unlicensed sales. The question on appeal was whether defendant was entitled to a jury trial on the release payment term. The court concluded that the release payment was in substance compensatory for past patent infringing activity, even though it was styled as part of an injunction. As such, defendant was entitled to a jury trial on the calculation of the release payment amount and defendant did not waive its right having timely objected and then renewed its objections to the bench trial. Moreover, although the original basis for a jury right—damages claims for patent infringement—had been dismissed, defendant had explicitly identified the release payment term as an alternative basis for a jury trial.

Challenging Errors: New Trial

Ingham v. Johnson & Johnson, ___ S.W.3d ___, 2020 WL 3422114 (Mo. Ct. App. E.D. 2020) provides an excellent teaching hypothetical on many of the topics raised
in the 1L course. A Missouri state court of appeals ruled that, inter alia, the trial court did not abuse its discretion by refusing to sever multiple plaintiffs’ claims in a product liability suit. The case arose out of a group of plaintiffs’ allegations that Johnson & Johnson products were carcinogenic. The plaintiffs specifically alleged that Johnson & Johnson knowingly concealed the fact that its talcum powder products contained asbestos, leading to the plaintiffs’ use of the products, and their subsequent ovarian cancer. After losing a jury trial, the defendant appealed on nearly a dozen grounds. The state court of appeals upheld the trial court’s decision not to sever the plaintiffs’ claims. The court rejected the argument that the jury award of $25 million to each plaintiff established inadequate jury attention to the different fact patterns and applicable laws for each plaintiff. To bolster its finding, the appeals courts cited the extraordinarily lengthy, yet correct, jury instructions that required individualized consideration of each plaintiff’s situation. The facts of the case could inform class discussion about juror comprehension (Casebook, p. 1040, Note 4); “complexity” exceptions to the Seventh Amendment (Casebook, p. 1010, Note 2; p. 1011, Note 3); and Markman (Casebook, p. 1030). The court’s rulings on the admissibility of both closing argument content and expert testimony may be useful for students with an interest in trial practice. (Another part of the decision contains a particularly clear application of the standard for specific personal jurisdiction after Bristol-Myers Squibb (Casebook, p. 157).)

Although likely beyond the scope of the 1L course, in Banister v. Davis, 590 U.S. ___, 140 S. Ct. 1698 (2020), the Supreme Court held that a Federal Rule 59(e) motion to alter or amend the judgment in a habeas proceeding was “part and parcel” of the original habeas petition, meaning it was not subject to a provision of the Antiterrorism and Effective Death Penalty Act (AEDPA) that imposes stringent limits on additional habeas petitions. Banister was sentenced to prison after being convicted of aggravated assault. After exhausting state court proceedings, Banister filed a habeas petition. The district court ruled against Banister, at which point he filed a Rule 59(e) motion to alter or amend the judgment. The district court denied the motion on the merits. When Banister appealed the district court’s unfavorable ruling on his habeas petition, the Fifth Circuit ruled that the Rule 59(e) motion was actually a successive habeas petition. Because filing an additional habeas petition does not extend the time to appeal a district court’s original habeas petition decision the way that filing a Rule 59(e) motion does, the Fifth Circuit’s decision meant Banister’s appeal was not timely. Writing for the Court, Justice Kagan examined both historical understanding and the AEDPA’s purpose to determine that a Rule 59(e) motion should not qualify as a “second or successive application.” Justice Kagan rejected the respondent’s argument that this contradicted the Court’s prior ruling that Rule 60(b) motions are “second or successive application[s]:” “[A] Rule 60(b) motion differs from a Rule 59(e) motion in its remove from the initial habeas proceeding. A Rule 60(b) motion—often distant in time and scope and always giving rise to a separate appeal—attacks an already completed judgment.” In his dissent, Justice Alito emphasized the importance of considering the substance of the motion, rather than the rule under which it was filed, when determining if a motion is “second or successive.”
Chapter 15. Securing and Enforcing Judgments

Preliminary Injunctions and Temporary Restraining Orders

The requirements of Federal Rule 65 are nicely illustrated in *YJ Guide Service, LLC v. Probert*, 2020 WL 2202442 (D. Idaho 2020), in which a hunting guide challenged the U.S. Forest Service’s suspension of his special use permit just before Idaho’s bear hunting season. Plaintiff sought a temporary restraining order without filing a complaint. Applying the Winter factors (Casebook, p. 1136), the district court denied the request, finding that petitioner had set out “detailed factual allegations,” but failed to state legal grounds for the relief sought—what the court called “the inverse of the problem that was present in *Iqbal*."

