To: Civil Procedure Professors

From: Jack H. Friedenthal, Arthur R. Miller, John E. Sexton, Helen Hershkoff, Adam N. Steinman & Troy A. McKenzie[1]

Date: July 17, 2023

Re: 2023–2024 Update Memo

The 2023-2024 Rules Supplement to the Comprehensive and Compact Thirteenth Editions of our casebook contains the current version of the statutes, forms, and rules governing federal procedure, as well as selected comparative state procedures. The Rules Supplement also includes edited versions of Supreme Court decisions handed down in 2022 and 2023 that are pertinent to the first-year course. In addition, the Rules Supplement contains a set of local rules, an illustrative litigation problem with sample court papers, and a litigation flow chart that we hope will be helpful to your course preparation.

This Update Memo highlights material contained in the Rules Supplement and provides additional cases and other materials mostly published since distribution of the Thirteenth Edition of our casebook that might prove helpful for class preparation or discussion. We have chosen these additional cases because the facts illustrate important rules or principles, the decision strikes new legal ground, or the dispute holds inherent interest. Some of the cases highlight the ways in which procedure affects judicial access, or enhances or undermines fairness or equality. Our goal throughout has been to include material that might be useful as teaching tools, form the basis for practice problems, or serve as starting points for examination questions. We do not present these additional materials as a comprehensive account of case developments over the last year, and underscore that time constraints make it impossible to incorporate all of the suggested material in a first-year course.

Part I of this memo provides a quick overview of material that appears in the 2023-2024 Rules Supplement.

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Part II highlights other recent cases that might be of interest to your course preparation. In some instances, we offer suggestions on how one might integrate materials into a syllabus and class discussion.

The Appendix lists errata. We apologize for these errors and ask that you to alert us to any others. We also welcome your suggestions for future editions of the casebook.

Part I. Overview of Material in the 2023-2024 Rules Supplement

Recent Cases Pertaining to 1L Civil Procedure

The Rules Supplement (Part X) includes excerpts or summaries of seven decisions of the Supreme Court of the United States and two decisions by a federal district court concerning artificial intelligence and sanctions. We list this material below, by Chapter:

Chapter 2—Jurisdiction over the Parties or Their Property

Mallory v. Norfolk Southern Railway Co., 600 U.S. ___, 143 S.Ct. 2028, ___ L.Ed.2d ___ (2023).

In a 5-4 decision, the Supreme Court held that the Due Process Clause permits a state (here, Pennsylvania) to assert general jurisdiction over a corporation that has consented to personal jurisdiction in connection with registering to do business in the state. Justice Gorsuch authored the majority opinion, joined in full by Justices Thomas, Sotomayor, and Jackson and in part by Justice Alito. Justice Alito, however, wrote a concurring opinion suggesting that Pennsylvania's registration-based jurisdiction statute may violate the dormant Commerce Clause—an argument that the Supreme Court did not resolve and that the court below had not considered. Justice Jackson also authored a separate concurring opinion. Justice Barrett authored the dissenting opinion, joined by Chief Justice Roberts and Justices Kagan and Kavanaugh. Excerpts from all opinions appear in the Supplement.

The majority opinion relies on the Supreme Court's 1917 decision in ***Pennsylvania Fire***, which the casebook mentions in the section on consent by registration. More broadly, the opinions discuss the Supreme Court's recent cases on general jurisdiction (***Goodyear***, ***Daimler***, and ***BNSF***), juxtapose jurisdiction over corporations with the availability of "tag" jurisdiction over individuals (***Burnham***), and address the role of "consent" as a basis for personal jurisdiction (***Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee***).

Chapter 4—Jurisdiction over the Subject Matter of the Action—The Court's Competency

Wilkins v. United States, 598 U.S. ___, 143 S.Ct. 870, 215 L.Ed.2d 116 (2023) (summary).

MOAC Mall Holdings LLC v. Transform Holdco LLC, 598 U.S. ___, 143 S.Ct. 927, 215 L.Ed.2d 262 (2023) (summary).

Santos-Zacaria v. Garland, 598 U.S. ___, 143 S.Ct. 1103, ___ L.Ed.2d ___ (2023) (summary).

These three cases address whether particular statutory requirements affect the subject-matter jurisdiction of federal courts. (The casebook discusses this issue with references to Supreme Court decisions including ***Arbaugh***, ***Sebelius***, and ***John R. Sand & Gravel Co.***)

Wilkins involves the Quiet Title Act's 12-year time limit; ***MOAC*** involves § 363(m) of the Bankruptcy Code; and ***Santos-Zacaria*** involves 8 U.S.C. § 1252(d)'s requirement that an individual seeking judicial review of an order of removal must exhaust administrative remedies. In all three cases, the Court found that the requirements were not jurisdictional, and were therefore subject to waiver and forfeiture.

Chapter 8—Modern Pleading

Mata v. Avianca, Inc., 2023 WL 3696209, No. 22-cv-1461 (PKC) (S.D.N.Y. May 4, 2023).

Mata v. Avianca, Inc., ___ F.Supp.3d ___, 2023 WL 4114965, No. 22-cv-1461 (PKC) (S.D.N.Y. June 22, 2023).

This case received considerable media attention[2] when lawyers prepared a federal court filing using ChatGPT. As a result, the filing contained non-existent case names, citations, and quotations that had been fabricated by the software and never checked by the lawyers. The Supplement contains the district court's show cause order and its opinion ordering sanctions.

[2] See, e.g., Benjamin Weiser, *Here's What Happens When Your Lawyer Uses ChatGPT*, N.Y. Times (May 27, 2023), https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html.

Chapter 14—Trial

Dupree v. Younger, 598 U.S. ___, 143 S.Ct. 1382, ___ L.Ed.2d ___ (2023).

This case follows up on an issue left open by the Supreme Court's decision in ***Ortiz v. Jordan***, which the casebook discusses in the Notes and Questions following ***Reeves v. Sanderson Plumbing Products, Inc***. Under ***Ortiz***, an order denying summary judgment on sufficiency-of-evidence grounds is not appealable after trial; rather, the party must challenge the sufficiency of the evidence presented at trial using Rule 50. Justice Barrett's unanimous opinion in ***Dupree*** held that this restriction on appellate review of summary judgment rulings does not apply to purely legal issues that are resolved at summary judgment.

Kemp v. United States, 596 U.S. ___, 142 S.Ct. 1856, 213 L.Ed.2d 90 (2022).

The majority opinion by Justice Thomas held that the term "mistake" in Rule 60(b)(1) includes a judge's error of law. Accordingly, a motion for relief from judgment based on such an error is subject to Rule 60(c)(1)'s 1-year limitations period. Excerpts from Justice Sotomayor's concurring opinion and Justice Gorsuch's dissenting opinion are also included in the Supplement.

Chapter 16—Appellate Review

Shoop v. Twyford, 596 U.S. ___, 142 S.Ct. 2037, 213 L.Ed.2d 318 (2022) (summary).

In a 5-4 decision, the Supreme Court held that the collateral order doctrine allows immediate appellate review of a district court's order, issued under the All Writs Act, that a prisoner be transported to a hospital for medical testing that could support his claim for federal habeas relief.

Recent Proposed Legislation Pertaining to 1L Civil Procedure

The Rules Supplement (Part VIII) includes excerpts from nine proposed federal statutes that are currently pending in the U.S. House of Representatives, Senate, or both:

- Proposed Bill to amend title 28, United States Code, to provide that the United States district court for the District of Columbia shall have exclusive jurisdiction over actions arising under the immigration laws, and for other purposes.
- Proposed Injunctive Authority Clarification Act of 2023
- Proposed Restoring Judicial Separation of Powers Act
- Proposed Stop Judge Shopping Act
- Proposed Highway Accident Fairness Act of 2023

- Proposed Forced Arbitration Injustice Repeal (FAIR) Act
- Proposed End Judge Shopping Act of 2023
- Proposed Judiciary Act of 2023
- Proposed Fair Courts Act of 2023

Sample Orders

We have added to the Rules Supplement (Part V) two orders from federal district court judges on the use of artificial intelligence in preparing papers filed with the court.

Part II. Additional Decisions and Materials of Interest

Chapter 2—Jurisdiction over the Parties or Their Property

The Traditional Bases for Jurisdiction

Reddy v. Buttar, 38 F.4th 393 (4th Cir. 2022).

The facts of the case are unusual for a 1L course—an action by a Vietnam citizen to enforce a Singapore arbitration award against a U.S. citizen arising from a dispute over an agreement for the sale of property in the Philippines. But the issue it raises is within the core and provides a good classroom problem: whether the district court committed clear error in finding defendant was a North Carolina domiciliary for purposes of general personal jurisdiction. The case also highlights the importance of the standard of appellate review in assessing a fact-intensive decision by the district court.

The action was filed in 2018. Until 2016, defendant Buttar resided in the forum state, had utility accounts there, and was registered to vote. On those facts, defendant's domicile was North Carolina, and that domicile continued in effect unless defendant could show a change before the action was commenced. After discovery, the district court held that despite his "lack of North Carolina-based property, contractual obligations, financial accounts, and tax obligations; his lack of a North Carolina driver's license; and his New Zealand address and permanent resident visa," defendant had not met his burden. But the court acknowledged evidence of a possible change:

> Buttar still receives mail, particularly legal documentation, in North Carolina. In fact, on April 20, 2018, Buttar's own attorney served notice on Buttar of a state court hearing at Buttar's North Carolina address. Buttar's sole bank account lists a North Carolina address. He has held an active North Carolina medical license since 1995, and this medical license is the only one he maintains. Buttar further

> declares that he has continued to maintain an active North Carolina pharmacy license since 1997. While records indicate that Buttar sold his former medical practice prior to the commencement of this action, the new business created when [his] practice was sold ... is listed as [his] practice according to the North Carolina Secretary of State filings. Furthermore, evidence suggests that [Buttar] appears to maintain significant involvement in the medical practice, including serving as the supervising professional over others employed at or in contractual relationships with the medical practice. Additionally, and perhaps most importantly, Buttar is registered to vote in North Carolina and voted absentee in the November 2016 presidential election. This voter registration in itself raises a presumption that Buttar is a citizen of North Carolina.

On this record, the Fourth Circuit found no clear error, but only "at most, quibbling with the court's discretionary weighing of evidence."

The Growth of State Long-Arm Statutes

Simonson v. Olejniczak, No. 22-1219, 2023 WL 2941521 (2d Cir. April 14, 2023).

The case involves alleged attorney malpractice. A Connecticut resident hired Wisconsin lawyers to handle a Wisconsin probate matter. She then sued the lawyers in Connecticut district court for violation of their duties under Wisconsin law and other claims. The Connecticut long-arm statute reaches "nonresident individual[s] … who in person or through an agent … [t]ransact[] any business within the state[.] Conn. Gen. Stat. § 52–59b(a)(1)." The Connecticut Supreme Court has interpreted the statute to call for a balancing of "considerations of public policy, common sense, and the chronology and geography of the relevant factors." The Second Circuit affirmed the dismissal of the action. First, it pointed to decisions that "have repeatedly found that representation of a Connecticut resident, and the necessary communications and business interactions that flow from that relationship, does not establish personal jurisdiction under the state's long-arm statute." The Wisconsin lawyers had not solicited business in the forum state, had not performed services there, and had not traveled to the state. Rather, plaintiff traveled to Wisconsin to attend a deposition and Wisconsin court hearings. Nor did the presence of assets in the forum change the analysis, because those assets were "only tangentially related to Simonson's breach of contract claims."

Daou v. BLC Bank, S.A.L., 42 F.4th 120 (2d Cir. 2022).

The case can form the basis of a compact problem of statutory interpretation: did New York's long-arm statute authorize the district court to exercise personal jurisdiction over commercial banks headquartered and operating primarily in Lebanon and with correspondent bank accounts in New York (used to facilitate the transfer of U.S. dollars into and out of

Lebanon)? The complaint alleged that the banks schemed to cheat plaintiffs of money by encouraging them to deposit U.S. dollars in Lebanese bank accounts on the promise that they would be able to withdraw the funds in the United States, and then reneged.

Section 302(a)(1) of the N.Y. CPLR is a "single act statute," and "proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." There was no dispute that the commercial banks used correspondent banks in New York on a regular basis to move U.S. dollars and the record showed at least four occasions on which the banks used the correspondent accounts to execute transactions on behalf of plaintiffs. Nevertheless, the Second Circuit agreed with the district court that plaintiffs failed to meet their burden with respect to the second prong of § 302(a)(1), that there be an "articulable nexus" or "substantial relationship" between the business transaction and the claim asserted. Although "causation is not required," "not every conceivable connection to a New York transaction is substantial enough to confer jurisdiction." The arising under prong is met where the complaint alleges an "actual transaction made through such an account formed part of the alleged unlawful course of conduct underlying the cause of action set out in the complaint." In this case, however, "the alleged unlawful conduct underlying the [plaintiffs'] claims does not involve a specific transaction through New York correspondent accounts – rather, the [plaintiffs] allege that the Commercial Banks have used their New York correspondent accounts to handle the [plaintiffs'] and other investors' money *in the past* and likely would have done so if, counterfactually, they had transferred the [plaintiffs'] money to the United States as promised."

Relevent Sports, LLC v. United States Soccer Federation, Inc., 61 F.4th 299 (2d Cir. 2023).

The facts make an interesting exercise for interpreting a state long-arm statute. "Soccer, also known as 'the beautiful game,' unites the world in shared competition," Judge Lohier's decision began. "This case, by contrast, concerns an allegedly anticompetitive policy that restricts access to the game by prohibiting soccer leagues and teams from playing official season games outside of their home territory." A soccer promoter sued national and international soccer associations alleging they conspired to block official games in the United States in violation of the restraint-of-trade provision of the federal Sherman Act.

The first question on appeal was whether FIFA, the private membership-based association that acts as the governing body for soccer, was subject to personal jurisdiction in New York under N.Y. CPLR § 302(a)(1). The circuit had interpreted that statute as permitting the exercise of jurisdiction over "any non-domiciliary … who in person or through an agent … transacts any business within the state or contracts anywhere to supply goods or services in the state" as to "any cause of action arising from such a transaction or contract." Defendant (USSF)

is the FIFA-authorized national association for the United States and acts as FIFA's agent in New York. No party disputed that USSF was subject to personal jurisdiction in New York under the state long-arm statute. Emphasizing that USSF took actions in the forum under the control of FIFA, its actions were attributed to FIFA for purposes of meeting New York's requirement of transacting business in the forum, and those actions related to the refusal to "sanction the official season games sought to be promoted."

(For another case involving personal jurisdiction under New York's long-arm statute based on agency, see **Spetner v. Palestine Investment Bank, 70 F.4th 632 (2d Cir. 2023).** The claims arose under the federal Anti-Terrorism Act and involved use by a foreign bank of a nonparty bank's correspondent bank accounts in New York.)

Edwardo v. Roman Catholic Bishop of Providence, 66 F.4th 69 (2d Cir. 2023).

This case illustrates rejection of the agency theory as a basis for meeting the New York long-arm statute. The facts are heartbreaking. A parishioner filed suit in New York state court against a Roman Catholic bishop, a church corporation, and a retired bishop, alleging that a now-deceased Rhode Island priest sexually abused him when he was between 12 and 17 years old, and that defendants enabled the abuse. His earlier suit, filed in Rhode Island state court, had been dismissed as time barred. New York, however, under the New York Child Victims Act, "created an approximately two-year window when plaintiffs could bring claims related to certain sexual offenses that would otherwise be barred by the statute of limitations, if the sexual offense at issue occurred when the plaintiff was under eighteen years old. *See* C.P.L.R. § 214-g." Abuse was alleged to have taken place in both Rhode Island and New York.

Defendants removed the New York action, and then moved to dismiss for lack of personal jurisdiction. The district court dismissed, and the Second Circuit affirmed, finding the requirements of NY CPLR § 302(a)(1) were not met. The priest had not acted as an agent, for the abuse, although carried out during the course of employment, stemmed from "personal motives." Moreover, the priest did not act with the knowledge and consent of defendants; under New York law the non-resident principal "must request not just the alleged agent's general presence in New York but also the activities giving rise to suit." At most, defendants had authorized that the boy and priest travel together to New York. Further, even if the alleged acts constituted a business transaction for purposes of the statute—the priest was in New York to solicit a donation—the claims did not "arise from" that business activity. Nor did NY CPLR § 302(a)(2) provide a basis for jurisdiction for recovery based on defendants' allegedly tortious conduct, rather than the priest's. Although the injury occurred in New York, defendants failed to intervene in Rhode Island.

Specific Jurisdiction in State Court

Martinez v. Union Officine Meccaniche S.P.A., No. 22-1364, 2023 WL 3336644 (3d Cir. May 10, 2023).

The facts of this case make it a good teaching vehicle for reconsidering ***J. McIntyre*** through the lens of ***Ford***. A worker suffered a severe injury to his hand when it was caught in a large machine while on the job. The accident took place in New Jersey, but Union, the defendant, manufactured and designed the machine in Italy. The appeals court agreed with the district court that the company did not purposefully avail itself of the New Jersey forum.

> The record does not demonstrate that Union ever advertised its products in New Jersey. And of the estimated 700 calender machines that Union manufactured since 1950, only this one went to New Jersey. Also, the decision to place the machine in New Jersey was not made by Union but rather by Martinez's employer, Primex Plastics Corporation, which selected the New Jersey facility over its facilities in other states. At most, an independent sales agent based in the United Kingdom visited Primex's New Jersey plant to discuss Primex purchasing the machine.

As such, the facts map onto those of ***J. McIntyre***. However, in this case, defendant "increased its contacts" in New Jersey after the initial sale of the accident-causing machine:

> It sent representatives to New Jersey to oversee installation. Later, its representatives traveled to New Jersey to train Primex and maintain the machine. Sometimes those representatives stayed in New Jersey for weeks at a time. And one time after the installation, Union's chief executive officer visited the Primex facility in New Jersey. In addition to those physical contacts, after the sale, Union representatives began to communicate with Primex by email, telephone, and remote access software. Regardless of whether those post-sale contacts were promised with the machine's sale or were efforts to nurture a customer relationship, they amount to deliberate targeting by Union of New Jersey for its business. Thus, after the sale of the calender machine, Union purposefully availed itself of New Jersey.

Nevertheless, even assuming purposeful availment, the court found that the increased contacts did not show the requisite strong relationship among the defendant, the forum, and the litigation, and so unlike the car manufacturer in ***Ford***, the record did not show that Union "systematically served a market" in New Jersey:

> [T]o support the exercise of specific jurisdiction, Union's actions in New Jersey, which are not alleged to have caused any of the claimed injuries, had to have included more than mere efforts to keep its one customer in New Jersey happy. That is especially so here where those efforts did not involve core characteristics of the products liability claim: the design and manufacture of the machine or any of its parts in New Jersey. Nor did Union advertise or seek other customers in New Jersey, and it has not opened a permanent office there.

State v. Volkswagen Aktiengesellschaft, --- S.W. ---, 66 Tex. Sup. Ct. J. 797, 2023 WL 3262271 (Tex. 2023).

The decision is the latest chapter in "Dieselgate," involving Volkswagen's installing software in diesel-powered cars sold in the United States in order to circumvent federal emissions standards (according to Forbes, the cars' "real-world Nitrogen Oxide (NOX) emissions were 40 times higher than U.S. standards permitted"[3]). The facts present the question of whether it is constitutionally valid to attribute the forum contacts of local entities to foreign defendants that otherwise lack purposeful and direct contact with the forum.