The utility of the preliminary injunction (Casebook, p. 1135) may be illustrated by its significance in a number of ongoing lawsuits involving the Trump Administration. We offer two decisions:

In *United States v. Bolton*, ___ F. Supp. 3d ___, 2020 WL 3401940 (D.D.C. 2020), the district court denied the government’s motion for a preliminary injunction to prevent the release of a former White House official’s memoir. The facts of the case are quite topical. Several months after John Bolton left his job as National Security Advisor for the Trump administration, he sent the manuscript of his political memoir to the National Security Council (NSC) for review. Government protocol required Bolton to take this step to prevent the dissemination of classified information. After months of editing and review, the NSC and Bolton developed a version of the memoir that at least one NSC official stated to be bereft of classified information. Bolton sought final official NSC approval to publish his book, did not receive it, and proceeded to arrange for its publication. The government sought a preliminary injunction to prevent the book’s publication. The district court applied a four-factor analysis to facilitate its decision on the injunction. Its decision stated that the government was likely to prevail on the merits of the case, other parties would not be harmed by the preliminary injunction, and the public had a slight interest in seeing the injunction granted. However, the widespread distribution of the book before its publication date meant that denying the preliminary injunction would not cause “irreparable harm.” Based on this last factor, the district court ruled in Bolton’s favor.

In *Department of Homeland Security v. New York*, 140 S. Ct. 599, 206 L. Ed. 2d 115 (2020), the Supreme Court temporarily stayed the district court’s order preliminarily enjoining enforcement of the Administration’s revised “public charge” rule, which affects a noncitizen’s immigration status and ability to obtain work authorization. The stay gave the government time to appeal from the order. Four months later, in April 2020, the Court denied a request from plaintiffs to stay enforcement during the pandemic, but permitted petitioners to seek relief from the district court “as counsel considers appropriate.” *See* ___ S. Ct. ___, 2020 WL 1969276 (U.S. 2020). Petitioners argued, in part, that the public charge rule would contribute to the pandemic by inhibiting noncitizens from accessing public health care.
Chapter 16: Appellate Review

Changes to the Federal Rules of Appellate Procedure

Modifications to Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39 were effective as of December 1, 2019. The amendments to Rules 3, 5, 21 and 39 were relatively minor changes that further formalized the acceptability of electronic service in light of changes to Rule 25(d). Rule 25(d) itself was modified to remove the need to submit certain service-related documents, if service occurred “through a court’s electronic-filing system.” Likewise, the modification to Rule 13 removed a previous mailing requirement in Tax Courts. The edit to Rule 26 was not substantive.

The amendments to Rule 26.1 expanded the disclosure statement obligations specified in Rule 26.1 to certain corporations involved in or affected by criminal or bankruptcy cases. Rules 28 and 32 merely replaced “corporate disclosure statement” with “disclosure statement.”

A final note is that the Supreme Court has approved alterations to Rules 35 and 40 and has transmitted them to Congress. Unless Congress intervenes, the changes will be effective December 1, 2020.

Rule 3. Appeal as a Right - How Taken

Changes to Rule 3(d) increased the acceptability of electronic service. Namely, the words “sending” and “sends” replaced the words “mailing” and “mails.” The amendment also removed other phrasing that had required certain forms of service to the exclusion of electronic service.

Rule 5. Appeal by Permission

Modifications to Rule 5 removed the term “proof of service” in order to harmonize the text with Rule 25(d), which no longer necessitates proof of service insofar as it is done through “a court’s electronic filing system.”

Rule 13. Appeals from the Tax Court

A change to Rule 13(a)(2) modified language that previously specified that a party must transmit an appeal notice to the Tax Court by mail.

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

Amendments to Rule 21(a)(1) and Rule 21(c) removed the words “proof of service.” See the Rule 5 Amendment for an explanation of the reasoning.
Rule 25. Filing and Services

Rule 25(d) was updated so that proof or acknowledgment of service is no longer required if service is effected “through a court’s electronic-filing system.”

Rule 26. Computing and Extending Time

Rule 26(c) was revised for clarity, and to reflect previous changes to Rule 25(d).

Rule 26.1. Disclosure Statement

Rule 26.1(a) was broadened so that it now also covers intervening nongovernmental corporations. Previous Rules 26.1(b) and 26.1(c) were relocated to Rules 26.1(d) and 26.1(e). In their place, new Rules 26.1(b) and 26.1(c) were added. Rule 26.1(b) extends the disclosure statement requirements detailed in 26.1(a) to corporations harmed as the result of the alleged crime that is on appeal. Rule 26.1(c) requires the submission of the disclosure statement information for any corporations that are debtors in a bankruptcy action.

Rule 28. Briefs

An amendment to Rule 28(a)(1) replaced the term “corporate disclosure statement” with the term “disclosure statement.”

Rule 32. Form of Briefs, Appendices, and Other Papers

Changes to Rule 32(f) replaced “corporate disclosure statement” with “disclosure statement.” Another update deleted the articles from the list of items that are not included when calculating a document’s length.

Rule 39. Costs

Amendments to Rule 39(d)(1) changed the words “with proof of service” to “and serve” in order to reflect previous updates to Rule 25(d).

The Principle of Finality

Courses that cover appeals and the federal requirement of finality are unlikely also to cover the special rules of bankruptcy. However, *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 589 U.S. ___, 140 S. Ct. 582, 205 L. Ed. 2d 419 (2020), provides an excellent discussion of the ordinary federal rule of finality as it relates to individual cases, and explains why bankruptcy’s unusual procedural regime warrants an alternative approach. The Court unanimously held that a bankruptcy court’s order denying relief from the automatic stay constitutes a final, appealable order. Justice Ginsburg’s opinion linked the question of finality to the aggregate nature of bankruptcy, explaining that the appropriate unit for determining finality in bankruptcy is often the “proceeding,” while in
ordinary civil litigation it is the “case.” Thus, “[o]rders in bankruptcy cases qualify as ‘final’ when they definitively dispose of discrete disputes within the overarching bankruptcy case.” In *Ritzen*, plaintiff sued defendant in Tennessee state court for breach of contract. Defendant then filed for Chapter 11 bankruptcy, and plaintiff’s claim was automatically stayed. Plaintiff challenged the stay, and the Bankruptcy Court denied relief. Plaintiff then appealed to the district court under 28 U.S.C.S. § 158(a), but failed to file within the required 14–day period and was time-barred. On appeal, the question was whether the denial of relief from the stay was final and so immediately appealable, and the Court held that it was, and so the appeal failed as untimely: “We hold that the adjudication of a motion for relief from the automatic stay forms a discrete procedural unit within the embrace of the bankruptcy case. That unit yields a final, appealable order when the bankruptcy court unreservedly grants or denies relief.” The Court emphasized that the term “proceeding” does not include, and so would not render final, the resolution of “disputes over minor details about how a bankruptcy case will unfold.” However, denial of a stay is not minor: “[I]t determines whether a creditor can isolate its claim from those of other creditors and go it alone outside bankruptcy.”

*Williams v. Seidenbach, 958 F.3d 341 (5th Cir. 2020)*, involved the complicated situation of appealability by plaintiff in a suit involving multiple defendants, turning on the intersection of Federal Rules 41(a) and 54(b), and multiple appeals. The Fifth Circuit referred to a “finality trap” in which the plaintiff is “unable to obtain an appealable final decision, despite having lost to the second defendant,” and set out several devices available to overcome the appealability barrier: amendment of the complaint to remove claims or parties under Federal Rule 15(a); severance of parties under Federal Rule 21; entry of a partial final judgment under Rule 54(b); and voluntary dismissal of a defendant with prejudice. Decedent’s children sued multiple defendants following their father’s death from cancer. The district court granted the motion of some defendants for summary judgment, and plaintiffs dismissed remaining claims against other defendants under Rule 41(a) without prejudice seeking to appeal the unfavorable summary judgment order. That dismissal left the dismissed claims unresolved, and the Fifth Circuit dismissed for want of jurisdiction. See 748 Fed. Appx. 584 (5th Cir. 2018). Returning to the district court, plaintiff sought and obtained partial final judgment under Rule 54(b) as to various defendants, and then appealed again. The Fifth Circuit again dismissed the appeal for want of a final decision. See 935 F.3d 358 (5th Cir. 2019), vacated on rehearing en banc, 941 F.3d 1183 (5th Cir. 2019). Rehearing en banc was granted, and the circuit court concluded that “Rule 54(b) authorized the district court to enter partial final judgment following the dismissal of the remaining defendants under Rule 41(a), and that this appeal may therefore proceed.”