After Volkswagen pleaded guilty to the federal government's criminal charges and agreed to pay more than $25 billion to resolve claims, the State of Texas sued VW and Audi (now VW's subsidiary); the case zeroed in on the claim that the companies manipulated fake recall campaigns to install the software in previously sold cars. In 2020, the Texas Court of Appeals dismissed the suit for lack of personal jurisdiction, emphasizing that the non-resident manufacturers aimed their recall campaigns at the United States as a whole, and not at Texas. The Texas Supreme Court, six-to-three, reversed, rejecting the argument that the contacts of local dealerships and distributorships could not be imputed to defendants. To the contrary, the manufacturers directed the local entities to engage in the local recalls and took control of the local recalls and repairs "and then used that control to tamper with vehicles in Texas after the initial sale to consumers":

> Unlike myriad software updates that might be accomplished in the ordinary course of consumer transactions with downloads initiated by the consumer or without regard to the consumer's location, these contacts with Texas were not fortuitous or accomplished by the unilateral actions of third parties.

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[3] Georg Kell, From Emissions Cheater to Climate Leader: VW's Journey from Dieselgate to Embracing E-Mobility, Forbes (Dec. 5, 2022), https://www.forbes.com/sites/georgkell/2022/12/05/from-emissions-cheater-to-climate-leader-vws-journey-from-dieselgate-to-embracing-e-mobility/?sh=7c49299768a5

> We also do not agree that the manufacturers' contacts were not purposefully directed at Texas simply because the same actions were also directed at other states. Personal jurisdiction is a forum-specific inquiry, and a defendant's contacts with other states do not negate purposeful availment of this jurisdiction regardless of whether out-of-state contacts are more, less, or exactly the same.

On these facts, the majority held, defendants "cannot now use their mere passthrough department as a 'haven from the jurisdiction of a Texas court.'" A dissenting opinion argued that the majority misapplied ***Keeton v. Hustler***, as well as the principles set out in Justice Kennedy's opinion in ***J. McIntyre***, which the Texas Supreme Court had cited twice with approval as requiring purposeful targeting of the forum:

> The Court's divergence from well-established personal-jurisdiction precedents will have significant ramifications for consumers in our state. A manufacturer wishing to sell its product in Texas can avoid personal jurisdiction in Texas courts by structuring its business in a way that avoids purposeful targeting of Texas. But should the same manufacturer wish to take post-sale action relating to the *same* product, it faces a catch-22: (1) direct its U.S. distributor to carry out a recall, and thus subject itself to personal jurisdiction under the Court's new rule; or (2) decide not to order a recall for fear of being subject to jurisdiction in Texas courts. The Court's new rule creates a perverse incentive for a manufacturer that knows it should address a product concern to instead roll the dice on Texans' safety.

Toshiba Global Commerce Solutions, Inc. v. Smart & Final Stores LLC, 873 S.E.2d 542, 381 N.C. 692 (N.C. 2023)

The decision offers a compact set of facts for applying ***Burger King*** outside the franchise context. In brief, Toshiba, a North Carolina corporation, sued a California limited liability company in North Carolina for wrongfully terminating a service agreement by which the corporation maintained and repaired the LLC's point-of-sale equipment, and for failing to pay overage fees required by the agreement. The LLC had no office in North Carolina; in its search for a service provider, it contacted Toshiba, but initially went with another vendor. After that arrangement went sour, the LLC again contacted Toshiba, and this time the deal closed, contemplating a three-year relationship plus an option for LLC to renew for one-year terms by sending written notice to Toshiba in North Carolina. The agreement contemplated that Toshiba would use its North Carolina-based depot to carry out the service obligations, and that Toshiba, in North Carolina, would obtain stock needed for the agreement. The North Carolina Supreme Court held that exercising jurisdiction met due process: the LLC solicited the relationship with Toshiba, knowing it was based in North Carolina; the deal was not a one-off but rather an agreement for multiple years and for on-going services; Toshiba was obligated to provide parts to carry out the agreement in North Carolina; and notices were to be sent to the corporation in the

forum state. The fact that negotiations did not take place in North Carolina did not defeat jurisdiction, and the LLC did not argue it would be unreasonable or inconvenient to defend in North Carolina.

Schaeffer v. SingleCare Holdings, 884 S.E.2d 698 (N.C. 2023).

The case involves an employment agreement gone sour and illustrates the effects of technology on business practices and, so, jurisdictional analysis. Plaintiff (a North Carolina resident) sued his corporate employers (both Delaware LLCs with their principal places of businesses in Massachusetts) and individuals associated with the companies (residents of Minnesota and Massachusetts) in North Carolina state court. The gist of the complaint challenged his termination and defendants' revocation of his equity interest in the companies. Plaintiff lived in California during the contract negotiations and during the early months of his employment; plaintiff then requested and received approval to work remotely from North Carolina; defendants employed other staff in that state and solicited applicants for jobs in that state; and defendants paid plaintiff in North Carolina and mailed tax documents to his North Carolina address.

The question on appeal was whether defendants' forum contacts resulted from plaintiff's unilateral action; moreover, defendants argued "that, in evaluating which forums' courts may exercise specific jurisdiction with respect to claims arising from an alleged breach of an employment agreement, only activities that occurred prior to or at the time of the execution of the relevant agreements bear on the analysis." The North Carolina Supreme Court rejected that position:

> [Such] a position would require a court to turn a blind eye to activities a defendant conducts in a new forum after agreements are negotiated and executed. Because this position would "allow [defendants] to escape having to account in other States for consequences" that arise from their own intentional conduct, we decline to adopt this unduly narrow approach to specific jurisdiction. * * * Determining whether specific jurisdiction exists does not—and has never—required a court to treat a discrete, temporally-limited set of events as dispositive to the exclusion of all other activities that occur throughout the evolution of a relationship. Instead, we consider *all* of Defendants' activities, including those that occurred after the employment agreements were executed, and hold that Corporate Defendants intentionally reached out to North Carolina to conduct business activities in the state, and the claims at issue in this litigation arise from or are related to those activities.

(For another employment dispute, see **Vapotherm, Inc. v. Santiago, 38 F.4th 252 (1st Cir. 2022),** affirming dismissal of an employer's breach-of-contract claim against a former

employee alleged to have violated a non-solicitation clause. The employer was a New Hampshire company, the employee resided in Georgia, and although the employee came to New Hampshire for about two weeks during a four-year period of employment, the contract breach did not arise out of or relate to the in-state contacts and those contacts were not instrumental to the formal of the contract. Nor were those contacts considered voluntary acts by the employee; he "was recruited to Vapotherm rather than seeking it out, was interviewed in Georgia and Illinois, formalized his portion of the employment agreement in Georgia, contacted New Hampshire primarily for technical and customer support, and only traveled there for company-wide corporate events." Referencing ***Ford Motor Co.*** and ***Bristol-Myers Squibb Co.***, the appeals court emphasized that "in-state injury alone is not sufficient under the Due Process Clause to prove relatedness for tort claims.")

Rodríguez-Rivera v. Allscripts Healthcare Solutions, Inc., 43 F.4th 150 (1st Cir. 2022).

The case offers a good discussion of the relatedness prong as well as purposeful availment, distinguishing between a parent company and subsidiary. Plaintiff, a doctor licensed in Puerto Rico, sued Allscripts, an electronic health records provider, and its parent company in Puerto Rico federal court after his electronic patient records were destroyed. The complaint alleged breach of contract, negligence, fraud, dolo (a specific type of fraud under Puerto Rico law), and temerity in connection with destruction of medical records. Allscripts was a North Carolina LLC with its principal place of business in Chicago; the parent company was a Delaware corporation with its principal offices in Chicago.

Looking to ***Ford***, the Court found that the relatedness prong was not met with respect to the parent company, which had no offices, employees, or forum contacts with Puerto Rico, but was for Allscripts, which had contracted with an in-state company, sent an employee to Puerto Rico for business purposes, and knew that Puerto Rico residents used its product.

Second, the complaint alleged the provider's purposeful availment. Citing ***Asahi*** and ***Daimler***, the appeals court found that the provider had done more than merely place a product into the stream of commerce. Rather, it had received significant revenue from Puerto Rico customers, and had not merely initiated a single in-forum sale. The provider "deliberately and specifically targeted Puerto Rico" by advertising in the forum; its distributor distributed only in Puerto Rico, and the provider's officers had to authorize all sales contracts between its distributor and physician-clients. The Court concluded: "After several years of knowingly targeting new Puerto Rico customers, serving current Puerto Rico customers, and benefitting from not insubstantial revenue out of Puerto Rico, Allscripts cannot claim that its contact with Puerto Rico was involuntary or that it couldn't foresee being haled into a Puerto Rico courtroom."

Distinguishing Specific and General Jurisdiction

Doucet v. FCA US LLC, 210 N.E.3d 393 (Mass. 2023).

In this post-***Ford***, post-***Bristol-Myers Squibb*** case, the Supreme Judicial Court of Massachusetts (SJC) vacated the trial court's dismissal of an action against the nonresident manufacturer of a car involved in a collision in New Hampshire. The car's first sale was in Massachusetts and passed through many hands outside the state. Boiled down, a Rhode Island dealership received the car and transferred it to a Massachusetts dealership, which leased the car to a Massachusetts resident and the car was later purchased by a Massachusetts resident, who then sold the car to two other Massachusetts residents, who then sold the car to a New Hampshire resident, who then did a private sale to plaintiff, a New Hampshire resident, who was in the front seat of the car when it was involved in a front-end collision in New Hampshire. Plaintiff was incapacitated and suffered profound brain injury.

The procedural history of the case makes it an excellent teaching vehicle for a number of 1L doctrines. Plaintiffs initially filed a products liability suit against the manufacturer in New Hampshire state court. The manufacturer removed to federal court, and the district court dismissed the case finding no personal jurisdiction. Plaintiff then sued the manufacturer and the Massachusetts dealership in Massachusetts state court, and again defendants removed to federal court. This time the district court held that personal jurisdiction could be exercised over the manufacturer, but remanded for lack of complete diversity. Back in state court, but now in Massachusetts, the manufacturer moved to dismiss for lack of personal jurisdiction and improper venue, and the trial court held that jurisdiction was absent under both the Massachusetts long-arm statute and the Fourteenth Amendment. Plaintiffs appealed. The Supreme Judicial Court sua sponte transferred the case from the Appeals Court.

The discussion of the long-arm statute makes the case an excellent classroom vehicle. Massachusetts has an enumerated acts long-arm statute; one specific basis is defendant's "transacting any business in this commonwealth." Mass. Gen. Laws c. 223A, § 3. The statute has received a broad construction. Here, the first leasing of the car was in Massachusetts; the manufacturer countered that it did not transact business in the state "in connection with the plaintiffs' claims." To determine whether the claims arose from the transaction of business in the state as a statutory matter, the Supreme Judicial Court applied a "but for" and not a proximate causation test. That test determined the result: acknowledging "multiple links in the factual chain, but for the manufacturer's "extensive business transactions in Massachusetts," which included distributing what would become plaintiff's car through a Massachusetts dealership, plaintiff would not have been injured; the distribution in Massachusetts was the "first step in a train of events that results in the personal injury" (internal citations omitted).

As for the due process inquiry, the SJC explained why the requirement of purposeful availment was met, but focused most of the analysis on relatedness—whether a "nexus" existed between the manufacturers Massachusetts contacts and plaintiff's claim. The SJC distinguished ***Bristol-Myers*** by reverting back to its but-for statutory analysis, emphasizing that the manufacturer engaged in extensive business in the state and the first-sale of the car in the forum state created a causal connection with the claim, "albeit an indirect one." As to whether that causal connection was too attenuated, the SJC turned to ***Ford***, finding that "none of the opinions expressly ruled out that the combination of extensive dealings in the forum State and the first sale of the automobile at issue in the forum State would be sufficient," and rejected treating a footnote in Justice Gorsuch's concurring opinion as to the contrary. Turning then to reasonableness as a separate inquiry, the SJC acknowledged that Justice Alito's concurrence could be read to suggest "that the connection to the litigation is stronger in the State in which the injury occurred (New Hampshire) than in the State in which the first sale occurred (Massachusetts)," but found that "both are strong enough where the defendant does substantial business in the State at issue to satisfy the requirements of due process"—certainly Massachusetts had a strong regulatory interest in the sale of defective cars.

Finally—and this point may be critical to press in class discussion—the SJC distinguished ***Bristol-Myers*** by finding no evidence of forum-shopping by plaintiffs.

> The plaintiffs originally filed their suit in New Hampshire, the State of residence and injury, and only brought this suit in the State of first sale after the defendants argued, and the Federal District Court in New Hampshire concluded, prior to the Ford Motor decision, that jurisdiction did not lie in the State in which the injury occurred. As the defendants are now arguing the exact opposite position, and the plaintiffs have been bounced from court to court for years, the values of "fair play and substantial justice," as well as interstate federalism, clearly now support jurisdiction in Massachusetts.

Consent as Another Basis of Jurisdiction

V&A Collection, LLC v. Guzzini Properties Ltd., 46 F.4th 127 (2d Cir. 2022).

The facts present a good hypothetical for exploring the boundaries of the consent theory for counterclaims set out in ***Adam v. Saenger***. The dispute concerned contested claims to different pieces of art. Guzzini, a collector, brought an *in rem* action in New York state court to quiet title to a Stingel artwork. V & A tried unsuccessfully to intervene in that action. V & A then brought an action for conversion against Guzzini in New York state court alleging interference with his part ownership of a Guyton artwork. Guzzini removed on the basis of diversity jurisdiction, the district court dismissed for lack of personal jurisdiction, and the Second Circuit affirmed, rejecting V & A's argument that by suing to quiet title in New York

state court, Guzzini had consented to jurisdiction in New York because both the quiet title and the conversion claim arose out of the same sale agreement.

The appeals court acknowledged that if a plaintiff brings a suit in a forum, it submits itself to the court's jurisdiction "with respect to all the issues embraced in the suit, including those pertaining to the counterclaim of the defendants." Moreover, it recognized that the First Circuit had expanded that rule "to extend consent jurisdiction to other lawsuits in the same forum arising out of the same transaction or occurrence." However, the rationale of the First Circuit's doctrinal extension did not apply to the facts of this case.

> This case concerns a dispute as to the ownership of the Guyton between V&A and Guzzini. At all times relevant to this litigation, the Guyton has been located in Switzerland. The state court case concerns the ownership of the Stingel, which is located in New York. The location of the Stingel dictated the forum of Guzzini's in rem action. * * * V&A alleges no ownership interest in the Stingel, and Guzzini did not name V&A as a party in that action. Accordingly, Guzzini's consent to jurisdiction in New York for purposes of the state in rem action does not extend that consent to other lawsuits.

AFC Franchising, LLC v. Purugganan, 43 F.4th 1285 (11th Cir. 2022).

The dispute involved a "floating forum-selection clause" in a development agreement, providing that the developer waived objections to personal jurisdiction in the state or judicial district in which "we" have "our" principal place of business at the commence of the action. Further, the agreement stated that none of its terms was intended to confer rights on any entity not a party to the agreement. The case was filed in state court and removed, seeking a declaratory judgment. The question on appeal was whether an assignee could enforce the forum term. The Eleventh Circuit reversed the district court's order dismissing the action. As a threshold matter, the appeals court considered whether state or federal law applied to interpretation of the forum term, and concluded it "needn't wade into these *Erie* waters," because the parties agreed which state's law should apply, and that state's law was harmonious with federal law on the issue. Further, the appeals court concluded the assignee could enforce the forum term. Among other things, the agreement itself said rights could be assigned to a third party "without restriction." The third question was whether the term as enforceable, and the party resisting enforcement failed to show that enforcing the term would be unreasonable or unjust. There was no fraud or overreaching; the clause was reasonably communicated; Alabama, as the selected floating forum, was not inconvenient and would not deprive defendant of a remedy; and enforcement would not frustrate any proffered public policy. A concurring opinion questioned the appropriateness of a declaratory judgment to discern the meaning of the forum term.

Internet and Other Technological Contacts

McCall v. Zotos, No. 22-11725, 2023 WL 3946827 (11th Cir. June 12, 2023).

The case presents a compact fact pattern discussing the relation between Internet contacts and purposeful availment. Consumer, a resident of Illinois, bought a Burberry scarf on Amazon. On inspection, the consumer was convinced the scarf was a knock-off and posted a negative review, refusing to take it down even after the vendors provided evidence of authenticity. Vendors, residents of Florida, sued for defamation in Florida district court. The Florida court held that it lacked personal jurisdiction over the consumer. After certifying the statutory question to the Florida Supreme Court, the Eleventh Circuit held that the consumer's posting of the review met the Florida long-arm statute's requirement for the commission of a tortious act in Florida—the review was accessible in Florida and accessed in Florida. As for due process, the Eleventh Circuit found that the claim arose out of the review and met the requirement that a direct causal relationship exist among the defendant, the forum, and the litigation. However, applying the intentional tort test as interpreted in Calder, the appeals court held that the consumer did not purposefully avail herself of the benefits of the Florida forum:

> [Consumer] wrote the allegedly defamatory review while in Illinois about a scarf she ordered on Amazon. Unlike the entertainer in *Calder*, whose reputation was harmed in the California-based entertainment industry, the alleged harm here was felt across the United States, as buyers from all 50 states can read the review on Amazon (and decide not to purchase items from * * * [the vendors]. Posting information on the internet "is not sufficient by itself to subject[ ] that person to personal jurisdiction in each State in which the information is accessed." * * * The mere fact that [the consumer] knew that the plaintiffs resided in Florida is not sufficient to show that Florida was targeted as the focal point of the statement.

(For another fact pattern, consider ***Brothers and Sisters in Christ, LLC v. Zazzle, Inc.***, 42 F.4th 948 (8th Cir. 2022), holding that Due Process as interpreted in *Calder* did not support the exercise of specific jurisdiction by Missouri in a suit by a trademark owner against a non-resident Internet-based seller based on a showing that one Missouri consumer accessed the seller's nationally available website and purchased a t-shirt bearing the trademark owner's logo. For a dispute involving Internet contacts and Rule 4(k)(2), consider ***Lang Van, Inc. v. VNG Corporation***, 40 F.4th 1034 (9th Cir. 2022), reversing the district court's dismissal for lack of personal jurisdiction. Lang Van, a California music distributor, sued VNG, a Vietnam-based website operator and mobile application, for infringing copyrights. Lang Van alleged that VNG had made their "copyrighted music available for download, worldwide" and that "VNG intentionally chose to release the Apps into the United States; consented to California jurisdiction, choice of law, and venue; and allowed hundreds of thousands of downloads by Apple iOS users and tens of thousands by app-based users on Google's platform.")

Jurisdiction Based on Power over Property

Prudential Insurance Co. of America v. Shenzhen Stone Network Information Ltd. 58 F.4th 785 (4th Cir. 2023).

The case involved the exercise of in rem jurisdiction under the Anticybersquatting Consumer Protection Act (ACPA), 15 U.S.C. § 1125. As the Fourth Circuit explained, "Cybersquatting refers to the registration, use, or sale of domain names in bad faith. The ACPA was designed to prevent cybersquatters from registering Internet domain names containing trademarks for the purpose of selling the domain name back to the trademark owner or a third party."

Under the ACPA, a trademark owner may challenge the misuse of a domain name by bringing an in personam action against a "suitable defendant" who registers, traffics in, or uses a domain name "identical or confusingly similar to or dilutive of" or a mark with the "bad faith to profit. The court must have personal jurisdiction over the suitable defendant. § 1125(d)(1)(A). If the mark holder cannot locate the current holder or cannot establish personal jurisdiction, then an alternative route is available: the mark holder can bring an *in rem* action against a domain name registered with the Patent and Trademark Office that infringes or dilutes a similar mark. § 1125(d)(2)(A). Congress enacted this alternative route recognizing, "'In an effort to avoid being held accountable for their infringement or dilution of famous trademarks, cyberpirates often have registered domain names under fictitious names and addresses or have used offshore addresses or companies to register domain names' H.R. Rep. No. 106-464, at 114 (1999).'"