To similar effect, see *Petronykoriak v. Equifax Information Services, LLC, 2020 WL 1952494 (6th Cir. 2020)*. Plaintiff sued multiple financial companies in state court for including false information in his credit report. Several defendants filed counterclaims for breach of contract, and the action was removed to federal court. The court granted some defendants’ motions to dismiss, granted one defendant’s motion for default judgment on its counterclaim and ordered plaintiff to pay attorney fees, and also issued other orders. Plaintiff pro se appealed and the Sixth Circuit held it did not have
jurisdiction. The default judgment on the counterclaim left pending in the district court some of plaintiff’s claims, making it an interlocutory order. However, the appeal was not accompanied by a Rule 54(b) certification.

Decisions Involving “Collateral Orders”

In Williams v. Catoe, 946 F.3d 278 (5th Cir. 2020), the Fifth Circuit held that the collateral order doctrine did not make the denial of a request to appoint counsel immediately appealable, overruling Robbins v. Maggio, 750 F.2d 405 (5th Cir. 1985). The case involved an inmate alleging an Eighth Amendment violation. The appeals court held that its earlier decision in Robbins erred in equating whether a claim is unreviewable with whether it is “effectively unreviewable.” According to the Fifth Circuit, the fact that a lack of counsel may burden a plaintiff’s ability to assert rights does not make the interlocutory ruling immediately appealable as a collateral order. The Fifth Circuit underscored that it took “additional comfort in the fact that nine federal circuits have held that orders denying counsel in § 1983 cases are not immediately appealable.” One line of discussion might focus on the impact of this rule on the ability of persons without financial means to secure counsel and its implications for the enforcement of rights and protections.

The Ambit of Appellate Review

Fact Findings in a Non-Jury Case

In June Medical Services L.L.C. v. Russo, 591 U.S. ___, ___ S. Ct. ___, 2020 WL 3492640 (2020), the Supreme Court struck down a Louisiana law that required abortion providers to have “admitting privileges” to a hospital within 30 miles of where the abortions are performed. The decision provides a good vehicle for discussing appellate review of fact finding in a non-jury case. Justice Breyer wrote for the majority. After affirming that the abortion providers had standing, Justice Breyer emphasized the appropriate standard of review for this case (Casebook, p. 1193), explaining, “We start from the premise that a district court’s findings of fact, ‘whether based on oral or other evidence, must not be set aside unless clearly erroneous * * *’”. He rejected the dissent’s argument that a less deferential approach should apply because the district court enjoined the requirement pre-enforcement: “We are aware of no authority suggesting that appellate scrutiny of factual determinations varies with the timing of a plaintiff’s lawsuit or a trial court’s decision.” Justice Breyer then reviewed the district court’s findings regarding the effect of requiring “admitting privileges” on abortion providers and women seeking abortions. He also considered the law’s purported benefits. He held that the findings supported the conclusion that the requirements “serve no ‘relevant credentialing function’”; rather, the act “would place substantial obstacles in the path of women seeking an abortion in Louisiana”; and the act did not help to cure any significant health-related problem, and that “these findings are not ‘clearly erroneous.’”

In United States v. Sineneng-Smith, 590 U.S. ___, 140 S. Ct. 1575 (2020), the Supreme Court ruled that the Ninth Circuit abused its discretion by inviting non-parties to
brief and argue a case and relying on these amici’s arguments (unraised by the parties) in reaching a decision. (See the section of this memo addressing A Survey of the Civil Action (Chapter 1) for a more in-depth discussion.)

**Determining Appealability for the Class Certification Decision**

In *Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020), the Seventh Circuit determined that the district court’s decision to grant the defendant’s motion to strike a class definition is immediately appealable under Rule 23(f). (See the section of this memo addressing Class Actions (Chapter 10) for a more in-depth discussion.)

**Chapter 17. Preclusion**

**Stare Decisis**

The principle of stare decisis significantly featured in a number of high profile decisions this term by the Supreme Court.

The Supreme Court grappled with what specific precedent existed, and whether to overturn it, in *Ramos v. Louisiana, 590 U.S. ___, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020).* Justice Gorsuch’s majority opinion noted that the Court decided in *Apodaca v. Oregon,* 406 U.S. 404, 92 S. Ct. 1628 (1972), that nonunanimous state jury verdicts did not violate the Fourteenth Amendment. Justice Gorsuch described the extent to which *Apodaca* itself was at odds with precedent and the fractured nature of the decision, rejecting the relevance of the *Marks* rule (Casebook, p. 139). Justice Gorsuch emphasized that stare decisis is not a rule of automatic deference, but rather requires that the Court consider “the quality of the decision’s reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision.” In this case, he stated, the four factors pointed against adhering to precedent. Justice Sotomayor concurred and explained why it was appropriate to overturn *Apodaca.* Justice Kavanaugh separately concurred, setting forth three categories of when it is appropriate to overturn precedent. Justice Thomas also separately concurred, stating his position that the Sixth Amendment is incorporated against the states through the Privileges or Immunities Clause, not the Due Process Clause. Justice Alito dissented, criticized the view that the *Apodaca* decision lacked precedential value, and insisted the *Marks* rule applied to that decision. Justice Alito also emphasized the reliance interests of Louisiana and Oregon, two states that permitted nonunanimous jury verdicts, on the *Apodaca* precedent, given the possible need to retry hundreds of cases.

*June Medical Services L.L.C. v. Russo, 591 U.S. ___, ___ S. Ct. ___, 2020 WL 3492640 (2020),* involved a challenge to a Louisiana law, almost word for word identical to a Texas law that the Court had invalidated, that required doctors who perform abortions to hold admitting privileges of a hospital medical staff. The discussion of stare decisis is lengthy and in its detail the topic of a Constitutional Law course. Chief Justice Roberts, concurring, held that the Court was bound in this case by precedent: “The legal
doctrine of stare decisis requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore Louisiana’s law cannot stand under our precedents.” Justice Thomas, dissenting, argued that the majority applied an erroneous conception of stare decision at odds with the judicial duty to interpret the Constitution. When prior decisions “clearly conflict with the text of the Constitution,” the Court has a duty, he insisted, not to apply them. Justice Alito’s dissent argued that the Texas case did not control the “pre-enforcement” challenge to the Louisiana statute, and therefore stare decisis was not implicated. Justice Gorsuch’s dissent argued that the plurality misapplied stare decisis, emphasizing that although the Texas and Louisiana statutes may be the same, the situations in Whole Woman’s Health and June Medical are distinct, given their potential effect on access to abortion within a state.

Claim Preclusion

Lee v. Pow! Entertainment, Inc., 2020 WL 3470501 (C.D. Cal. 2020), discussed in connection with Rule 11 sanctions, sets out an excellent fact pattern for applying the elements of claim preclusion. The dispute concerns rights to the intellectual property of Stan Lee—the famous comic book author who created X-Men, Iron Man, and Spider Man—and likely will be of interest to students, although the details of the prior litigation are somewhat complicated.

If you have taught Rush (Casebook, p. 1209), Simmons v. Trans Express Inc., 955 F.3d 325 (2d Cir. 2020) offers an excellent and important fact pattern for discussing the transaction rule and the policies supporting preclusion. It also provides an opportunity to discuss problems of ascertaining state law by a federal court (Casebook, p. 475) and the use of certification (Casebook, p. 482, Note 4) in a non-diversity case. Simmons sued for unpaid wages in small claims court, had a trial before an arbitrator, was awarded $100 plus a $20 disbursement, and then sued in federal court for overtime wages under the federal Fair Labor Standards Act. The district court held that the small claims court judgment carried claim preclusive effect in a later federal action, found that the wage claim and overtime claim were transactionally related, and granted defendant’s motion to dismiss on grounds of res judicata. On appeal, the Second Circuit noted that New York’s intermediate appellate courts disagreed on the scope of the preclusive effect of a small claims court judgment, and certified the question to the state’s highest court. The case also provides an excellent vehicle for discussing access-to-justice questions.

Defense Preclusion

In Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc., 590 U.S. ___, 140 S. Ct. 1589 (2020), a long running trademark dispute, the Supreme Court held that there is no freestanding doctrine of defense preclusion (Casebook, p. 1226). The Court also emphasized that claim preclusion did not apply because the two cases involved different trademarks, different legal theories, and different conduct at different times. The two suits thus lacked the “common nucleus of operative facts” needed for
claim preclusion and petitioner was not barred from asserting a defense in the other action.