In this case, Prudential sued a Chinese Internet company (SSN) for purchasing and re-registering a domain name identical to the insurance company's distinctive mark, and the district court exercised in rem jurisdiction over the domain name. Defendant argued that the listed registrant of the domain name was a suitable defendant, and that the registrant had submitted to personal jurisdiction in Arizona by signing GoDaddy's Registration Agreement. The Fourth Circuit affirmed the exercise of in rem jurisdiction. First, the listed registrant was not a suitable defendant under the ACPA because it was not the actual registrant, and throughout the discovery process SSN has stated it owned the domain name. Further, the appeals court held that the Registration Agreement did not require the registrant to submit to jurisdiction in Arizona for all legal disputes, but only disputes brought pursuant to GoDaddy's administrative proceeding provision, from which the ACPA claim was wholly separate. Nor did the record suggest that Prudential could have obtained in personam jurisdiction over SSN, which operated almost exclusively in China. Significantly, the Fourth Circuit held that whether an ACPA plaintiff can assert personal jurisdiction over a suitable defendant must be determined at the time of filing:

> As the district court reasoned, "to conclude otherwise would allow any foreign defendant to choose their desired forum for litigation after being sued in an ACPA

> action." * * * Foreign-based domain name registrants with no ties to the United States would be able to manipulate ACPA proceedings by simply consenting to personal jurisdiction in a forum of their choice after the action is initiated.

Herbal Brands, Inc. v. Photoplaza, Inc., ___ F.4th ___, No. 21-17001, 2023 WL 4341454 (9th Cir. July 5, 2023).

The manufacturer and distributor of health and wellness products sued Photoplaza, Inc., alleging that the online sellers' sales of its products violated its trademarks and constituted tortious interference with the manufacturer and distributor's agreements with its approved sellers. The district court dismissed for lack of personal jurisdiction, and the Ninth Circuit Court of Appeals reversed.

As a matter of first impression, the Ninth Circuit held:

> We now hold that if a defendant, in its regular course of business, sells a physical product via an interactive website and causes that product to be delivered to the forum, the defendant "expressly aimed" its conduct at that forum. Though the emergence of the internet presents new fact patterns, it does not require a wholesale departure from our approach to personal jurisdiction before the internet age.

The appeals court explained that selling physical products over the Internet was akin to "selling those same products to a forum resident through a mail-order catalog." Establishing that defendant "expressly aimed" its conduct at the forum required a dual showing:

> First, the sales must occur as part of the defendant's regular course of business instead of being "random, isolated, or fortuitous." * * * Second, the defendant must exercise some level of control over the ultimate distribution of its products beyond simply placing its products into the stream of commerce.

In this case, the complaint made out a prima facie showing with allegations that defendants "exercised control over distribution: they created and maintained a distribution network that reached the relevant forum by choosing to operate on a universally accessible website that accepts orders from residents of all fifty states and delivers products to all fifty states," and so "expressly aimed their conduct at Arizona." Citing to ***Burger King***, the appeals court emphasized that the express-aiming inquiry does not depend on the number of sales made to customers in the forum."

Jurisdictional Reach of the Federal District Courts

Douglass v. Nippon Yusen Kabushiki Kaisha, 46 F.4th 226 (5th Cir. 2022).

The case raises the important question of the standard to apply when determining the constitutionality of the exercise of specific jurisdiction under Federal Rule 4(k)(2). The facts are compelling: following the collision in Japanese waters between a U.S. Navy ship and a ship chartered by a Japanese corporation, the injured Navy sailors and the relatives of deceased Navy sailors sued the company on federal claims in federal court invoking admiralty jurisdiction. The cases were consolidated on appeal. On rehearing en banc, Judge Jones, writing for a majority, held that Fifth Amendment due process required the same "minimum contacts" with the United States as the Fourteenth Amendment required with a forum state. The Court also held that exercising general jurisdiction over the Japanese corporation would be a violation of due process.

The en banc court reasoned that both the Fifth and the Fourteenth Amendments "use the same language and serve the same purpose," and therefore the Fourteenth Amendment "minimum contacts" standard was appropriate for Fifth Amendment personal jurisdiction cases. In particular, the court rejected the argument that "the Fifth Amendment due process inquiry is simply whether a defendant, sued on a federal claim, was doing enough systematic and continuous business in the United States that it had fair notice it could be subjected to suit in federal courts," calling that theory "novel" and at odds with "the traditional distinction between general and specific personal jurisdiction."

Additionally, the court affirmed that exercising general jurisdiction over the Japanese company would be a violation of due process because the company's place of incorporation and its headquarters were in Japan; its U.S. port calls comprised only six to eight percent of all its port calls (citing ***Daimler*** for the proposition that a minimum contacts analyses is "an inherently comparative inquiry"); and its U.S. employees constituted "less than one and one-half percent of all its employees" (again, citing ***Daimler*** for the proposition that a minimum contacts analyses is "an inherently comparative inquiry").

Judge Ho, concurring, argued that precedent determined the result and that until the Supreme Court called for a different standard, drawn from the text of the amendments and original understanding, he would "stick with the simplicity of the approach adopted by the majority of my colleagues." Three separate dissents, by Judges Elrod, Higginson, and Oldham, variously argued in favor of a different Fifth Amendment standard for personal jurisdiction, emphasizing differences in the text and history of the amendment from that of the Fourteenth Amendment.

Many of the dissents' arguments about constitutional history are beyond the scope of the 1L course. However, classroom discussion can focus on whether federalism concerns ought to

play any role in interpreting Federal Rule 4(k)(2) in determining personal jurisdiction over federal claims by U.S. citizens who are injured abroad by a foreign defendant.

In re: Stingray IP Solutions, LLC, 56 F.4th 1379 (Fed. Cir. 2023).

The circuits currently are divided on whether a defendant can defeat jurisdiction under Federal Rule 4(k)(2) by unilaterally consenting to jurisdiction in a district other than the district in which plaintiff has filed suit. The action was a patent infringement suit against companies based in China and Hong Kong; the patentee filed the action in the Eastern District of Texas, and defendants moved to dismiss for lack of personal jurisdiction and to transfer to the Central District of California.

The Federal Circuit, like the First Circuit, uses a burden-shifting negation rule when applying Rule 4(k)(2)—defendant is given an opportunity to designate a forum in which it is amenable to suit, and the district court can transfer the action to that district. If defendant does not designate such a forum, then the district court may invoke jurisdiction under Rule 4(k)(2) assuming its requirements otherwise are met. The Federal Circuit granted mandamus to determine whether defendant meets the negation burden by consenting to jurisdiction in a forum in which suit could not have been brought absent consent. Drawing from the venue analysis in ***Hoffman v. Blaski***, the Federal Circuit held that Rule 4(k)(2) does not "permit a defendant to achieve transfer to a preferred district simply by unilateral, post-suit consent." Rather, considerations of "fairness and convenience" under 28 U.S.C. § 1404 apply.

Lewis v. Mutond, 62 F.4th 587 (D.C. Cir. 2023).

The facts of this case make it a compelling teaching vehicle for faculty who discuss the relation between procedure and human rights. It also raises the same question as in *Douglass*, above, namely the Fifth Amendment due process standard for determining jurisdiction under Federal Rule 4(k)(2). Lewis, a U.S. citizen, worked as a security advisor to a presidential candidate in the Democratic Republic of the Congo. He sued defendants, DRC foreign officials, alleging they detained and tortured him for several weeks. The D.C. Circuit Court of Appeals upheld the district court's finding that it lacked personal jurisdiction under Federal Rule 4(k)(2), explaining: "[W]e must answer whether the Foreign Officials purposefully availed themselves of the United States by torturing Lewis to extract a false confession that he was an American mercenary. We think not."

The appeals court assumed that the judicially created categories of general and specific jurisdiction for assessing due process under the Fourteenth Amendment apply to the Fifth Amendment due process determination under Federal Rule 4(k)(2), noting that in the absence of a Supreme Court decision, most circuits and the D.C. Circuit Court of Appeals itself believed that "little jurisdictional daylight exists between the two Amendments [the Fifth Amendment and

the Fourteenth Amendment]. * * * Exceptions occur when the Fifth Amendment does not cover a particular entity, such as States of the Union or sovereign foreign states, not when foreign persons are involved." On the question of purposeful direction, the court wrote: "To start, torture alone of an American abroad, unless directed at the United States, is 'insufficient to satisfy the usual 'minimum contacts' requirement'" (quoting ***Price v. Socialist People's Libyan Arab Jamahiriya***, 294 F.3d 82, 95 (D.C. Cir. 2002)). In the court's view, Lewis' American citizenship was only "incidental to the Foreign Officials' chief concern: that mercenaries * * * were attempting to influence the DRC's presidential elections." The Court disagreed with Lewis that "the Foreign Officials meant to avail themselves of the United States by merely accusing American citizens of being mercenaries," that the defendants desired to "entangle the United States in a geopolitical conflict," or that the defendants wished to influence U.S. politics (and thus avail themselves of the United States).

The appeals court also held the district court did not abuse its discretion in denying jurisdictional discovery: "Requesting relevant correspondence from the Foreign Officials is likely to be a fishing expedition because it is unlikely to uncover that they were part of any scheme to target the United States. Nevertheless, because Lewis failed to make any specific discovery requests until his reply brief, that argument is waived on appeal."

Judge Rao concurred, noting "there are reasons to reconsider whether the personal jurisdiction limits required by the Due Process Clause of the Fifth Amendment are identical to those of the Fourteenth," pointing to recent originalist scholarship, and that "in an appropriate case we should reassess what limits the Fifth Amendment places on the federal courts' exercise of personal jurisdiction over foreign defendants."

Will Co., Ltd. v. Lee, 47 F.4th 917 (9th Cir. 2022).

The case involves the application of Rule 4(k)(2) in a copyright suit brought by a Japanese adult entertainment producer against a Hong Kong-based video hosting site. On appeal, the Ninth Circuit focused on whether, under ***Calder***, defendant purposefully directed their activities at the forum, namely the United States. The appeals court first asked whether defendant committed an intentional act; this factor was met by defendant's purchasing its domain name, purchasing domain privacy services, and operating a passive website. Whether defendant expressly aimed the site at the U.S. market was a closer question and required, as the court put it, "something more" than merely making a website accessible in the United States. The court considered defendant's advertising structure and efforts to cultivate a U.S. audience: its decision to host the website in Utah to reduce load time and to optimize search engine results; and the decision to post in English a Privacy Policy relevant almost exclusively to viewers in the United States. The court then turned to ***Keeton*** to assess whether the challenged conduct caused foreseeable harm in the United States:

> While just 4.6% of ThisAV.com's views occurred in the United States during the relevant period, that amounted to over 1.3 million visits, an undeniably "substantial" number. * * *
>
> We also find that the harm was foreseeable. The operators * * * actively appealed to a U.S. audience, knew that a significant number of people in the United States were actually viewing the website, and were put on notice that they were hosting infringing content when Will Co. sent them a takedown notice. In light of that, it's hard to see how Defendants could have failed to anticipate the harm that occurred in the forum.

Finding purposeful direction, the circuit court remanded for the district court to conduct the remainder of the Rule 4(k) analysis.

Peters Broadcast Engineering, Inc. v. 24 Capital, LLC, 40 F.4th 432 (6th Cir. 2022).

The decision discusses how to establish personal jurisdiction in a civil action under the federal Racketeer Influenced and Corrupt Organizations Act (RICO), which contains provisions governing nationwide service of process and venue. 18 U.S.C. § 1965(a)–(d). The Sixth Circuit held, as a matter of first impression and joining the majority of circuits,[4] that the court is to use a forum-state approach in which RICO "does not provide for nationwide personal jurisdiction over every defendant in every civil RICO case, no matter whether the defendant is found." Rather, "nationwide jurisdiction hinges on whether at least one defendant has minimum contacts with the

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[4] The Court summarized the circuit division as follows:

> Over the past thirty years, a split has emerged as the circuits determined which RICO venue and process subsection permits service of process on out-of-district defendants. The minority approach, adopted by the Fourth and Eleventh Circuits, holds that § 1965(d) governs service over out-of-district defendants. Subsection (d) broadly allows process "on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs." * * * The Eleventh Circuit held that subsection (d) "provides for service in any judicial district in which the defendant is found." * * * The Fourth Circuit * * * reached the same conclusion. * * * This "national contacts" approach considers "a defendant's aggregate contacts with the nation as a whole rather than his contacts with the forum state." * * *.
>
> The majority approach holds that § 1965(b) governs service over out-of-district defendants. Subsection (b) provides that if "other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof." * * *. The Second, Third, Seventh, Ninth, Tenth, and D.C. Circuits have adopted this "forum state" approach. * * * These circuits considered 18 U.S.C. § 1965 in its entirety to hold that the statute "does not provide for nationwide personal jurisdiction over every defendant in every civil RICO case, no matter where the defendant is found." * * *. Rather, because "§ 1965(a) grants personal jurisdiction over an initial defendant ... to the district court for the district in which that person resides, has an agent, or transacts his or her affairs," nationwide jurisdiction hinges on whether at least one defendant has minimum contacts with the forum state.* * *

forum state," and whether "the ends of justice" require it. Rejecting plaintiff's argument that RICO is to "be liberally construed to effectuate its remedial purposes," the appeals court defended the forum-state approach as "ensu[ring] that there will be at least one federal forum for all defendants in a single civil RICO trial," even though it "does not provide for absolute nationwide personal jurisdiction over every defendant in every civil RICO case."

The action was brought by a broadcasting company against a financing business and its operations manager and alleged RICO and state law claims. Defendant 24 Capital was a New York LLC with its principal place of business in New York; Defendant Jason Sanko was a resident of Florida. Peters Broadcast claimed pendent jurisdiction over the state law claims, via its RICO claim.

Under the forum-state approach, the Sixth Circuit affirmed the district court's granting of a motion to dismiss, holding that the broadcasting company had not established a *prima facie* case of sufficient minimum contacts between Ohio and the financing business or its operations manager. Although Peters Broadcast alleged that the injurious conduct took place in Ohio and that "24 Capital Enterprise has a history of involvement within Ohio, Indiana, Florida, Washington, D.C., and throughout the United States," these allegations were insufficient to establish personal jurisdiction because they failed to explain "what acts or activities occurred in the state." Additionally, the financing company submitted evidence that:

> 24 Capital does not market or advertise its funding products in the State of Ohio and does not transact business in the State of Ohio. The Merchant Agreement was not entered into in the State of Ohio, 24 Capital is not located in Ohio, and the Merchant Agreement provides for jurisdiction and venue in New York. There is simply no reason why 24 Capital would anticipate being hailed [sic] into court in Ohio.
>
> Sankov does not reside in Ohio, has never transacted business in Ohio and has no contacts with Ohio whatsoever. There is likewise simply no reason why Sankov would anticipate being hailed [sic] into court in Ohio.

Nor did 24 Capital's website subjected it to personal jurisdiction as a form of "virtual presence." Rather, this website "would settle only purposeful availment of the forum state and neither of the other two requirements to establish minimum contacts." Thus, the district court properly dismissed the action, as the plaintiff did not establish that the defendants had minimum contacts with the forum.

(For another case focusing on the scope of the Fifth Amendment due process clause when interpreting the jurisdictional reach of Rule 4(k)(2), see **Herederos De Roberto Gomez Cabrera, LLC v. Teck Resources Limited, 43 F.4th 1303 (11th Cir. 2022)**, an action by the

owner of property seized by the Cuban government against a nonresident mining company for unlawfully trafficking in confiscated property in violation of the Helms-Burton Act, also known as the Cuban Liberty and Democratic Solidarity Act.)

Challenging a Court's Exercise of Jurisdiction over the Person or Property

Estate of Beauford v. Mesa County, Colorado, 35 F.4th 1248 (10th 2022).

The opinion in part raises the issue of the timeliness of an objection to personal jurisdiction. The estate of a Black male who died following an epileptic seizure in his prison cell sued the county, sheriff, private health care companies, and others alleging deliberate indifference to serious medical needs and a violation of the Eighth Amendment. After "actively defending against the Estate's lawsuit for years," the county defendants raised an objection to personal jurisdiction, which the district court did not address on the ground that it was moot, having already entered summary judgment in favor of the county defendants. On appeal, the Tenth Circuit in part reversed the grant of summary judgment, so the challenge was no longer moot, but held that the personal jurisdiction objection was waived, quoting a prior Tenth Circuit opinion: "After its lengthy participation in this litigation, * * * [Defendant] may not pull its personal jurisdiction defense out of the hat like a rabbit," citing to Federal Rule 12.

Webber v. Armslist LLC, 70 F.4th 945 (7th Cir. 2023).

Estate representatives of two individuals killed by guns that had been listed on an online firearms marketplace sued the marketplace, which was a limited liability company, and its manager alleging negligence and other claims. The district court dismissed the complaint, and plaintiffs appealed. One ground for dismissal was whether the manager was subject to personal jurisdiction in Wisconsin; the manager had designed the marketplace to be accessible in Wisconsin, but there was no allegation that he anticipated receiving financial benefits from users in that state. But before reaching that question, the Seventh Circuit considered whether the manager had waived his objection to personal jurisdiction by failing to cross-appeal, and held there was no waiver because a cross-appeal was not required:

> A cross-appeal is required when a party seeks to modify the district court's judgment. * * * "The judgment is not the court's opinion or reasoning; it is the court's bottom line ...." * * * A cross-appeal permits an appellant "the same right to respond to his opponent's brief" and "alert[s] the court to the dual role of the parties in the appeal." * * *
>
> Here, the judgment is the dismissal of the case and entry of final judgment. Dismissing the case for lack of personal jurisdiction would not modify that judgment.

Chapter 3—Providing Notice and an Opportunity to Be Heard

The Requirement of Reasonable Notice

Grimm v. City of Portland, --- F.Supp.3d ---, 2023 WL 2456309 (D. Or. 2023).

After ***Jones v. Flowers***, what is the government's obligation to take follow-up steps if it has reason to believe that an attempted notice prior to seizure of property has failed? This case raises that question in the context of a municipal ordinance authorizing a car to be towed after being illegally parked. In an earlier appeal, the Ninth Circuit reversed the grant of summary judgment in favor of the city on the ground that the court erred in applying ***Mathews***, instead of ***Mullane***, to the adequacy-of-notice claim. See **Grimm v. City of Portland, 971 F.3d 1060 (9th Cir. 2020)**. On remand, the district court was instructed to consider these, among other, questions, each of which raises interesting issues for class discussion and highlights the context-specific nature of the due process inquiry:

> (1) Is putting citations on a car that do not explicitly warn that the car will be towed reasonably calculated to give notice of a tow to the owner?;
>
> (2) Did the red tow slip placed on Grimm's car shortly before the tow provide adequate notice?; and
>
> (3) Was Portland required under ***Jones*** to provide supplemental notice if it had reason to suspect that the notice provided by leaving citations and the tow slip on Grimm's windshield was ineffective?

On appeal for the second time, the Ninth Circuit first considered whether the notice was systemically defective. The record, unlike in ***Greene***, showed "no information that the City's method of notice by posting citations and a warning slip on the vehicle was repeatedly failing to notify drivers," and so the court treated the pre-tow notice protocol as constitutionally adequate. As to the individualized notice, the appeals court found that citations left on the driver's car did not meet ***Mullane***'s standard because they failed to state explicitly that a car left illegally parked would be towed. However, the parties stipulated that two other notices were placed on the car: a warning and a tow slip. The warning was constitutionally adequate because it explicitly stated an illegally parked car would be towed. The tow slip was not adequate because it was issued "shortly" before the towing and was not reasonably calculated to inform the driver of the possible seizure. The Ninth Circuit also considered whether Jones required the city to take additional steps; the record showed that the notices were on the car at the time of towing, suggesting they were not read, and that the city was on notice that its communications were not effective. The appeals court held that under the circumstances described in the record, the city

was not obligated to take supplemental steps because practicable alternatives for notice did not exist; indeed, the circuit court "categorically" rejected the need for additional mail notice:

> The parties stipulated to the fact that the City did not have access to the contact information inputted into Parking Kitty. The City did not have Mr. Grimm's email address or phone number, making these methods of communication impracticable for providing service. Further, the parties agreed to the fact that Parking Kitty is not configured to allow the City to send notifications regarding towing or citations.
>
> [The driver] also insists that sending pre-tow notice by mail was required to satisfy [***Mullane/Jones***]. However, sending pre-tow notice by mail is not a "reasonable step" in the context of street parking. The City has a legitimate interest in regulating downtown parking, which entails towing vehicles that remain illegally parked for a certain period of time. Sending pre-tow mail would severely interfere with the City's ability to timely enforce its parking codes. The mail would take several days to arrive at the registered owner's house or potentially longer if, as here, the car is registered out of state. This is not a reasonable method of notice given the necessity of keeping city streets clean, safe, and orderly.