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

For a clear application of the *Taylor* principle (Casebook, p. 1292), consider *CentraArchy Restaurant Management Co. v. Angelo*, 806 Fed. Appx. 176 (4th Cir. 2020). Former restaurant workers filed arbitration demands to challenge their employer’s use of a “tip pool.” The restaurant owner responded in two ways. First, it severed parties from the arbitration, arguing that the workers’ “situations were too diverse to allow them to remain parties”; and then it sued those workers in federal court seeking declaratory and injunctive relief. The workers counterclaimed under the Fair Labor Standards Act. The district court granted the employer’s motions for judgment on the pleadings and for partial summary judgment, finding that the doctrines of claim and issue preclusion barred the counterclaims. The Fourth Circuit reversed. The workers who had been severed from the arbitration were not represented in that lawsuit, and none of the *Taylor* categories permitting virtual representation were present.

For a case involving nonmutual offensive collateral estoppel, consider *Bifolck v. Philip Morris USA Inc.*, 936 F.3d 74 (2d Cir. 2019). A widower sued Philip Morris alleging that it deliberately manipulated the nicotine in its cigarettes to cause addiction, resulting in the death of his wife. He moved to bar relitigation of factual findings in a RICO action against defendant and other cigarette manufacturers, including whether defendant manipulated cigarette design to raise nicotine levels. The district court denied the motion, finding that nonmutual offensive collateral estoppel did not apply because the issues were not necessary to the prior judgment and the issues were not sufficiently identical. After trial, plaintiff lost, and appealed. The Second Circuit reversed the district court’s two rulings on issue preclusion, but remanded to determine the fairness of imposing a bar. Necessity, according to the appeals court, could be shown if the relevant issue “is essential to the remedy imposed, even if the issue is not essential to a finding of liability”; the element was not one that the party must ultimately prove at trial but the final outcome must “hinge[]” on the issue. Whether differences in scope and causes of action made the application of preclusion doctrine unfair was a separate question.

For a discussion of issue preclusion in the context of an immigration proceeding, consider *Janjua v. Neufeld*, 933 F.3d 1061 (9th Cir. 2019). Immigration law is complicated, made more complex because of the use of non-Article III decision makers. Janjua was awarded asylum in an immigration proceeding, and then sought permanent resident status. In that latter proceeding, the government argued that he was a member of a terrorist group. Janjua argued that the government was issue precluded: any affiliation with the terrorist group would have defeated the grant of asylum and was discussed during that proceeding. The district court held, and the Ninth Circuit affirmed, that issue preclusion did not apply. As a matter of first impression, the appeals court held that an issue is actually litigated for issue preclusion purposes only if it was raised, contested and
submitted for determination in the prior adjudication; that an issue was “implicitly raised” was not sufficient and would have cut too close to claim preclusion.

Rodriguez v. City of San Jose, 930 F.3d 1123 (9th Cir. 2019) presents the unusual situation of a court sua sponte raising the defense of claim and issue preclusion notwithstanding defendant’s forfeiture of the objections. The case involved a Second Amendment challenge to the city’s refusal to return guns that it had seized without a warrant after detaining plaintiff’s husband for mental health evaluation. A prior state court decision authorized the state to retain the guns, but did not require the city to do so. In overlooking the forfeiture, the Ninth Circuit balanced public and private interests, and found that the public interest outweighed the private.

Chapter 18: Alternative Dispute Resolution

Arbitration

In GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC, 590 U.S. ___, 140 S. Ct. 1637 (2020), the Supreme Court held that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards did not conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories.

Changing Judicial Attitudes Towards ADR: The Example of Binding Arbitration

In the wake of Concepcion (Casebook, p. 1344), consider 20/20 Communications, Inc. v. Crawford, 930 F.3d 715 (5th Cir. 2019), in which the Fifth Circuit held that the question of class arbitration was for the federal court, not the arbitrator, to decide, unless the parties’ arbitration agreement contained explicit language to the contrary. 20/20 is a sales company that insisted its employees sign arbitration agreements that prohibited class arbitrations. Multiple employees attempted to combine their claims against 20/20 into a class arbitration, and the arbitrator held that the class bar was unlawful. The district court affirmed. The Fifth Circuit vacated and remanded, holding as a matter of first impression that whether an arbitration agreement bans class arbitration is a “gateway issue” that courts should decide unless the agreement unambiguously specifies otherwise.