The Mechanics of Giving Notice

Hudson Furniture, Inc. v. Mizrahi, No. 1:20-cv-04891-PAC-RWL, 2022 WL 16954854 (Fed. Cir. Nov. 16, 2022).

The decision offers a good fact pattern for discussing alternative service under Federal Rule 4(f)(3). Hudson, a high-end lighting company, filed federal claims for copyright, trademark, and patent infringement against a designer/wholesaler who posted photos of Hudson's products on his website. Hudson did not know defendant's whereabouts. He contacted defendant's U.S. counsel, who, after speaking with his client, stated he was not authorized to accept service on his client's behalf. Hudson believed defendant last resided in Austria, and moved ex parte to serve by alternative service under Rule 4(f)(3), Specifically, Hudson requested to permission to serve "via RPost email to a list of email addresses known to be used by [defendant] Mizrahi and by mail to [defendant's U.S. counsel]. Hudson notified counsel of the motion, and counsel did not oppose it. The court granted leave, and Hudson effected service. Defendant then sought leave to reconsider the order granting alternative service and moved to dismiss for lack of personal jurisdiction for improper service. Defendant appealed to the Second Circuit, and that court transferred the appeal to the Federal Circuit, which applied the Second Circuit abuse-of-discretion standard. The Federal Circuit held it was not an abuse of discretion to require a showing that plaintiff first attempted service by conventional means, finding that "no such

blanket requirement exists" and that Hudson showed sufficient cause. Finally, the mode of alternative service used met due process requirements because it was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (quoting ***Mullane***). As the appeals court explained, plaintiff showed that the U.S. counsel had previously represented defendant before the same court in similar litigation; provided an affidavit from defendant that he personally used two of the email addresses used for service; and "RPost confirmed that 12 of the email addresses opened the communications, including the two * * * [that defendant] admitted to using, and three of the addresses downloaded the papers." Finally, the court noted that after service, defendant appeared in the action and challenged the grant of alternative service, "showing actual notice of the litigation."

Xochipa v. IHR1 Construction Inc. et al, Docket No. 1:22-cv-07332 (S.D.N.Y. Aug 27, 2022).

This brief order discusses the standard of impracticability under New York law for determining whether alternative service may be ordered under Federal Rule 4. The facts showed that plaintiff's process services repeatedly attempted to serve defendants, and that after diligent efforts could not locate additional addresses or confirm that the known address is indeed defendants' correct addresses. Permission was granted to serve by plaintiff's requested mode, namely, by certified mail, iMessage, WhatsApp, and follow-up phone calls, plus an enlargement of time for service, specifying that phone calls were to be made once a week for three consecutive weeks. The court called this a "multi-prong" approach and found that it was calculated under all the circumstances to apprise defendants of the lawsuit.

Commodities & Mins. Enter. Ltd. v. CVG Ferrominera Orinoco, C.A., 49 F.4th 802 (2d Cir. 2022), cert. denied sub nom. CVG Ferrominera Orinoco, C.A. v. Commodities & Mins. Enter. Ltd., 143 S.Ct. 786 (U.S. 2023).

The decision, involving Rule 4, offers a detailed exercise in statutory interpretation when multiple sources must be considered. The case involves a dispute between a mineral-trading firm and a mining company owned by the Venezuelan government that resulted in an arbitral award. Ferrominera sought to block confirmation of the award arguing, among other things, that the service of notice of the application to confirm was defective and so the court lacked personal jurisdiction. On appeal of the district court's confirmation, the Second Circuit, as a matter of first impression, held that service, even without an accompanying summons, was sufficient under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Federal Arbitration Act to establish personal jurisdiction. In particular, the FAA requires only service of notice, not also a summons, and although the FAA incorporates other federal statutes through the Federal Rules of how service must be made on a foreign instrumentality, those cross-references, according to the court, did not change what must be served under the FAA.

B.T. v. Silver Diner Dev., LLC, No. 2:22CV94, 2022 WL 3372755 (E.D. Va. Aug. 16, 2022).

The decision involves an issue that currently divides the circuits: whether a state summons issued before removal is effective after removal, or whether 28 U.S.C. § 1448 requires new process. This case, involving claims of sexual harassment by an under-age restaurant worker, against multiple defendants, began in state court. Plaintiff attempted service on one defendant, a non-resident, under the Virginia long-arm statute that permitted service on non-residents via certified mail from the Secretary of the Commonwealth. Specifically, she paid the fee; mailed the summons, a copy of the complaint, and an affidavit for service of process to the Secretary; and waited for acknowledgment that the Secretary was served. One day after a second defendant removed the action to federal court, the Secretary acknowledged receipt. Plaintiff then completed service using the state summons. Defendant moved to dismiss under Rule 12(b)(4), arguing that although § 1448 permitted service to be completed with a previously issued state process after removal, that rule did not apply because defendant had not been served at all prior to removal. The court rejected that argument:

> This reading, however, conflicts directly with the text of § 1448. Section 1448 covers three situations that may occur before removal: (1) "any one or more of the defendants has not been served with process," (2) "the service has not been perfected prior to removal," or (3) the "process served proves to be defective." If any of these situations arises, § 1448 states that service of state court process "may be completed." There is no indication from the text that the phrase "may be completed" is limited to scenarios two and three, as Haliburton seems to argue. Therefore, to maintain fidelity with the text, the Court concludes that when a state court issues process before removal, but a defendant is not served before removal, § 1448 allows a plaintiff to either (1) complete service of previously issued state process, or (2) obtain a summons in federal court and serve it pursuant to the Federal Rules of Civil Procedure.
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> Applied here, Plaintiff clearly fits into the first category: the state court issued process before removal, Plaintiff attempted to complete service on Haliburton before removal, and Plaintiff ultimately completed service of state process shortly after removal.

The issue presents an excellent problem for a classroom problem involving statutory interpretation and the interplay between state procedure, Rule 4, and removal procedure.

Smart Study Co., Ltd. v. Acuteye-US, 620 F.Supp.3d 1382 (S.D.N.Y. 2022).

Moonbug Ent. Ltd. v. Autumn Sell, No. 21 CIV. 10328 (NRB), 2023 WL 2051247 (S.D.N.Y. Feb. 16, 2023).

Montano v. Herrera, No. 22-CV-7272, 2023 WL 2644340 (S.D.N.Y. 2023)

These three cases present different compact fact patterns for considering whether and when service by email of a foreign defendant is sufficient under Federal Rule 4(f). The decisions also discuss whether such service meets due process concerns. ***Smart Study*** and ***Moonbug*** both involved Chinese defendants. In the former, the district court denied a request to serve by email on the ground that China objected to such service under the Hague Convention. In particular, plaintiff did not send the relevant documents to China's Central Authority or in any other way comply with the Hauge Convention. In ***Moonbug***, the district court permitted alternative service by email finding that the Hague Convention did not apply because defendants; addresses were not known despite a showing of reasonable diligence by plaintiff in attempting to discover a physical address (including seeking the information from Amazon; investigating information on defendants' Amazon merchant storefronts; securing translations of the information; and comparing the addresses to information obtained through expedited discovery). In ***Montano***, the district court permitted email service; plaintiff showed a reasonable effort to comply with the Hague Convention but the Venezuelan Central Authority refused to accept the package and its process server showed it had been unable to deliver any such packages to the Venezuelan Central Authority for three years.

Opportunity to Be Heard

Dorsey v. Varga, 55 F.4th 1094 (7th Cir. 2022).

Those of you who teach ***Lassiter*** and the right-to-counsel as an aspect of due process might be interested in this decision of the Seventh Circuit affirming the denial of counsel under 28 U.S.C. § 1915(e)(1). The action was brought by a state prisoner alleging Eighth Amendment violations (also discussed in this Memo in relation to Chapter 9). In the Seventh Circuit, decisions to appoint counsel under 28 U.S.C. § 1915(e)(1) are governed by two factors: "(1) has the indigent plaintiff made a reasonable attempt to obtain counsel or been effectively precluded from doing so; and if so, (2) given the difficulty of the case, does the plaintiff appear competent to litigate it himself?" The decision is reviewed for abuse of discretion, and the granting of relief requires not only a showing of an abuse of discretion, but also a showing of prejudice—"that is, when there is 'a reasonable likelihood that the presence of counsel would have made a difference in the outcome of the litigation.'" The appeals court found that plaintiff had made good faith efforts, and rejected the argument that the COVID-19 pandemic (and the closing of the prison library) changed the calculus. As to the complexity of the suit, the Seventh Circuit emphasized

that the difficulty of proving a deliberate indifference claim "increases as the case progresses," and here the request for counsel came at the PLRA screening stage; any procedural barriers to a fair opportunity to present claims and defenses could be lightened, in the appeals court's view, by the lower court's instructions on how to replead claims. Moreover, there was no showing that the prisoner's injuries impeded his ability to present his claims; to the contrary, his "filings were impressively cogent." The appeals court emphasized that the denial of counsel was without prejudice, and the request could be renewed on remand.

Cahoo v. SAS Inst., Inc., ---- F. 4th ---, 2023 WL 4014172 (6th Cir. 2023).

The case involves technology, due process, and the relation between the fact-specific, contextual nature of procedural due process and a government official's defense of qualified immunity. Although the immunity question may be beyond the ken of some 1L courses, the case highlights how the due process analysis shifts from the Rule 12(b)(6) stage, when the allegations of the complaint are accepted as true, and Rule 56, when the party must come forward with evidence of the violation. Although on a motion to dismiss the appeals court found that the right to procedural due process was clearly established, and that the government officials were not entitled to qualified immunity, after discovery on summary judgment the court held that the specific procedural violation was not clearly established and dismissal of the claim was affirmed.

In 2013 Michigan's Unemployment Insurance Agency began administering its state unemployment benefits through an automated program called MiDAS. The program had access to records of benefit recipients receiving benefits or who had received benefits six years prior to implementation of the program, and cross-checked files for discrepancies that the agency then put through an income-spreading formula and in certain circumstances deemed to be fraud without inquiring whether the claimant had actually truthfully reported income for the period in question and without giving the claimant notice that they had been targeted for fraud. Rather, MiDAS automatically sent a multiple-choice questionnaire to the target that was to be returned within ten days, asking such questions as, "Why did you believe you were entitled to benefits?" Answers included "I needed the money," and if the claimant answered yes to any of the questions, or did not return the questionnaire, MiDAS auto-adjudicated the fraud issue and automatically determined whether the claimant knowingly and intentionally misrepresented or concealed information to unlawfully receive benefits. MiDAS sent the questionnaire to the claimant's online account established through the state's Web Account Management System; but because some targets had not received benefits for many years, many accounts were dormant. MiDAS took no additional steps to make sure the target actually received the questionnaire. An auto-determination of fraud resulted in immediate benefit termination and the assessment of monetary penalties equal to restitution plus an amount equal to four-times the amount of benefits received or sought, and these penalties were assessed even if the target did not receive benefits. At this stage, MiDAS automatically sent the target a statement letter demanding payment, and the letter stated that nonpayment could result in garnishment of wages.

A lawsuit followed, filed as a putative class action, and in 2019 the Sixth Circuit, on interlocutory appeal, held that the individual agency officials were not entitled to qualified immunity with respect to the alleged due process violations. See **Cahoo v. SAS Analytics Inc., 912 F.3d 987 (6th Cir. 2019).** The 2019 decision sets out an excellent discussion of procedural due process, the right to notice, and the right to be heard, and the appeals court concluded "any reasonable official would have known that depriving Plaintiffs of their protected property interests in the manner alleged violated their due process rights." On remand, discovery proceeded, the district court denied class certification, and the court then granted defendants' motion for summary judgment in part, but denied two supervisors' motion in part. The present appeal held that the supervisors were entitled to qualified immunity: "No case put [the supervisor] on notice that these pre-deprivation forms and appeal procedures for these plaintiffs in this context did not stack up." Discovery showed:

> MiDAS provided the four specific plaintiffs with some notice and an opportunity for a hearing before any of those later property deprivations occurred. It sent fact-finding questionnaires and two notices of determination to each plaintiff. * * * The questionnaires stated that claimants could submit information on top of answering the multiple-choice question. * * * The two notices detailed the challenged benefits period, relevant employer, fraud finding, and applicable statute. As the district court put it, these notices "provided an adequate description" of the alleged wrongdoing. * * *
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> Now that we know MiDAS did not immediately terminate *these plaintiffs'* ongoing benefit payments without pre-deprivation process, cases like *Goldberg* and our prior opinion do not tell us what to do with the remaining claims in the case. What was once relatively easy to answer no longer is. In today's distinct setting, we must keep in mind that due process's "flexible and fact intensive" nature makes it "less likely it will be clearly violated in a case without similar facts." * * * That is the case here. The content of the two notices, the opportunity for a hearing, and the months- or years-long delay before these plaintiffs faced a deprivation distinguish this case from existing due process precedent.

Yohannes v. Olympic Collection Inc., No. C17-509-RSL, 2022 WL 17832263 (W.D. Wash. Dec. 21, 2022), appeal filed (9th Cir. No. 22-36059 Dec. 28, 2022).

The case raises the question whether due process under ***Mathews v. Eldridge*** requires notice and an opportunity to be heard after entry of a default judgment and before wage garnishment. It also provides a window into a well-documented phenomenon: default judgments in debt cases. Plaintiff received dental treatment in 2002. He had an outstanding bill of $389.03. In 2006 the claim was assigned to a collection agency, and the agency filed a state court collection agency. By that time the amount owed totaled more than $790 given interest. That

same year, defendant's process server completed a declaration of service, reciting he had arranged a meeting with the consumer. About a month later the state court entered a default judgment. The collection agency tried to collect on the judgment but "paused" those efforts when it was not able to locate the judgment-debtor's address and employer. Ten years later, the collection agency learned that the judgment-debtor worked for the federal Department of Transportation. The collection attorney signed the Writ of Garnishment and directed it to the U.S. Department of Interior which was responsible for Transportation's payroll services. Interior responded to the writ and wrote a letter to the employee informing him of the garnishment, and in May 2016 two checks, totaling more than $1200, were garnished. However, it turned out that the judgment had expired that month and the collection agency returned the money, cleared the debt from the consumer's credit report, and released the writ of garnishment. Several months later, the consumer sued, alleging claims under state consumer protection statutes, federal statutes, and federal due process. The district court dismissed the action. On appeal, the Ninth Circuit addressed the due process issue, and found that the evidence suggested that the consumer had never received notice as required under state law, and vacated. On remand, the district court again dismissed, giving an extended discussion of state procedural requirements and Supreme Court decisions interpreting ***Mathews***, and in the absence of Ninth Circuit precedent, held that notice or hearing are not required before a post-judgment attachment. An appeal is pending.

Todman v. Mayor & City Council of Baltimore, No. CV DLB-19-3296, 2022 WL 4548640 (D. Md. Sept. 29, 2022).

In 2007, Baltimore City enacted City Housing Code § 8A-4, treating as abandoned all property remaining in a tenant's apartment after eviction, with no period to reclaim the possession, and providing no notice to holdover tenants. After the bill's enactment, the Mayor's Office "erroneously announced the law would provide residents facing eviction with a 'five-day advance notification' and 'the opportunity to keep their belongings in covered storage for three days after the eviction for a modest cost.'"

The court proceeding leading to the eviction of the ***Todman*** plaintiffs at no point "notified [them] that any personal possessions still in the home on eviction day would be deemed abandoned." Based on the judge's statements, the tenants believed the eviction would take place August 2. Prior to that date, a form notice of eviction was mailed to the tenants; that form recited "any personal property left in or around the rental unit is considered abandoned"; and "[t]he tenant has no right to the property." The eviction took place on July 31 while the tenants were at work; they contested receiving the notice. Over a period of months, the landlord and tenant texted about the eviction and return of possessions. The landlord returned a motorcycle, but apparently never returned a flatscreen TV, furniture, clothing, other items, and family photos and claimed that the tenants had orchestrated a break-in to the apartment because they wanted him "to buy" things for them.

The tenants sued the City and landlord, challenging the constitutionality of the statute and alleging, among other things, conversion under state law. After discovery, plaintiffs moved for summary judgment on the due process claim. The decision offers a clear discussion of procedural due process in an as-applied challenge, carefully considering ***Mullane*** and the competing interests balanced under three-part ***Mathews*** test, and held (1) "Due process required the City to provide the plaintiffs with adequate notice of the state-ordered abandonment of their personal property to allow them an opportunity to remove their possessions before the eviction or to knowingly relinquish their right to them. What little notice was proved was inadequate"; and (2) "Because the plaintiffs did not receive any opportunity to be heard on the issue of abandonment and thus had no way to present their claim of entitlement, the operation of § 8A-4 violated their procedural due process rights."

Chapter 4—Jurisdiction over the Subject Matter of the Action—the Court's Competency

Subject-Matter Jurisdiction in State Courts

Notes and Questions: The Distinction between Subject Matter Jurisdiction and the Merits

Wiener v. AXA Equitable Life Ins. Co., 58 F.4th 774 (4th Cir. 2023).

The decision involved appeal of a post-trial dismissal of a case for lack of subject matter jurisdiction, and highlights the difference between jurisdiction and choice of law. Wiener, a Connecticut resident, sued AXA in North Carolina state court, alleging it reported false diagnosis codes to an information exchange, rendering him uninsurable. AXA removed. The case was tried to a jury under North Carolina law, which awarded $8 million in damages. Post trial, AXA sought relief from the judgment, including to dismiss for lack of subject matter jurisdiction. AXA argued that North Carolina law preempted Wiener's negligence claim and deprived the court of jurisdiction. Wiener argued the North Carolina statute did not apply because he lived in Connecticut. The district court sua sponte undertook a choice of law analysis and held Connecticut law applied, that Connecticut law provided exclusive remedies for the claims, and that the state statute ousted the federal court of jurisdiction. On appeal, the Fourth Circuit reversed. The Fourth Circuit found that choice of law is waivable; that AXA waived the possible application of Connecticut law by affirmatively litigating under the law of North Carolina; and even if Connecticut law did apply, it did not eliminate the court's diversity jurisdiction.

Charlotte-Mecklenburg County Board of Education v. Brady, 66 F.4th 205 (4th Cir. 2023).

Students, like many courts, may find it difficult to distinguish elements of a cause of action from jurisdictional requirements, especially when those elements pertain to steps a claimant must take before filing suit, such as administrative exhaustion. This case involves the exhaustion requirement under the Individuals with Disabilities Act. That requirement conditions the filing of a federal lawsuit upon the claimant's first seeking relief through the IDEA's state administrative procedures. 20 U.S.C. § 1415(l). The Fourth Circuit, applying the clear statement rule, held in 2022 that although the statute requires exhaustion, the requirement is not jurisdictional emphasizing that the IDEA "does not contain language expressly stating that it limits the power of the courts to hear the matter." **K.I. v. Durham Public Schools Board of Education, 54 F.4th 779, 792 (4th Cir. 2022)**. The question now was whether the exhaustion requirement also applied when the IDEA challenge arose by way of counterclaim. Looking to the text of the statute, the Fourth Circuit emphasized that § 1415(i)(1)(A)'s pre-suit requirements apply only to the party "bringing the action," but a party asserting a compulsory counterclaim is not such a party required to exhaust. The same distinction applied to the district court's dismissal of the parents' counterclaim that their child did not receive appropriate services. (Also consider discussing this decision in connection with Chapter 9.)

NuVasive, Inc. v. Absolute Medical, LLC, --- F.4th ---, 2023 WL 4096037 (11th Cir. 2023).

This case presents another situation in which the court must address the distinction between a claims-processing and jurisdictional condition. The Federal Arbitration Act includes a three-month deadline for moving to vacate a final arbitration award. As a matter of first impression, the Eleventh Circuit held that the deadline is not jurisdictional but instead is subject to equitable tolling. The appeals court recited Supreme Court decisions establishing that whether a provision is claims-processing or jurisdictional is a matter of congressional intent and requires a clear statement in the legislative text. The Eleventh Circuit emphasized that the Court does not require Congress to incant "magic words" but "the traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences." Turning to the FAA, the three-month provision made no reference to jurisdiction and the appeals court found that the language "must be served" did not manifest "jurisdictional clarity."

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

Vincent v. Nelson, 51 F.4th 1200 (10th Cir. 2022).

The dispute involved a truck collision at a Wyoming open-pit coal mine between a coal-haul truck driver and a Wyoming driver. The action was filed in the District of Wyoming. The

district court entered a jury verdict for defendant and denied plaintiff's motion for a new trial. On appeal, the Tenth Circuit initially considered whether diversity jurisdiction was present. The complaint and the amended complaint alleged only that plaintiff was a resident of Louisiana and not citizen and did not aver an intent to remain in Louisiana. Sua sponte the appeals court ordered plaintiff to confirm the existence of diversity jurisdiction. He provided an affidavit that stated when he moved from Wyoming to Louisiana; how long he remained in Louisiana; and that he intended to remain in Louisiana, and also attached excerpts from a deposition testifying that he is from Louisiana, that he moved to Wyoming for employment, and that his doctor was in Louisiana. On these facts, the appeals court concluded that plaintiff was a citizen of Louisiana when he filed his complaint and when he filed his first amended complaint, and so diversity jurisdiction existed. In a footnote, the appeals court underscored: "Though our *sua sponte* order that inquired regarding the existence of subject-matter jurisdiction referred to Mr. Vincent's initial Complaint, strictly speaking, it is ordinarily the proper course to 'look to the amended complaint to determine jurisdiction.'"

Atkins v. Propst, 2023 WL 2658852 (5th Cir 2023).

The Fifth Circuit affirmed the dismissal of a pro se prisoner's suit for lack of diversity jurisdiction because the complaint did not contain supporting allegations of his domicile. Initially the district court sua sponte dismissed the complaint finding diversity jurisdiction did not exist, and the Fifth Circuit vacated on the ground that it was error not to give plaintiff an opportunity to further develop his allegations. On remand, plaintiff submitted an amended complaint, the district court again dismissed, and this time on appeal the Fifth Circuit affirmed. Plaintiff argued that it was an error to treat him as a citizen of Texas because he was a citizen of and domiciled in Wyoming before his arrest, and a prisoner remains a citizen of the state in which he was domiciled before imprisonment unless he plans to live elsewhere upon reentry; he was in Texas only for temporary employment and lived in rented hotel rooms, and never had any Texas ID or Texas car registration, but did have a Wyoming ID and Wyoming car registration. The appeals court rejected this argument because plaintiff "only mentioned those supporting allegations for the first time on appeal; he did not include any of those assertions in any of his complaints." Further, plaintiff "was on notice that his pleading may be deficient, and yet he failed to include any meaningful supporting allegations in his second amended complaint * * *. * * * [W]e see no reason to give him yet another chance to replead."

Determining Citizenship

Determining Citizenship of Corporations and Associations

Yeh Ho v. Merrill Lynch Pierce Fenner & Smith Inc., No. 22-11521, 2023 WL 2017380 (11th Cir. 2023).

The Eleventh Circuit, in this unreported decision, affirmed the dismissal with prejudice of plaintiff's second amended complaint for failing to allege defendant's principal place of business. Plaintiff's original complaint alleged defendant's state of incorporation but not its principal place of business and the second amended complaint replaced the original complaint but remained defective. Although the decision is not clear, likely plaintiff appeared pro se in the district court. The short decision is a good vehicle for emphasizing the basic rules of amendment, jurisdictional pleading, and fundamental questions about judicial fairness and whether a court should have a duty to assist a pro se litigant overcome rules that might otherwise act as traps for the unwary and unknowing.

BRT Mgmt. LLC v. Malden Storage LLC, 68 F.4th 691 (1st Cir. 2023).

The case offers a tidy set of facts to apply the citizenship rules of ***Carden v. Arkoma*** and ***Americold*** for LLCs and trusts. The dispute involved breach of contract claims against limited liability companies. Following a bench trial, the district court entered judgment for defendants and awarded them over $10 million on their counterclaims.

From the get-go, the allegations of the complaint were deficient. It alleged: "there is complete diversity between the parties" because BRT was a Massachusetts limited liability company (LLC) with a usual place of business in Massachusetts and defendants Malden Storage LLC ("Malden"), Plain Avenue Storage LLC ("Plain"), and Banner Drive Storage LLC ("Banner") were each Delaware LLCs with usual places of business in Illinois." Defendants replied by alleging substantially the same facts, i.e., that Malden and Plain were both Delaware LLCs with principal places of business in Northbrook, Illinois. As the First Circuit underscored, "These allegations were plainly insufficient because, as a matter of black letter law, '[t]he citizenship of an unincorporated entity ... is determined by the citizenship of all of its members.'" The district court pointed out the pleading deficiency, issuing an order to show cause as to why the action should not be dismissed. Limited discovery was permitted, and eventually the parties filed a joint stipulation about complete diversity.

The problem, however, was that the stipulation did not identify the citizenship of every state in which defendants' members were a citizen. Another complication was that some of the LLC members were trusts, and information was not provided about the trusts' beneficiaries and members. This "lurking lacuna" in the jurisdiction of the nested LLCs apparently went

unnoticed until the appeals court drew attention to it. On appeal, the court ordered the filing of affidavits of jurisdictional facts, and then held that the record on appeal was insufficient to establish the LLCs' citizenship and to show that no defendant shared state citizenship with any plaintiff. The appeals court acknowledged that dismissal would be appropriate: "Defendants' deficient second affidavit on appeal is particularly noteworthy because despite prevailing below, to the tune of millions of dollars, they have still failed to submit facts that show their citizenships even after being ordered to do so by this court." Rather than dismiss, the appeals court vacated and remanded, noting the case had involved six years of litigation. In what it called a "coda," the appeals court commented favorably on the district court's allowing limited jurisdictional discovery, after noting that plaintiff had consulted available public sources and alleged in good faith that diversity of citizenship existed.

(For another fact pattern on determining citizenship of an LLC, see **Wagstaff & Cartmell, LLP v. Lewis, 40 F.4th 830 (8th Cir. 2022),** involving citizenship of a law firm. The record did not show that the partners were domiciled in specified states at the time of the filing of the complaint. However, the appellate brief represented that all partners were so domiciled, and given the absence of contrary evidence, the appeals court treated the complaint as amended.)

Determining Jurisdiction in Cases Involving Foreign Parties

Suedrohrbau Saudi Co., Ltd. v. Bazzi, No. 21-2307-cv, 2023 WL 1807717 (2d Cir. Feb. 8, 2023).

The Second Circuit affirmed as not clearly erroneous the district court's finding that defendant was domiciled in Beirut, Lebanon and not New York at the time of the filing of the complaint, and the opinion offers interesting examples of the types of evidence courts will consider in determining a party's residence and intent to remain (e.g., ownership of property in Brooklyn, payment of taxes on an even bigger house in Beirut, extensive travel from New York to Lebanon, car ownership in Lebanon).

Sunny Handicraft (H.K.) Ltd. v. Envision This! LLC, 66 F.4th 1094 (7th Cir. 2023).

The case illustrates some of the problems associated with determining the citizenship of a foreign entity, starting with how to determine whether an entity is a corporation or an association. Sunny Handicraft and Bin Teh Handicraft, foreign seasonal merchandise suppliers based in China (one in Hong Kong and the other on the mainland) sued a U.S. LLC for breach of contract and fraud. Sunny was based in Hong Kong and Bin Teh was based in mainland China. The Seventh Circuit first considered whether the suppliers were corporations, as all parties assumed:

> We held in *Superl Sequoia Ltd. v. Carlson Co.*, 615 F.3d 831, 832 (7th Cir. 2010), that a Hong Kong business "limited by shares" and bearing the identifier "Ltd." is treated as a corporation. This recognition stemmed from the fact that Hong Kong inherited its legal system from the United Kingdom, and we had previously concluded that other "Ltd." entities in that tradition should be treated as corporations when they are perpetual, can issue traded shares, and are independent of investors for tax and liability. * * * If business law in Hong Kong remains the same as in 2010, then *Superl Sequoia* remains controlling—but the parties have not told us what changes, if any, have been made recently in the law of business organization in Hong Kong.
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> As for business entities based in mainland China, we held in *Fellowes, Inc. v. Changzhou Xinrui Fellowes Office Equipment Company Ltd.*, 759 F.3d 787 (7th Cir. 2014), that such a business can be more like an American LLC than like a Hong Kong Ltd., even when it bears the "Ltd." label. It mattered in *Fellowes* that investment interests in that Ltd. were inalienable. The parties have not told us anything about the alienability of investments in Bin Teh Handicraft or whether the law of the People's Republic has changed in material ways since 2014; they have instead proceeded as if *Fellowes* did not exist.

But the Seventh Circuit then explained that "alienage" jurisdiction was present given the presumption that no member of either foreign company was a Florida citizen:

> Fortunately, it is not necessary to remand for further proceedings to investigate contemporary Chinese law and the attributes of the two plaintiffs. In response to [defendant's] docketing statement in this court, Sunny told us that Bin Teh Handicraft has only one investor, Sunny Handicraft, and that Sunny has four shareholders: Daniel Huang, his father, his mother, and his brother. The statement continues: "All live and work in Shenzhen, China where the business is located." It is exceedingly unlikely that any of the Huangs is a citizen of Florida, where both members of Envision are domiciled. So even if the two plaintiffs are treated as partnerships or LLCs, complete diversity of citizenship has been established.

From a jurisdictional perspective, it is lucky that only six investors are involved. Many business entities have hundreds, thousands, or more investors. Accurate classification of the nature of these entities can be vital to ascertaining subject-matter jurisdiction. We have dodged a problem today, but it will recur. Counsel must pay more attention to the proper classification of foreign business entities than they have done in this litigation.

The Problem of Collusive Joinder and the Real Party in Interest

Sorenson v. Sorenson, 64 F.4th 969 (8th Cir. 2023).

This family dispute illustrates another limit of the anti-collusion rule of § 1359—it proscribes collusive joinder to invoke jurisdiction, not to obtain jurisdiction by colluding not to join a party. The facts are simple to understand. Two of decedent's three adult children sued decedent's second wife challenging her use of her power as decedent's attorney-in-fact to close certificates of deposit and to retain funds alleged to be for the benefit of the children. The wife moved to dismiss the action for lack of diversity jurisdiction, and at that point decedent's third child, who was not a party but was from the same state as the wife, assigned his potential claims against the wife to one of the siblings. An amended complaint followed, in which the siblings alleged fraudulent misrepresentation and civil theft. The court held that collusion not to join a party to preserve diversity jurisdiction did not violate § 1359. However, it emphasized that this strategy will not succeed if the omitted party is an indispensable party under Federal Rule 19 (an issue the Memo discusses in connection with Chapter 9).

Avenatti v. Fox News Network LLC, 41 F.4th 125 (3d Cir. 2022).

The decision provides a cogent discussion of the district court's discretionary authority to drop a nondiverse party from an action to preserve jurisdiction post-removal. The dispute is high profile: a celebrity lawyer's defamation action against a cable news network alleging defamation. The complaint named an in-state defendant, but defendant succeeded in removing before the in-state defendant was properly served. After removal, the lawyer amended the complaint to add a new nondiverse defendant as of right, and then moved for remand. The district court denied the remand motion, and instead invoked its discretionary authority under Federal Rule 21 to drop the nondiverse party. In doing so, the district court was guided by the four-factor test announced by the Fifth Circuit in ***Hensgens v. Deere & Co. v. Deere & Co.*, 833 F.2d 1179 (5th Cir. 1987)**, which sets out what the Third Circuit called "an open-ended balancing test for considering post-removal amendments that add nondiverse parties":

- "the extent to which the purpose of the amendment is to defeat federal jurisdiction,"
- "whether plaintiff has been dilatory in asking for [the] amendment,"
- "whether plaintiff will be significantly injured if [the] amendment is not allowed," and
- "any other factors bearing on the equities."

The Third Circuit affirmed: "Where, as here, a nondiverse defendant has been added post-removal by amendment as of right, courts may sua sponte consider dropping the spoiler under

Rule 21. If the new defendant is dispensable and can be dropped without prejudicing any party, then courts may go on to consider the ***Hensgens*** factors to guide their discretion 'on just terms.'"

The Amount-in-Controversy Requirement

Allstate Fire & Casualty Insurance Co. v. Love, No. 22-20405, --- F.4th ---, 2023 WL 4113227 (5th Cir. June 22, 2023)

The case illustrates the "no possible" standard and its interaction with state rules of decision when determining the amount in controversy. Allstate, an auto insurance company, sued judgment creditors for a declaratory judgment that it had no duty to indemnify them for a $163,822 default judgment entered in their underlying suit against the insured. Defendants moved to dismiss for lack of diversity jurisdiction, arguing that the insurance policy had a $50,000 cap and therefore the suit did not meet the amount-in-controversy requirement. The district court disagreed, entered summary judgment in the insurer's favor, and the Fifth Circuit affirmed. Under Texas law, which applied to the suit, it was legally possible for the insurer to be held liable for the entire amount based on its failure to settle for policy limits.

Louisiana Indep. Pharmacy Ass'n v. Express Scripts, Inc., 41 F.4th 473 (5th Cir. 2022).

A member-based pharmacy association sued a benefits manager seeking a declaration of whether a Louisiana statute requiring benefits plans to reimburse pharmacies a 10-cent fee for filling Medicare Part D prescriptions was preempted by federal law. The district court denied the motion to dismiss, and the Fifth Circuit vacated and remanded, finding diversity jurisdiction (as well as federal question jurisdiction) was lacking. Diversity jurisdiction turned on whether the amount-in-controversy was met. No single member of the association could meet the $75,000 threshold, and the appeals court held that when an organization sues in a representative capacity it may not aggregate the damages to each of its members to meet the statutory requirement.

Cleartrac, L.L.C. v. Lanrick Contractors, L.L.C., 53 F.4th 361 (5th Cir. 2022).

The decision raises the important question of how to value the amount in controversy when a judgment creditor seeks to enforce a state court judgment made executory by state court in federal court as a matter of diversity jurisdiction. The district court dismissed on grounds of res judicata, but the Fifth Circuit vacated and remanded to dismiss the case for lack of subject matter jurisdiction because the jurisdictional amount was not met. Plaintiffs alleged that the amount in controversy was $85,180.97: $51,519.47 in principal; $1,313.16 in pre-judgment interest; $3,000 in attorneys' fees for filing and prosecuting the case; $2,500 in post-judgment collection efforts; $500 in court costs; and 5.00% interest per annum from the date of the Judgment until paid in full. Although the judgment clearly did not exceed $75,000, the appeals court acknowledged

that § 1332(a)(1) "does not prevent a plaintiff from using costs or interest that his principal claim includes at the time it arose, such as those accrued in a prior case," in this case the interest "had not yet accrued at the time their claim to enforce the prior judgment arose." The Fifth Circuit held as a matter of first impression, that pre-judgment interest awarded in the state judgment was includable in the calculation of the amount in controversy, but post-judgment interest was not.

Lizama v. Victoria's Secret Stores, LLC, 36 F.4th 762 (8th Cir. 2022).

If your course includes coverage of the Class Action Fairness Act, this decision offers a compact problem for considering the $5 million amount-in-controversy requirement. It also raises the related question of how to value an injunction. A customer filed a putative class action in state court alleging that the retailer Victoria's Secret violated state law by assessing a tax at a rate higher than that required under the state tax code. The retailer removed, and the district court granted the customer's motion to remand. The appeals court affirmed, holding that the retailer failed to show by a preponderance of the evidence that the CAFA amount in controversy was met.

The parties agreed, and the district court accepted, that compensatory damages and attorney fees would total about $3.3 million. In addition, Victoria's Secret argued that the amount in controversy also included the value of injunctive relief, which it specified at more than $1.7 million based on its estimate of $2.5 million of allegedly excess tax collected over the prior five-year period and applying a discount rate of 5 per cent. The district court found that estimate to be "speculative," and remanded to state court. On appeal, the parties disagreed whether the value of an injunction is to be measured from the plaintiffs' perspective (the aggregate value of the claims to class members), or defendant's perspective (the total potential cost to defendant if plaintiffs win). The appeals court did not resolve that legal question, finding Victoria's Secret did not meet its burden from either perspective. From plaintiffs' perspective, the uncollected tax clearly had value, but there was no evidence for the inference that past customers would be future customers, and at the least, the absence of this allegation could mean that the class could not be certified for injunctive relief. Further, defendant presented no data to support its statement that the number of class members who would be repeat purchasers would generate at least $1.3 million in value. From defendant's perspective, not collecting an illegal tax imposed no cost on the company. The Eighth Circuit thus affirmed the order remanding the action.

Note on Judicially Created Exceptions to Diversity Jurisdiction

Bowes-Northern v. Miller, No. 21-3319, 2022 WL 16849058 (7th Cir. Nov. 10, 2022).

The case illustrates the domestic relations exception to the diversity grant, but also raises important questions about court administration, the purpose of federal courts, and fairness. A

parent with court-ordered visitation rights filed a federal action pro se under 42 U.S.C. § 1983 to redress "the failure of the state judge, the police, and other public actors to enforce the visitation order." The appeals court piles on the reasons for dismissing the suit: Due Process does not require state officials to enforce state court orders and no federal statute affords such a right; federal courts (other than the Supreme Court) do not review decisions of state courts; federal courts as a matter of abstention do not oversee state court proceedings; and, to the extent plaintiff seeks relief under state law, although complete diversity is present and the amount-in-controversy is met, "the domestic-relations exception to this statute allocates child-custody disputes to state courts even when other elements of § 1332 have been satisfied."

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

Minnesota by Ellison v. American Petroleum Inst., 63 F.4th 703 (8th Cir. 2023)

City of Hoboken v. Chevron Corp., 45 F.4th 699 (3d Cir. 2022), cert. denied sub nom. Chevron Corp. v. City of Hoboken, --- S. Ct. ---, 2023 WL 3440749 (2023).

Rhode Island v. Shell Oil Prods. Co., L.L.C., 35 F.4th 44 (1st Cir. 2022).

These three cases involve what the First Circuit called "the mind-numbing complexities of federal removal jurisdiction" in the context of climate change, and can be discussed in the context of the well-pleaded complaint rule or removal jurisdiction. In each case, a state government entity brought suit, mostly state tort claims such as public nuisance, against fossil fuel producers, and defendants removed.[5] In each case, the circuit courts found that no federal question jurisdiction existed and that, absent another jurisdictional basis, remand was required. The First Circuit characterized the complaint as an example of "artful pleading" because, although they nowhere referred to federal common law, the claims nevertheless were "inherently federal" and necessarily arise under federal law because they are based on interstate and international emissions. The court then turned to the ***Grable*** factors, and found that defendants' challenge failed at the first factor—the complaint did not necessarily raise a federal issue and a federal issue was not an essential element of the state law tort claim even though federal interests were implicated. Finally, the court considered and rejected complete preemption as an exception to the well-pleaded complaint rule (calling it "a doctrine only a judge could love"), explaining

[5] In **BP p.l.c. v. Mayor & City Council of Baltimore**, 593 U.S. ——, 141 S.Ct. 1532, 209 L.Ed.2d 631 (2021), the Supreme Court held that when a removal motion is based on the federal-officer removal statute, as well as federal question or other bases of federal jurisdiction, courts of appeals have jurisdiction to review the district court's entire remand order and to consider all of the defendants' removal grounds, and not just the part of the order resolving the federal-officer removal ground.

that the Clean Air Act has not been interpreted by the Supreme Court has having extraordinary complete preemptive force.