In Jock v. Sterling Jewelers Inc., 942 F.3d 617 (2d Cir. 2019), the Second Circuit held that an arbitrator’s decision that an arbitration agreement allows class arbitration is binding on members of the class who are not parties to the action. Current and former employees brought a Title VII class action alleging their employer’s gender discrimination. Plaintiffs had signed mandatory arbitration agreements with the employer as a condition of their jobs. The matter was referred to arbitration, and the arbitrator held that the agreement did not bar class arbitration. The district court found that the arbitrator exceeded its powers. Employees appealed, and the Second Circuit reversed and
remanded. The arbitrator then certified a class made up of named plaintiffs and absent class members who had not submitted claims to, nor opted into, the arbitration proceeding. The district court denied the employer’s motion to vacate the class determination. The employer appealed, and the circuit court vacated and remanded. The district court then granted the employer’s motion to vacate the arbitrator’s class determination award, and the employees appealed. The Second Circuit reversed, holding that the absent members in their arbitration agreements had consented to whether the arbitrator would decide for the arbitration to proceed on a class-wide basis.

The impartiality of an arbitrator was at the core of the decision in Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130 (9th Cir. 2019). City Beverages entered into an exclusive distribution agreement with Monster, authorizing the former to sell the latter’s energy drinks in a certain region. When Monster terminated the contract, the parties engaged in arbitration to determine what (if anything) City Beverages was owed for this, beyond a contractually specified penalty. The arbitrator ruled that Monster had been within its rights to terminate the contract, and the district court confirmed the arbitration’s outcome. On appeal, the Ninth Circuit exercised authority granted under the Federal Arbitration Act to vacate the arbitration outcome on the ground of “evident partiality.” Namely, the arbitrator had failed to reveal that he was a partial owner of JAMS, the organization through which the arbitration occurred. JAMS in turn had conducted almost a hundred arbitrations involving Monster in recent years. The Ninth Circuit’s opinion differentiated this dynamic from the general reality that all arbitrators have an interest in their organizations’ profitability.

In Singh v. Uber Technologies Inc., 939 F.3d 210 (3d Cir. 2019), the Third Circuit held that the Federal Arbitration Act’s carve-out for transportation workers applied to Uber drivers. The suit was by a putative class of Uber drivers alleging that Uber misclassified them as independent contractors and thereby avoided paying overtime wages that would be owed to an employee. The drivers had signed an arbitration agreement, and Uber sought to compel arbitration in federal court. The FAA provides that “‘nothing’ in the FAA ‘shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.’” The district court held that the exception did not apply to Uber drivers, and the Third Circuit vacated. It remanded for discovery on whether the drivers are engaged in interstate commerce.
Appendix A: Errata

Comprehensive Twelfth Edition, Errata

<table>
<thead>
<tr>
<th>Page</th>
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<td>140</td>
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<td>Justice Kennedy announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice Scalia, and Justice Thomas join.</td>
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<td>The Fourth Circuit explained:</td>
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<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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<td>Justice Kennedy announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice Scalia, and Justice Thomas join.</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. 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.

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.

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

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181 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.

193 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

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202 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

I

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” capacitiously (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
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 codify’ 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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214 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.225

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. *

225 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.
Appendix C: Teacher’s Manual—Incorporating Issues of Race, Class, and Gender Inequality into Classroom Discussion

Here is the opening section of the Teacher’s Manual (pp. 5-8):

Some faculty will choose to teach the rules of civil procedure as neutral and autonomous mechanisms for dispute resolution. Others will bring to the surface these rules’ distributional and political implications, especially as they relate to questions of race, gender, class, and disability. There is a growing literature on how to integrate treatment of marginalized and less well-resourced groups into the law classroom (although some of the articles do not focus specifically on civil procedure). Without purporting to be comprehensive, here are some writings pertinent to the topic:


Gilles, Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket, 65 Emory L.J. 1531 (2016)

Greene, Race, Class, and Access to Civil Justice, 101 Iowa L. Rev. 1234 (2016)


Relatedly, there is a large literature that situates civil procedure within the field of procedural justice and access to justice. The following list includes some classic titles, as well as articles published since the Eleventh Edition of the casebook. The list is eclectic and does not purport to be comprehensive, but we hope it draws attention to writings from multiple perspectives.

**Theories of Procedural Justice**


**Due Process and Procedural Justice**


**Procedural Justice and Adjudication**

Fuller, *The Forms and Limits of Adjudication*, 92 Harv.L.Rev. 353 (1978)


**Perceptions of Procedural Justice**


**Procedural Justice and Technology**


**Access to Justice**