Solomon v. St. Joseph Hospital, 62 F.4th 54 (2nd Cir. 2023).

Hudak v. Elmcroft of Sagamore Hills, 58 F.4th 845 (6th Cir. 2023).

This pair of cases considers whether claims for state medical malpractice and other negligence claims are within the scope of the federal Public Readiness and Emergency Preparedness Act's exclusive federal cause of action, and so removable to federal court or, alternatively, whether federal jurisdiction was available under ***Grable***. In each, the court held that the complaint did not necessarily raise a federal issue; defendants' defense of federal immunity did not have complete preemptive force, could be raised only as an affirmative defense, and § 1331 jurisdiction cannot be based on a federal defense. Again, the fact patterns can be used either to discuss removal or the ***Grable*** test.

Louisiana Indep. Pharmacy Ass'n v. Express Scripts, Inc., 41 F.4th 473 (5th Cir. 2022).

This case, earlier discussed with respect to the amount-in-controversy requirement, also involved § 1331 jurisdiction. The parties in their briefs agreed that the district court had federal question jurisdiction. Nevertheless, the Fifth Circuit sua sponte asked for and received supplemental briefing on the issue, and held that the declaratory action was not within the court's § 1331 power. Judge Jones, for the court, stated the jurisdictional test as "if the declaratory judgment defendant brought a coercive action to enforce its rights [against the declaratory judgment plaintiff] that suit would necessarily present a federal question" [alteration in original]. In this case, the hypothetical coercive action would be a breach of contract claim by a member against Express Scripts for failing to reimburse, and that action was a simple state law claim. Nor could plaintiff base jurisdiction on complete preemption. The Medicare statute, although it contains a preemption provision, did not meet the standard for complete preemption: it did not create a cause of action that replaced and protected the analogous area of state law; there was no specific jurisdictional grant to enforce the federal right, and there was no showing of congressional intent that the federal cause of action is exclusive.

Sauk-Suiattle Indian Tribe v. City of Seattle, 56 F.4th 1179 (9th Cir. 2022).

The case has a complicated procedural history but offers a clear application of the *Grable* factors in the context of removal. The Sauk-Suiattle Tribe sued in Washington state court alleging that Seattle's operation of a hydroelectric dam impermissibly interfered with fish passage, violating federal and state laws. Seattle removed the case to federal court, which determined it could exercise federal question jurisdiction over the federal claims and

supplemental jurisdiction over the state claims, but then granted Seattle's motion to dismiss for lack of subject-matter jurisdiction. Specifically, because the Federal Energy Regulatory Commission's order granting a license to Seattle to operate the dam had decided the issue of fish passage, the district court found that the Tribe's lawsuit was a "collateral attack" on an order that was reviewable only by a federal court of appeals. The Ninth Circuit affirmed the district court's findings regarding subject-matter jurisdiction and further found that the district court properly dismissed the case, despite the language of 28 U.S.C. § 1447(c), in light of the futility of remand. The decision elicited concurrences on the scope of the futility exception and the narrow window for appellate review.

As to whether § 1441 removal was proper on the basis of § 1331 jurisdiction, the appeals court found:

> [T]he Tribe necessarily raises a federal issue because a court would have to interpret the Congressional Acts and apply the Supremacy Clause in determining whether Seattle is violating the Congressional Acts by operating the Gorge Dam without fishways. The parties dispute Seattle's obligations under the Congressional Acts and the applicability of the Supremacy Clause. And finally, the United States's strong interest in national regulation of FERC-licensed projects, as evidenced by the FPA, supports that the issue of Seattle's obligations under the Congressional Acts is an important federal-law issue that properly belongs in federal court. Thus, the district court correctly determined that removal was proper based on a substantial federal question.

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

Nautilus Insurance Co. v. S&A Pizza, Inc., 2022 WL 3019743 (W.D. Mo. 2022).

The underlying facts in this case are sufficiently interesting to motivate students to work through the complicated question of jurisdiction—whether a crossclaim is "so related" to an original diversity claim as to support supplemental jurisdiction. Pipeline Productions and various others entered into a deal with S&A Pizza and others to form a limited liability company called Crossroads to produce and operate musical events in Kansas City. The deal went sour, and the Pipeline parties sued the Pizza parties (called the "Crossroads Defendants" in the decision) alleging that they conspired to steal the company's business and assets. Nautilus, the insurer, sued both sets of parties to rescind an insurance policy previously issued to S&A Pizza, alleging material misrepresentations, or alternatively that the policy did not cover Pipeline's lawsuit and that the insurer has no duty to defend. In the insurer's action, the Pipeline parties asserted a crossclaim against the Crossroads Defendants, alleging the insurance misrepresentation was misconduct under their deal, seeking indemnification and contribution. Among other defenses,

the Crossroads Defendants moved to dismiss the crossclaim for lack of subject matter jurisdiction. The district court rejected that argument finding the crossclaim was "logically related to, and arises out of, the same transaction and occurrence that is the subject matter of the Amended Complaint."

The court began by asking and answering two questions that will be familiar to the students:

- What is the source of its original jurisdiction? In this case, the court's jurisdiction was grounded in diversity.

- When can a court assert supplemental jurisdiction over a crossclaim? The court looked to the language of § 1367(a) and recited when the claims are "so related" to the original action that they form part of the same case or controversy. Further, the court turned to ***Gibbs*** in stating that the claims form a part of the same case or controversy when they derived from a common nucleus of operative fact, which they do if counsel "would ordinarily be expected to try them all in one judicial proceeding."

The Eighth Circuit has not yet set out the standard for determining whether a crossclaim arises out of the same transaction or occurrence as the original claim, and district courts in that circuit have looked to caselaw pertaining to counterclaims. On that question, the Eighth Circuit has set out four factors, and students can be asked to apply them to the facts that have been provided:

> Does the counterclaim raise issues of law and fact that are largely the same with the initial claim?; (2) Would res judicata bar a subsequent suit on the counterclaim?; (3) Will substantially the same evidence support or refute the initial claim and counterclaim?; and (4) is there a logical relationship between the initial claim and the counterclaim?

(We discuss the joinder issue in connection with Chapter 9 of this Memo.)

Vo v. Choi, 49 F.4th 1167 (9th Cir. 2022).

If you teach ***Executive Software***, this case offers an important discussion of "exceptional" circumstances as a basis for declining to exercise supplemental jurisdiction and whether the avoidance of a state-law decision, absent a showing of novelty or complexity, is ever sufficient grounds. The facts of the case also are important and timely: a customer who used a wheelchair for mobility sued a shopping plaza owner alleging violations of the Americans with Disabilities Act and the California Unruh Civil Rights Act. A violation of the ADA constitutes a violation of the Unruh Act. The state statute goes beyond the remedies provided by federal

disability law, and is subject to heightened pleading rules and other procedural requirements. In particular, any party who has filed ten or more complaints within the prior 12-month period must plead additional facts and pay an additional $1,000 filing fee for each new case filed.

The district court declined to exercise supplemental jurisdiction over the state law claim, and the Ninth Circuit affirmed, relying on the two-step framework earlier set out in **Arroyo v. Rosas, 19 F.4th 1202 (9th Cir. 2021)**, for evaluating a joint ADA and Unruh Act suit. ***Arroyo*** assumed that the Unruh Act's special procedural requirements apply only in state court, but nevertheless could count as an exceptional circumstance under § 1367(c)(4) to decline to exercise supplemental jurisdiction. On the other hand, ***Arroyo*** recognized that the ***Gibbs*** factors of judicial economy, convenience, fairness to litigants, and comity could present compelling reasons in favor of supplemental jurisdiction where the district court already had ruled on summary judgment in favor of the ADA claim—it "would be a sheer waste of time and resources to require that claim to be refiled in state court" after a victory on the federal claim.

The appeals court found it was not an abuse of discretion for the district court to decline to exercise jurisdiction before adjudicating the ADA claim and thus avoiding an unnecessary decision on state law. The appeals court also rejected the argument that the district court's "boilerplate" order was not sufficiently case-specific. A dissenting judge argued that although exceptional circumstances were present, compelling reasons made it an abuse of discretion to decline to exercise jurisdiction. In particular, the district court made no factual finding that Vo was a high-frequency plaintiff, even after plaintiff provided information on the issue under threat of dismissal, and the appeals court was without authority to fill that gap. And it did not address whether the state law allegations met the Unruh Act's heightened pleading standard. The dissent further argued that avoiding state-law decisions does not by itself provide a compelling reason to avoid exercising supplemental jurisdiction:

> Under the majority's view, any time a district court decides that it would prefer not to pass on *any* issue of state law, no matter the novelty or complexity, it could exercise its discretion under § 1367(c)(4)—and potentially the other § 1367(c) subsections as well—to decline supplemental jurisdiction as a matter of comity. This is inconsistent with our exhortation that "declining jurisdiction outside of subsection (c)(1)–(3) should be the exception, rather than the rule."

(On the obligation of the district court to provide notice or an opportunity to respond before sua sponte dismissing for lack of supplemental jurisdiction, again in a case involving the ADA/Unruh Act, see ***Ho v. Russi*, 45 F.4th 1083 (9th Cir. 2022)**. The Ninth Circuit identified two circumstances when district courts do not have this duty: (1) when parties have already argued the issue of jurisdiction; and (2) when the lack of jurisdiction appears on the face of the

complaint and the defect is not curable. A discretionary decision to decline to exercise supplemental jurisdiction by definition cannot be known from the face of the complaint.)

Rubenstein v. Yehuda, 38 F.4th 982 (11th Cir. 2022).

The Eleventh Circuit affirmed in part and reversed in part the district court judgment in an action alleging fraud and conversion, as well as federal RICO claims. The RICO charges were dismissed, but the federal district court continued overseeing the remaining claims, completing a jury trial on the state claims of fraud and conversion. On appeal from judgment in favor of the assignee, the assignors argued that the district court lacked subject matter jurisdiction. The court of appeals, however, noted that a RICO claim was substantial enough to confer federal question jurisdiction, and supplemental jurisdiction could be used to cover the other claims. Even after dismissal of the RICO claim, the district court had the choice to continue hearing the claims. The Court noted that a frivolous federal law claim would not confer federal question jurisdiction, but that bar was not met here. The opinion touches on other important 1L civil procedure concepts like supplemental jurisdiction, and neatly displays judicial efficiency arguments for retaining jurisdiction in cases that have remained in federal court for a long time.

Crider v. Williams, No. 21-13797, 2022 WL 3867541, at *1-3, *10 (11th Cir. Aug. 30, 2022).

The decision highlights an important difference between diversity jurisdiction and supplemental jurisdiction—the latter is discretionary and the former generally is not. In this case, parents brought a federal civil rights action and state law claims against a social worker who they alleged lied to Alabama and Tennessee courts to obtain jurisdiction to remove their child from them. The district court granted qualified immunity to the social worker and declined to exercise supplemental jurisdiction over the state malicious-prosecution claims. The Eleventh Circuit vacated and remanded, finding the complaint sufficiently alleged a clearly established violation of procedural due process, and it was error to decline to exercise supplemental jurisdiction when diversity jurisdiction was present over the state law claims.

Note on Nonstatutory Ancillary Jurisdiction

Atlas Biologicals, Inc. v. Kutrubes, 50 F.4th 1307 (11th Cir. 2022).

Those who teach ***Kokkonen*** will find this Eleventh Circuit opinion helpful as an example of a district court's use of ancillary enforcement jurisdiction (although the case itself involves complicated standing questions that are outside the 1L curriculum). A corporation sued a former employee in federal court on various federal intellectual property claims. The employee transferred his interest in the company to a rival company. The corporation, when it learned of the transfer, requested and was granted a writ of attachment against the employee's interest. At

the same time, the district court suggested that the corporation file a separate declaratory action to declare the stock transfer void. The corporation did so. The problem is that the district court in this second action, which now involved a third party, lacked an independent basis of subject-matter jurisdiction and instead exercised ancillary jurisdiction (although the corporation did not allege this basis of jurisdiction), and voided the stock transfer. The Eleventh Circuit affirmed, finding no abuse of discretion and calling the facts "unique." The opinion provides an excellent summary of the doctrine.

The Subject-Matter Jurisdiction of the Federal Courts—Removal

Sevelitte v. Guardian Life Insurance Co. of America, 55 F.4th 71 (1st Cir. 2022).

This family drama involves contested claims by a widow and an ex-wife to decedent's assets; the decision involves the interplay of removal jurisdiction, interpleader, crossclaims, and supplemental jurisdiction. It also illustrates how easy it is to misapply the various rule-based exceptions to § 1367(b). To simplify:

- Ex-wife sued insurance company to recover a whole-life insurance policy.
- Insurer removed to federal court and asserted a counterclaim for interpleader against the ex-wife, the widow, and the insurer's estate.
- Widow asserted crossclaims against ex-wife.
- Ex-wife then asserted crossclaims against widow asserting wrongful nonpayment of three other insurance policies specified in the divorce agreement.

Of relevance here, the district court dismissed the ex-wife's crossclaims for lack of supplemental jurisdiction, reasoning that a federal court sitting in diversity cannot exercise supplemental jurisdiction over claims by plaintiffs against persons made parties under Rule 14, governing third-party impleader. The problem, however, was that the widow was joined under Rule 22, governing interpleader, and so the dismissal was an abuse of discretion. The appeals court then sua sponte inquired into jurisdiction and found supplemental jurisdiction lacking under § 1367(a). The crossclaims pertained to the divorce agreement's treatment of various insurance policies and so did not derive from a common nucleus of fact as the insurer's interpleader action about a whole life insurance policy.

M&B Oil, Inc. v. Federated Mutual Ins. Co., 66 F.4th 1106 (8th Cir. 2023).

Can snap removal provide a work-around for a lack of complete diversity? As a matter of first impression, the Eighth Circuit answered no, and vacated and remanded the district court's denial of remand in this state-law insurance contract action. Snap removal refers to a defendant's motion to remove an action under § 1441(b)(2) before plaintiff has "properly joined and served" one of the defendants—a maneuver used to escape the statutory forum-defendant bar on removal.

In this case, the snap removal came before service on a non-diverse defendant. After removal, plaintiff amended the complaint and added claims, prompting the removing defendant to rethink its forum choice and move to remand for lack of complete diversity.

The case thus presented two issues: (1) whether snap removals are permitted and whether an amended pleading could warrant removal; and (2) whether the district court could certify its order for an immediate appeal under § 1292(b). Allowing the appeal, the Eighth Circuit, which has not yet addressed the effect of snap removal on the forum-defendant rule, held that the absence of service "does not matter in evaluating the diversity of the parties," so that snap removal could not cure an absence of complete diversity—all of the named parties in the complaint count.

Advanced Indicator & Mfg. Inc. v. Acadia Ins. Co., 50 F.4th 469 (5th Cir. 2022).

Plaintiff, a Texas resident, filed a routine insurance dispute against an out-of-state insurance company and the in-state inspector who assessed damage to his property. Under Texas law, the insurance company chose to take responsibility for the in-state agent's acts, and a statute required the agent to be dismissed with prejudice. At that point, the insurance company removed, and the district court denied the insurer's request to remand. The Fifth Circuit reversed. Whether the agent had been improperly joined, allowing the district court to disregard its citizenship for removal, was to be determined at the time of removal, not at the time of commencement of the action. And, at the time of removal, plaintiff had no possibility of recovery against the agent. In reaching this result, the appeals court discussed the so-called voluntary-involuntary rule of improper joinder, which has divided district courts in the Fifth Circuit, and provides that a nonremovable action when commenced may become removable only by the voluntary action of plaintiff. A concurring opinion emphasized that "our holding all but eviscerates the voluntary-involuntary rule" by allowing an improper joinder 'exception' to be triggered unilaterally by the defendant after filing of the case.

Rock Hemp Corp. v. Dunn, 51 F.4th 693 (7th Cir. 2022).

Typically, a notice of removal must be filed within 30 days after receipt of the complaint. § 1446(b). However, if the original complaint was not removable, then the removal may occur within 30 days after receipt of a copy of an amended pleading or other paper showing that the case is removable. § 1446(b)(3). In this case, involving contract and tort claims and seeking compensatory and punitive damages, the complaint did not state the amount sought in damages. In state court, defendant moved to dismiss and began discovery. During discovery plaintiff's attorney stated in an email that the client sought $250,000 in punitive damages. Seven days later, defendants filed a notice of removal, and plaintiffs moved to remand arguing the removal was out-of-time because outside the statutory 30-day window. The district court denied the remand motion, and the Seventh Circuit affirmed. The 30-day limit began only after defendant was given

a pleading or other litigation paper that explicitly enumerated the damages sought. Moreover, a subjective inquiry into what a defendant should have known, the court stated, would be "improper." The appeals court also rejected the argument that defendant waived its right to removal by taking litigation activity in the state court, relying on circuit precedent that § 1446(b) does not authorize remand on the ground of waiver. Even if the common law doctrine of waiver might allow remand, the bar is high and was not met in this case, where defendants filed motions only to avoid default and had no basis for thinking a federal forum was available.

LeChase Construction Services, LLC v. Argonaut Ins. Co., 63 F.4th 160 (2d Cir. 2023).

The decision addresses a question left open by ***Powerex Corp. v. Reliant Energy Services***, whether appellate jurisdiction under 28 U.S.C. § 1447(d) is available to review a remand order that "dress[ed]" "a patently nonjurisdictional ground" for remand in "jurisdictional clothing." As a matter of first impression, the Second Circuit answered yes, and vacated and remanded.

The dispute involved a breach of bond action by a contractor against the subcontractor and insurer that supplied the bond as the subcontractor's surety. The subcontractor removed, and the district court remanded under § 1447(e). Although the court "expressly acknowledged" that this provision was "facially inapplicable" because plaintiff did not seek to join a non-diverse defendant and did not contest diversity jurisdiction, it nevertheless found that remand was warranted in the interests of judicial economy and consistency to allow consolidation of the action with two related matters pending in New York state court.

First, the appeals court held that it had appellate jurisdiction notwithstanding §1447(d), "which precludes review of remands based on the grounds specified in other subsections of section 1447," because although the district court recited that its remand order was based on § 1447(e), while expressly stating that its conditions were not met, "its stated *grounds* for remanding—the avoidance of 'inconsistent outcomes and wasted judicial resources' * * * were the principles of the ***Colorado River*** abstention doctrine," and the Supreme Court in ***Quackenbush*** held that abstention-based remands do not fall within the scope of § 1447(d), and the ***Quackenbush*** exception survived later developments.

> In sum, while "[section] 1447(d) deprives us of jurisdiction to review remand orders that were issued pursuant to [section] 1447(e) *and that invoke the [jurisdictional] grounds specified in that subsection*," * * * it is "inapplicable" to "abstention-based remand order[s]," * * *. And a district court cannot immunize such an order from appellate review by baldly reciting that it is issuing the order "pursuant to [section] 1447(e)," * * *.

Second, the Second Circuit held that the district court exceeded its authority by issuing the remand order "for essentially the reasons acknowledged by the district court itself – that its remand order here was unauthorized."

> Unable to locate support for its rationale in the plain text of section 1447(e), the district court relied on a line of cases in which "*other* [district] courts ha[d] concluded that [section] 1447(e) can serve as a basis to remand" – "even where a [plaintiff is] not seeking to add a party whose [joinder] would destroy subject[-]matter jurisdiction" – if "a failure to remand and consolidate" with pending state-court actions "contain[ing] related factual and legal issues" would putatively "risk[ ] inconsistent outcomes and wasted judicial resources." * * * But none of these district-court decisions reached us on appeal, and as a matter of first impression, we find their reasoning to be wholly unpersuasive.

In re Levy, 52 F.4th 244 (5th Cir. 2022).

Th case offers an interesting twist on snap removal. Levy, a Louisiana citizen, filed an action in Louisiana state court against three defendants related to a traffic accident. Two of the defendants also were Louisiana citizens. Before they were served, the third defendant, Zurich American Insurance Company, who had been served, removed, arguing jurisdiction was proper under § 1441(b)(2). The district court denied plaintiff's motion to remand, and the Fifth Circuit held on appeal that remand was warranted, and that the case law on snap removal was irrelevant because complete diversity was lacking. "Complete diversity is still required even if one or more defendants have not been served; citizenship is what counts. So in a situation of complete diversity, a case can be removed despite the presence of a resident defendant, but only if that defendant is unserved."

Adams v. 3M Co., 65 F.4th 802 (6th Cir. 2023).

The case illustrates the rules governing removal of a state action as a mass action and CAFA's local-action exception. Coal miners filed two actions in Kentucky state court against 3M and other out-of-state corporations alleged to have manufactured and distributed defective respirators used to protect against coal dust. Each action joined more than 100 plaintiffs. 3M removed, the district court remanded, and the Sixth Circuit reversed—the complaints asserted "parallel claims on behalf of more than 100 plaintiffs, all proceeding on the theory that the claims are similar enough to merit adjudication in tandem." The appeals court rejected the argument that the cases ultimately might not involve common questions of law or fact—even if plaintiffs' proposal for a joint trial was "unwarranted," the proposal "remains a proposal." Nor did federalism cut against removal:

> It also does not matter that federalism concerns premised on a "[d]ue regard for the rightful independence of state governments" generally cut against removal. * * * Once Congress exercised its enumerated powers in this area, "no antiremoval presumption attends cases invoking CAFA." * * * CAFA, moreover, leaves state courts plenty of room to operate. Plaintiffs may avoid removal "by filing separate complaints naming less than 100 plaintiffs and by not moving for or otherwise proposing joint trial in the state court." * * *.

Nor did the local-action exception block removal, for the allegations involved conduct of out-of-state defendants; although Kentucky vendors sold the respirators in state, that appeals court held that in-state conduct did not form a "significant basis" for the claims and was merely derivative of 3M's liability.

Leflar v. Target Corp., 57 F.4th 600 (8th Cir. 2023).

The decision focuses on how to evaluate the amount in controversy for purposes of CAFA removal and remand. A consumer sued Target in Arkansas state court, and Target removed under CAFA. The district court granted the motion to remand, relying on a presumption against removal and finding that the amount in controversy "was nowhere near $5 million."

First, although in the ordinary course an appeals court lacks jurisdiction to review a remand order, Target sought permission to appeal under 28 U.S.C. § 1453(c)(1), which creates an exception for class-action remand orders. The Eighth Circuit granted the request, based on "the 'important' and 'recur[ring] issues" the appeal presented concerning how to evaluate the amount in controversy. The appeals court set out two steps:

> At step one, the pleading stage, the test is whether "the notice of removal plausibly alleges" that the case *might* be worth more than $5 million. * * * And at step two, following a jurisdictional challenge, the district court must determine if "a fact finder *might* legally conclude" that the value of the case is more than $5 million, not whether the damages "*are* greater than the requisite amount." * * * (quotation marks omitted). In practice, this means that, if "the notice of removal plausibly alleges," and the evidence shows, that the case *might* be worth more than $5 million (excluding interest and costs), "then [it] belongs in federal court."

Second, the appeals court clarified that the general anti-removal presumption does not apply to removal under CAFA.

Under these standards, the district court made two errors. First, it applied a sufficiency standard, not a plausibility standard, in evaluating whether the amount in controversy was met, presumably because it was carrying out an anti-removal presumption; and second, it considered

only declarations that accompanied the notice of removal and not post-removal declarations. A notice of removal, however, "need not be accompanied by … evidence," and the parties can supplement it; the test for consideration of such material "is simply whether the additional proof 'sheds light on the situation [that] existed when the case was removed.'"

Challenging the Subject-Matter Jurisdiction of the Court

Direct Attack on a Court's Lack of Subject-Matter Jurisdiction

Rubenstein v. Yehuda, 38 F.4th 982 (11th Cir. 2022).

The case highlights the power and discretionary aspects of supplemental jurisdiction, and circumstances in which a court may exercise § 1367 jurisdiction even after it has dismissed the federal-question anchor claim. It goes on to raise the interesting question of whether objections to the district court's decision not to decline to exercise such supplemental jurisdiction can be waived if not raised after dismissal of the federal claim. Because § 1367(a) implicates Article III and the case or controversy requirement, it is not subject to waiver; by contrast, § 1367(c) involves judicial discretion to exercise power, so it is subject to waiver and forfeiture and the objection will not be considered on appeal. The Eleventh Circuit explained:

> Waiver is the "intentional relinquishment or abandonment of a known right." * * * A party can waive an issue by making only a passing reference to it and failing "to make arguments and cite authorities in support of [the] issue." * * * With that standard in mind, we conclude that waiver occurred here. [Defendants] cited § 1367(c) only a single time in their motion to dismiss reply, and they did not develop any argument under that subsection. Nor did they file any motion to put the issue before the court after the federal RICO claim was dismissed. Moreover, by stipulating that the exhaustion of "extensive judicial resources" on the case was a "compelling reason[]" for the district court to continue exercising jurisdiction over state law claims, the [defendants] relinquished any right to have the district court decline to exercise supplemental jurisdiction over the remaining state law claims. * * * Because the argument is waived, we will not entertain it on appeal.

Chapter 5—Venue, Transfer, and Forum Non Conveniens

Transfer of Venue in Federal Courts

Seville v. Maersk Line, Ltd., 53 F.4th 890 (5th Cir. 2022).

The case presents a compact fact pattern for questions concerning general jurisdiction, specific jurisdiction, venue, § 1406 transfers, statutes of limitations, and lawyering strategies that could lead to Rule 11 sanctions.

The basic facts are simple, but troubling: A seaman suffered a back injury at work and later committed suicide. His personal representative brought a negligence action under the Jones Act in the Eastern District of Louisiana against the vessel owner-employer. The employer moved to dismiss for lack of jurisdiction and venue, the district court granted the motion, and then denied the personal representative's § 1406 motion to transfer. The Fifth Circuit affirmed, finding that it was within the district court's discretion to decline to transfer in the interest of justice notwithstanding the time bar to filing suit in a proper venue, emphasizing the representative's admission at oral argument that no colorable basis for jurisdiction in the forum existed.

Venue in a Jones Act suit is "proper in any district in which the defendant is subject to personal jurisdiction." The appeals court first considered whether general jurisdiction was present. Applying the "at home" test and citing ***BNSF Railway v. Tyrrell***, the court quickly concluded that Louisiana could not exercise general jurisdiction over a Delaware corporation that had its principal place of business in Virginia, adding that the representative offered no ground for showing this was an "exceptional case." Turning then to whether specific jurisdiction was present, the appeals court relied upon ***Walden v. Fiore***, emphasizing that due process "focuses on the relationship among the defendant, the forum, and the litigation." Although the complaint alleged defendant's business activity in Louisiana, the cause of action arose "in the waters of Bahrain," and no allegation connected the accident to defendant's business in the forum state.

As to a § 1406 transfer in the interest of justice, the appeals court acknowledged that it could excuse the jurisdictional defect had defendant misled plaintiff about the facts relevant to venue. But in this case, plaintiff's counsel should reasonably have foreseen that jurisdiction was improper; counsel admitted he filed the case in Louisiana only because that is where his law office was located. The appeals court stated:

> [A]t oral argument, counsel stated that he (1) believed he needed no colorable basis for filing in that district, (2) in fact had no colorable basis for the representation he made as to jurisdiction and venue, (3) had known from the start that his only real chance of establishing personal jurisdiction and venue was if the

> defendant failed to object, and (4) figured he could always obtain a transfer under § 1406 if it turned out defendant objected. Those statements are equal parts disturbing and surprising. Today we hold that such admissions not only foreclose transfer under § 1406, on defendant's objection, but also give rise to Rule 11 violations.

In re Planned Parenthood Federation of America, Inc., 52 F.4th 625 (5th Cir. 2022).

This case, a relator's qui tam action for false Medicaid claims against Planned Parenthood, presents a variant on the problem of venue-choice as judge choice.[6] The relator filed the suit in the Amarillo Division of the Northern District of Texas. Every case filed in Amarillo, Texas is assigned to Judge Kacsmaryk, whose views on abortion have been noted in the news media in connection with litigation over mifepristone.[7] Defendants moved to dismiss the relator complaint and, when the district court denied the motion, engaged in discovery. Seven months after unsealing the relator complaint, defendants moved to transfer under § 1404(a) to the Austin Division of the Western Division of Texas. The district court denied the motion, finding the private and public factors did not support transfer and the motion was untimely. Defendants then petitioned for mandamus (the Fifth Circuit recognized mandamus as an appropriate vehicle to challenge the denial of a transfer motion in **In re Volkswagen of America, Inc., 545 F.3d 304 (5th Cir. 2008)**). The appeals court denied the petition, emphasizing that the extraordinary nature of mandamus required not simply a showing of an abuse of discretion, but rather "clear abuses of discretion that produce patently erroneous results," and Planned Parenthood failed to meet this burden. In its analysis, the Fifth Circuit recited public and private factors, treating them as nonexhaustive, and agreed with the district court's assessment, among other things, that on the private side, defendants and witnesses were located across the state and evidence was largely electronic, and that on the public side, the Amarillo Division is less congested than the proposed venue and the case had statewide concerns. Judge Ho, concurring, would have based the denial of the writ on timeliness and delay.

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[6] The 2021 Year-End Report on the Federal Judiciary, https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf, warned about patent lawyers using venue-selection as a proxy for judge selection through the device of filing cases in districts that have only one division and so only one judge. (Congress repealed divisional venue in 1988, see 28 U.S.C. § 1393.) For an earlier empirical discussion of the issue in the context of bankruptcy proceedings, see Theodore Eisenberg & Lynn M. LoPucki, Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations, 84 Cornell L. Rev. 967 (1999).

[7] See, e.g., Leah Litman, Melissa Murray & Kate Shaw, *Mifepristone, Mega Yachts, and MaskGate on* STRICT SCRUTINY (CROOKED MEDIA) (Apr. 10, 2023) (noting that the Alliance for Hippocratic Medicine, suing to enjoin the FDA's approval of mifepristone, incorporated in the Amarillo Division a few months before filing. ***All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, No. 2:22-CV-223-Z, 2023 WL 2825871 (N.D. Tex. Apr. 7, 2023)**).

In particular, the Fifth Circuit rejected Planned Parenthood's argument that the district court erred as a matter of law by adopting a districtwide analysis, explaining "we have never framed the transfer analysis as focusing exclusively on either the destination *district* or destination *division.* It is telling, then, that Petitioners cite no Fifth Circuit precedent for their argument, or indeed any circuit precedent at all." The appeals court also rejected the argument that the Austin Division was more convenient as the venue in which a prior related case, involving Planned Parenthood's participation in the Medicaid Program, had taken place, finding the relator's action was "not so related" as to compel transfer by itself, that it was only speculative that the case would be assigned to the same judge as in the related case, and that this factor usually deserved weight only when the transfer venue is in a different state.

Students likely have read about "judge shopping" in the popular press.[8] Consider discussing why this use of forum shopping presents systemic problems and how Congress or the Court might remedy the problem. Proposed legislation would limit venue in any suit seeking nationwide relief be filed in a judicial district in which there are at least two or more active judges assigned to hear field actions.[9] Complicating the situation are practices involving "related" cases, which was an issue in ***Planned Parenthood***.[10]

As another line of questions, if you have taught the ***Piper*** case, consider focusing on the timeliness of the motion to transfer in ***Planned Parenthood***. Was it appropriate to let discovery run its course in order to assess private factors related to location of witnesses and documents? Or was defendant engaged in an improper "wait and see" approach? Recall that in ***Piper***, defendants moved to dismiss on forum non conveniens after having moved to dismiss for lack of personal jurisdiction and successfully moving under § 1404 to the very district they now argued was oppressive and vexatious.

In re Google LLC, 58 F.4th 1379 (Fed. Cir. 2023).

This case, a patent case, analyzed the same factors as in ***In re Planned Parenthood***, but here the Federal Circuit granted Google's petition for mandamus, finding that the district court

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[8] See, e.g., Charles P. Pierce, How Judge-Shopping Has Turned the Judiciary into a Rubber Stamp for Nonsense, Esquire (Feb. 6, 2023), https://www.esquire.com/news-politics/politics/a42776208/judicial-venue-shopping-courts/; Perry Stein, The Justice Department's fight against judge shopping in Texas, Washington Post (March 19, 2023), https://www.washingtonpost.com/national-security/2023/03/19/judge-shopping-justice-protests-texas/.

[9] See, e.g., Tierney Sneed, House Democrat's bill is latest proposal aimed at alleged judge-shopping in abortion pill case, CNN Politics (May 9, 2023), https://www.cnn.com/2023/05/09/politics/judge-shopping-kascmaryk-abortion-pill-bill/index.html. See generally Alex Botoman, Divisional Judge-Shopping, 49 Columbia Hum. Rts. L Rev. 297 (2018).

[10] See generally Marcel Kahan & Troy A. McKenzie, Judge Shopping, 13 J. Legal Analysis 341 (2021).

"clearly abused its discretion" in denying the § 1404 transfer motion from the Western District of Texas to the Northern District of California because the transferee district was "clearly more convenient" than the venue chosen by plaintiff. The appeals court found that the district court's treatment of a number of specific factors was "clearly erroneous": the cost of attendance for willing witnesses, local interest, the existence of a particularized connection of the facts giving rise to the dispute with the destination venue, and relative ease of access to proof. The facts of the case can be quickly summarized and served as a classroom hypothetical.

In re Monolithic Power System, 50 F.4th 157 (Fed. Cir. 2022).

Defendant, a Delaware corporation, was sued for patent infringement in the Western District of Texas and moved to dismiss or transfer to the Northern District of California. Over a dissent, the Federal Circuit held that the district court's venue determination could not be reviewed by mandamus, and the refusal to transfer under 28 U.S.C. § 1406 was not an abuse of discretion. Defendant, a Delaware corporation, argued it did not reside in the Western District of Texas within the meaning of § 1400(b) because it does not own or lease property in the district, and that the homes of four fulltime employees in that district did not constitute a "regular and established place of business." Rejecting that argument, the district court emphasized defendant's maintaining a business presence in the district as evidenced by a pattern of soliciting employment in Austin to support local customers, and providing some employees with equipment to be used in their homes, which were located in the district, and also found that convenience and fairness did not weigh in favor of California. Although a dissenting judge urged that the question of whether to impute employee homes to a defendant for purposes of venue was likely to become an important issue given trends in remote work, the majority found that the district court's ruling did "not involve the type of broad, fundamental, and recurring legal question of usurpation of judicial power that might warrant immediate mandamus review."

(Consider also discussing ***Planned Parenthood***, ***Google***, and ***Monolithic Power*** in connection with Chapter 16, interlocutory appeals and mandamus. For another mandamus case, this time denying the petition for mandamus to vacate an order denying transfer of venue from the Eastern District of Texas to the Northern District of California, **see In re Zhejiang Crystal-Optech Co. Ltd., 2023 WL 2298764 (Fed. Cir. 2023)** (holding defendant failed to meet the § 1404 threshold requirement that the action "might have been brought" in the alternative forum).)

Chevron U.S.A. Inc. v. Environmental Protection Agency, 45 F.4th 380 (D.C. Cir. 2022).

If you include ***Sinochem***, this case provides a helpful addition to class discussion, holding that venue, like forum non conveniens, is a threshold, non-merits issue that a court can address without first establishing its jurisdiction. You might also discuss this case in connection with Chapter 4 (Direct Attack on a Court's Lack of Subject-Matter Jurisdiction). The merits

question concerned an administrative petition for review by Chevron, as the operator of oil and gas platforms, of EPA's letter providing guidance on whether the platforms remained subject to the Clean Air Act after Chevron had decommissioned the platforms.

Venue under the Clean Air Act allows for judicial review in the D.C. Circuit Court of Appeals only if the challenged action is "nationally applicable," as distinct from "locally or regionally applicable." 42 U.S.C. § 7607(b)(1). The appeals court held that EPA's letter was a locally or regionally applicable action, and so venue was not proper. Deciding the venue question allowed the appeals court to avoid deciding whether the EPA's letter was a final agency action needed to establish subject-matter jurisdiction. The Court recited ***Steel*** that a federal court cannot rule on the merits of a case without first determining jurisdiction. The court explained that a threshold, nonjurisdictional issue could be addressed without first establishing subject-matter jurisdiction only if can result in a dismissal "short of reaching the merits." Drawing an analogy to forum non conveniens, the court reasoned that a venue dismissal simply determines that a case can be litigated elsewhere, an analysis that does not implicate its "substantive law-declaring power." Can the students draw a clear line between nonmerits and merits threshold issues—a distinction lower courts have had difficulty finding?

Tagliere v. Horseshoe Hammond, LLC, 2023 WL 3886135 (N.D. Ill. 2023).

The case offers a simple set of facts involving general jurisdiction and a § 1406 transfer motion. Plaintiff tripped and fell at defendant's casino in Indiana. She sued in Illinois. Defendant moved to dismiss for lack of personal jurisdiction and improper venue, and in the alternative to transfer to the Northern District of Indiana. The court granted the motion to transfer, finding jurisdiction and venue lacking.

Tagliere resided in Illinois. Horseshoe was an Indiana limited liability company, a citizen of Delaware and Nevada, had its principal place of business in Nevada, advertised owned and operated a casino in Indiana, and on its website emphasized the casino's proximity to Chicago and offered a free shuttle service between the casino and Chicago.

Plaintiff argued only general, and not specific, jurisdiction, invoking the ***International Shoe*** "continuous and systematic business" test. The district court easily found that Horseshoe was not at home in Illinois, emphasizing that mere solicitation of business in the forum is not a sufficient basis for general jurisdiction and, moreover, its shuttle service was not exclusive to Illinois residents. Nor did any facts point to making this dispute an "exceptional case." As for venue, the court walked through the § 1391(b) factors and found that none of them were met. Horseshoe was a resident of other jurisdictions and was not subject to the forum's personal jurisdiction; moreover, the alleged negligent conduct occurred outside the forum district. The court then considered whether transfer under § 1406 would be in the interest of justice. The court granted the motion because defendant consented to suit in the Northern District of Indiana.

Apart from the basic doctrinal and statutory questions, one might focus on lawyering strategy and professional responsibility: why did plaintiff fail to argue specific jurisdiction? Did plaintiff have a good faith basis for filing in Indiana? Why did counsel fail even to acknowledge ***Daimler*** and ***Goodyear***? Why did defendant consent to jurisdiction in the alternative forum?

Transfer under 28 U.S.C. § 1631

North v. Ubiquity, Inc., ___ F. 4th ___, No. 17-2620, 2023 WL 4188502 (7th Cir. June 26, 2023).

The case involved a prolonged contract dispute. The principal of an Illinois firm filed a breach-of-contract suit against a California company in Illinois. The district court dismissed for lack of personal jurisdiction. On appeal, plaintiff argued that even if personal jurisdiction was lacking the district court "shouldered an affirmative obligation to transfer the case to another venue—in particular, the Central District of California," which could have exercised general jurisdiction over defendant. As a matter of first impression, the Seventh Circuit clarified that the term "jurisdiction" in § 1631, used without qualifier, "encompasses personal jurisdiction as well as subject matter"—the view of "every circuit court to address this issue." Moreover, even "when federal courts find that they lack jurisdiction, they bear an independent obligation under § 1631 to consider whether to transfer the case—even if neither party requests transfer." However, that obligation "is quite limited," and in this case no reversible error occurred because the record did not show that transfer would be in the interest of justice.

Forum Non Conveniens

DIRTT Environmental Solutions, Inc. v. Falkbuilt Ltd., 65 F.4th 547 (10th Cir. 2023).

The dispute followed in the wake of a contentious "corporate divorce" between a Colorado corporation and a Canadian parent company; the suit was later expanded to include additional parties and at the time of the amended complaint plaintiff changed its principal place of business from Canada to the United States. The procedural history was complicated. On appeal, the circuit court focused on whether the district court abused its discretion in dismissing the action with respect to some defendants on the basis of forum non conveniens, while retaining jurisdiction with respect to the remaining defendants, and held it was error to do so. As the Tenth Circuit explained, forum non conveniens did not allow the district court to "split" or "bifurcate" a case; the district court erred in focusing on the position of the movant seeking to dismiss on this ground rather than on the entire case. As a matter of law, Canada, as the proposed "more" convenient forum, was not adequate and available because three of the defendants were not amenable to suit there and they did not consent to jurisdiction. This approach, the court argued, best comported with the purposes of forum non conveniens as a doctrine concerned with convenience:

> [C]onvenience is a multi-dimensional concept that is not primarily focused on any one party's interests. Instead, courts should consider convenience as it applies to the *entire case* when it analyzes the appropriateness of dismissal for *forum non conveniens*. That means considering the convenience as it relates to *all* parties as well as the court's inherent interest in the efficient administration of justice.

By contrast, allowing splitting of a case would undermine these goals because "because it only increases the possibility of overlapping, piecemeal litigation that is inherently inconvenient for both the parties and the courts."

Behrens v. Arconic, Inc., No. 20-3606, 2022 WL 2593520 (3d Cir. July 8, 2022), cert. denied, 143 S.Ct. 787, 215 L.Ed.2d 53 (2023).

The case stems from the 2017 deadly fire at Grenfell Tower, the London high-rise apartment building, that killed 72 people and injured hundreds more. Many lawsuits concerning the fire are pending in the United Kingdom. This suit was filed in the United States and raised products liability claims against three U.S.-based corporate defendants responsible for the fridge-freezer that started the fire and some of the combustible material used on the building's exterior that, as the Third Circuit put it, "allowed the flames to engulf the building with alarming speed." The district court dismissed the suit on grounds of forum non conveniens, but attached what the appeals court called "a novel condition to its dismissal: if the UK court concludes that Pennsylvania law applies to damages and that Defendants may be liable for punitive damages, that court may send the case back to the United States for damages-only proceedings." On appeal and cross-appeal, the Third Circuit, on an abuse of discretion standard, affirmed the dismissal but struck the condition. In affirming the dismissal, the appeals court rejected the argument that greater deference was due to plaintiffs' forum choice because it was the corporate defendants' home state, and the fact that discovery had taken place in the forum. Moreover, defendants' inability to implead UK-based defendants was entitled to the deference given by the district court, given the greater efficiencies of trying the contribution claims together with plaintiffs' claims. Finally, the location of physical evidence in London supported the district court's analysis, given the relevance of that evidence to defendants' defenses.

The Third Circuit emphasized the novelty of the attached condition, distinguishing it from conditions that remove procedural barriers or waive a statute of limitations and finding problematic returning the case to the United States without any showing that the UK-forum was inadequate or unavailable for this part of the proceeding. In the appeals court's view, "the only discernible benefit being that an American jury—rather than a UK court—would get to decide on a damages award." However, should the UK court decline jurisdiction over damages, the appeals court emphasized that defendants had agreed, pursuant to the district court's order, that plaintiffs could reinstate the action in the United States. (The condition read, "Defendants agree that Plaintiffs may reinstate this action in this Court if the English courts reject, for jurisdictional

reasons, the subject matter of Plaintiffs' claims such that those courts are not an available alternative forum for Plaintiffs.") In a footnote, the majority stated that one judge would conclude that the return condition, although novel, was within the district court's discretion.

Fasano v. Li, 47 F.4th 91 (2d Cir. 2022).

The decision involves the intersection of a forum selection clause and forum non conveniens. The district court dismissed on grounds of forum non conveniens a class action brought by minority shareholders in a foreign e-commerce company against the company, controlling shareholders, and others, alleging state and federal claims. On appeal, the Second Circuit vacated the dismissal and remanded for reconsideration in light of a forum selection clause. On remand, the court against dismissed for forum non conveniens, finding that the clause was applicable "to so few claims and so few defendants" and so "did not warrant retention of an action that is almost entirely between foreign parties and that arose from a merger executed in a foreign jurisdiction." The Second Circuit reversed, finding the district court erred in misinterpreting the scope of the forum selection clause, thus undercounting the number of defendants covered by the clause. Moreover, the district court attributed undue weight to a Cayman Islands interest in deciding the claims, in light of a contractual provision that required common law claims to be submitted for arbitration in New York and the remaining claims arose under federal securities law and the law was unsettled. In addition, the appeals court held that defendants did not waive their right to move to dismiss the amended complaint for failure to state a claim by not joining that motion with their original forum non conveniens motion.

Venue-Selection Agreements

Technology Revelations, Inc. v. Peraton, Inc., 2022 WL 4798283 (W.D. Va. 2022)

The dispute involves contract breach, and the contract included a forum-selection clause. Technology Revelations (TechRev) entered into a subcontract with Northrup to provide staffing support for a project in Florida. Peraton later took over Northrup's interest in the contract. TechRev's staff were then removed from the project, and it sued in federal court in the Western District of Virginia. Defendants moved to dismiss for improper venue or to transfer venue.

The subcontract stated, "Any legal action shall be brought in a court of competent jurisdiction in Virginia." A separate contract clause stated, "Any litigation shall be brought and jurisdiction and venue shall be proper only in a state or federal district court in the Commonwealth of Virginia." The district court looked to ***Atlantic Marine*** and assessed whether venue was proper in the Western District of Virginia under § 1391(b) irrespective of the forum-selection clause. The facts relevant to venue were:

- TechRev was a Florida corporation with its principal place of business in Melbourne, Florida.

- Peraton was a Maryland corporation with its principal place of business in Herndon, Virginia. Northrup was a Delaware corporation with its principal place of business in Falls Church, Virginia. Herndon and Falls Church are within the Eastern District of Virginia.

- TechRev and Northrup executed the contract in Chantilly, Virginia, which also is within the Eastern District of Virginia. TechRev provided services under the contract in Melbourne, and personnel managing the subcontract for defendants were in the Eastern District of Virginia or Florida.

TechRev conceded that venue was not proper in the Western District of Florida under § 1391(b), but argued that defendants waived any objection to venue by agreeing to the forum-selection clause, which designated Virginia generally as the venue. The court rejected this argument, finding that the clause did not manifest express consent and distinguishing the contractual provision from a term titled "Consent to Jurisdiction and Venue" or a contract that recited an employee "consent[ed] to personal jurisdiction and venue." In the absence of express consent or waiver, ***Atlantic Marine*** held that the forum selection clause did not independently establish venue. But the court agreed to transfer the case to the Eastern District of Virginia under § 1406(a) in the interests of justice, explaining the case had been pending for a year and ordering the transfer would not cause prejudice.

Chapter 6—Ascertaining the Applicable Law

The Erie Doctrine: The Rules of Decision Act and the Rules Enabling Act[11]

Moreau v. United States Olympic & Paralympic Committee, --- F.Supp.3d ---, 2022 WL 17081329 (D. Colo. 2022).

The Supreme Court has not yet addressed whether state anti-SLAPP suits—"Strategic Lawsuits Against Public Participation"—apply in federal court. This case addresses that question as applied to defendant's counterclaims. Boiled down, an employee challenged his termination as a violation of public policy; the employer counterclaimed alleging employee took the employer's confidential and proprietary information. The employee then moved to dismiss the counterclaims under Colorado's anti-SLAPP law. Defendant argued that the anti-SLAPP law was procedural and did not apply in federal court.

As an initial matter, the district court noted that few cases had interpreted or applied the Colorado statute because it was "new and untested"; however, because it tracked the California anti-SLAPP law, the court turned to California case law for guidance. Then, applying the Tenth Circuit's approach for assessing potential conflicts between state and federal rules, the court asked whether application of the state law would result in a "direct collision" with Federal Rule 56 and, if not, whether its application was consistent with ***Erie***. The court rejected the argument that because the state law imposed a burden on the plaintiff to show a "reasonable likelihood that [it] will prevail on [its] claim," it presented a direct conflict with Rules 12 or 56. Under ***Shady Grove***, the court then asked whether the state law was substantive or procedural. On that, the court held the state law was "crafted to serve an interest not directly addressed by the Federal

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[11] The distinction between substance and procedure figured prominently in the Court's analysis of whether the Elections Clause insulated state legislatures from ordinary state judicial review for violations of state constitutional law:

> The defendants * * * do not * * * offer a defensible line between procedure and substance in this context. "The line between procedural and substantive law is hazy." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 92, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) (Reed, J., concurring in part); see also *Shady Grove Orthopedic Associates, P. A. v. Allstate Ins. Co.*, 559 U.S. 393, 419–420, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010) (Stevens, J., concurring in part and concurring in judgment). Many rules "are rationally capable of classification as either." *Hanna v. Plumer*, 380 U.S. 460, 472, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965); see also *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726, 108 S.Ct. 2117, 100 L.Ed.2d 743 (1988) ("Except at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy."). Procedure, after all, is often used as a vehicle to achieve substantive ends. When a governor vetoes a bill because of a disagreement with its policy consequences, has the governor exercised a procedural or substantive restraint on lawmaking? * * * [W]e see no neat distinction today.

Moore v. Harper, 600 U.S. ___, ___ S. Ct. ___, 2023 WL 4187750 (2023).

Rules: the protection of 'the constitutional rights of freedom of speech and petition for redress of grievances,'" and was substantive. It bears emphasis that in deciding whether there was a direct collision, the court did not make an up-or-down decision; rather, it pointed out that some provisions could be applicable in federal court while others might not be.

Hamilton v. Wal-Mart Stores, Inc., 39 F.4th 575 (9th Cir. 2022).

Hamilton involved the relationship between Federal Rule 23 and the California Labor Code Private Attorneys General Act ("PAGA"), which authorizes a party to sue as the state's proxy on behalf of all affected employees and mandates certain pre-suit requirements. The Supreme Court in ***Viking River Cruises, Inc v. Moriana*, 142 S.Ct. 1906 (2022)**, earlier considered the relationship between PAGA and the Federal Arbitration Act.

The state complaint alleged wage and hour violations and sought civil penalties under PAGA. Wal-Mart removed. The district court dismissed some of the PAGA claims as unmanageable and other PAGA claims as a discovery sanction (the sanction issue is discussed later in this Memo, under Chapter 11).

On appeal, the Ninth Circuit reversed on both grounds. First, it held that ***Viking River*** foreclosed Wal-Mart's argument that an aggrieved employee filing a PAGA claim must also meet the Rule 23 requirements for class certification, and that the manageability standard did not apply. As the Supreme Court explained, PAGA actions differ structurally from class actions: they are not binding on nonparty employees as to any individual claim, they represent only the California labor agency and not multiple absent individuals, and the affected employees' future interest in penalties that might be awarded is inchoate and does not make them parties. Given these differences, there is a "logical mismatch" between the Rule 23 need to consider adequacy of representation, numerosity, commonality, and typicality, and certification is not needed. Moreover, the analysis does not change even if PAGA is characterized as a state procedural rule—a proposition "that is itself on shaky footing"—because PAGA does not conflict with Rule 23, does not cover the same ground as Rule 23, and does not address the same issues as Rule 23. Here, the Ninth Circuit distinguished PAGA from the New York rule at issue in ***Shady Grove***:

> [U]nlike the New York statute at issue in Shady Grove, which prohibited plaintiffs from bringing their claims as class actions even if the claims did comply with the dictates of Rule 23, PAGA authorizes a type of action fundamentally distinct from a class action, one that does not have most of the features that the requirements of Rule 23 seek to regulate. Given their differing coverage, PAGA and Rule 23 are fully compatible and do not conflict for purposes of the first step of an *Erie* analysis.

Finally, the Ninth Circuit, acknowledging a split of authority among California courts on the question, held it would be inconsistent with PAGA and an unreasonable exercise of the federal court's power to impose a manageability requirement.

(For other post-***Shady Grove*** decisions, see **CoreCivic, Inc. v. Candide Grp., LLC, 46 F.4th 1136 (9th Cir. 2022)**; **Collazo v. Progressive Select Ins. Co., No. 20-CV-25302, 2022 WL 18144067 (S.D. Fla. Dec. 19, 2022), report and recommendation adopted No. 20-25302-CIV, 2023 WL 122614 (S.D. Fla. Jan. 6, 2023)**.)

The Problem of Ascertaining State Law

Determining Which State's Law Governs

Enigma Software Group USA, LLC v. Malwarebytes, Inc., 69 F.4th 665 (9th Cir. 2023).

The case illustrates the intersection of ***Klaxon,*** venue transfer, and personal jurisdiction, and offers a helpful analysis of the "arising from" prong of the New York long-arm statute. There also are concurring and dissenting opinions. To streamline a complicated procedural history: Enigma, a computer security software company operating in Florida, sued Malwarebytes, a competitor incorporated in Delaware, alleging state tort and federal false advertising claims. Suit was filed in federal court in New York; defendant moved to dismiss under Rules 12(b)(2) and 12(b)(6), or, in the alternative, to transfer under § 1404 to the Northern District of California. The New York district court granted the transfer motion and did not reach the motion to dismiss. Now in California, defendant renewed the motion to dismiss for failure to state a claim and argued, in the alternative, that defendant was immune from suit under federal law. The district court did not consider the motion to dismiss but held Malwarebytes was immune from suit. Enigma appealed, and the Ninth Circuit reversed the immunity ruling. On remand, Enigma filed a second amended complaint; defendant again moved to dismiss; and the California district court again dismissed and this time denied leave to amend. On appeal, among other issues, Enigma challenged the district court's holdings that Malwarebytes was not subject to personal jurisdiction and that California law applied to the dispute.

The Ninth Circuit recited the familiar ***Van Dusen*** rule that, on a § 1404 transfer, the transferee district court sitting in diversity applies the state law, including the choice-of-law rules, of the transfer court. However, to apply the state law of the transferor court, the transferor court must have had personal jurisdiction over defendant. The problem is that the New York federal court had declined to rule on the Rule 12(b)(2) motion before granting the transfer. In order to determine the correct law to apply to the dispute, the Ninth Circle then determined whether personal jurisdiction existed under New York law given the operation of defendant's

interactive website, and whether due process was satisfied. Answering yes to those questions, the appeals court then applied New York law to the dispute, and reversed.

Garcia v. Chiquita Brands Int'l, Inc., 48 F.4th 1202 (11th Cir. 2022).

The case applies the principle of ***Klaxon***, as interpreted by the Supreme Court in *Day & **Zimmerman, Inc. v. Challoner***, that a federal court sitting in diversity applies the choice of law rule of the state in which it sits, even if the application of that rule results in the application of a foreign sovereign's laws. Under that rule, Colombian law was held to apply to a multi-district litigation pending in Florida district court that originally was filed in New Jersey, the state in which defendant, Chiquita, a U.S. company, was incorporated. The claims arose from Chiquita's funding of Colombian terrorist groups that targeted and killed plaintiffs, who were banana workers and their families. That the company funded this activity was not in dispute. The procedural history was complicated. Victims filed a putative class action in 2007. The district court denied class certification in 2019. Unnamed class members then filed suit in New Jersey district court. The question was whether the action was time-barred under Colombian law, which did not permit class tolling, while federal law did allow for tolling. The MDL court applied Colombian law, dismissed the complaint, and denied a motion to amend. The Eleventh Circuit agreed that Colombian law applied, but held it was an abuse of discretion not to permit amendment of the complaint to allege that certain family members were minors at the time of the original filing.

The choice of law analysis likely is beyond the ken of most 1L courses. However, some students might be interested in the analysis given the human rights implications of the lawsuit. The court applied a four-step process.

At step one, the court asked whether a conflict existed between the federal equitable tolling rule and state law. To decide which state's law applied—the law of the forum (in this case, New Jersey) or that of Colombia—the court looked to New Jersey's choice of law rule because New Jersey was the state in which the case began before it was transferred to the district court in the Southern District of Florida.

New Jersey's choice of law rule then triggered a two-part inquiry: (1) whether the laws of the states with interests conflict, and a conflict is shown if the differences are outcome determinative; (2) if a conflict exists, in determining which state's limitations period to apply, to follow Secondary Restatement.[12] New Jersey law permitted class tolling. Determining

[12] Section 142 explains:
In general, unless the exceptional circumstances of the case make such a result unreasonable:
(1) The forum will apply its own statute of limitations barring the claim.
(2) The forum will apply its own statute of limitations permitting the claim unless:
(a) maintenance of the claim would serve no substantial interest of the forum; and

Colombian law required the district court to review expert affidavits; the court concluded Colombian law did not permit tolling and that Colombian judges, as civil law judges, lacked inherent authority to craft an equitable exception to a limitations period. Moreover, the conflict was outcome determinative because timely under New Jersey law and untimely under Colombian law.

The court then assessed whether permitting the suit to proceed "would serve no substantial interest of the forum" and the claim would be barred under the law of the state "having a more significant relationship to the parties and the occurrence." Under this test, the court determined that Colombian law applied. The fact that Chiquita was incorporated in New Jersey did not give that state a substantive interest in the dispute; by contrast, the alleged criminal conduct took place in Colombia and the victims were Colombian citizens.

At step two, the court asked whether a congressional statute or Federal Rule covered the disputed issue. None existed, and equitable tolling rules, as judge-made rules, do not qualify.

At step three, the court again applied an outcome determinative test in light of the twin aims of ***Erie***, namely, discouragement of forum shopping and avoidance of inequitable administration of the law.

> Even under *Hanna*'s modified version of *Guaranty Trust*, applying the rule in *American Pipe* in diversity class actions is "outcome determinative." For one, *American Pipe* would result in forum-shopping. An unnamed class member of a former Rule 23 putative class action (where class certification was denied) would have a longer time to file her individual state law claim in federal court than in state court because of *American Pipe*, so she would likely choose the federal forum. And this result would also cause the inequitable administration of the laws (at least when federal class actions are filed predicated on state law claims) because unnamed class members in a federal forum would benefit from the class action vehicle, while also individually getting a longer statute of limitations period. By effectively modifying a state's statute of limitations, *American Pipe* would "alter[] the mode of enforcement of state-created rights in a fashion sufficiently 'substantial' to raise the sort of equal protection problems to which the *Erie* opinion alluded." * * *

(b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.
Restatement (Second) of Conflicts of Law § 142 (Am. Law Inst. 1971).

At step four, the court found no countervailing federal interests in favor of applying an equitable tolling rule over a no-tolling rule, finding that the no-tolling rule was substantive and an integral part of Colombia's class action practice, which placed a premium on expedition.

As to amending the complaint to permit minority tolling, the court held it was error to deny plaintiffs the opportunity.

Kelly v. Corizon Health Inc., No. 2:22-CV-10589, 2022 WL 16575763 (E.D. Mich. Nov. 1, 2022).

The decision involves choice of law in a federal civil rights action in the context of a Rule 25(c) motion for substitution where a party has transferred its interest in an ongoing action. In particular, the transfer, if it occurred, was part of a "divisional merger" under Texas law. The Federal Rule is only procedural and does not define what constitutes a transfer of interest. The parties disputed to which of two parties defendant had transferred its interest. To resolve the substitution question, the court thus had to resolve the substantive transfer question. But first it had to determine what law governed resolution of that issue. In the end, the court opted to apply ***Klaxon***, and applied the conflict rule of the state in which it sat, finding the Michigan rule not inconsistent with federal interests. But then the court ran into considerable interpretive difficulties: Michigan choice of law was not clear on the relevant issue:

> Because the internal affairs doctrine does not apply, the Court must look instead to "broader" choice of law principles. * * * The only snag is that outside of the internal affairs doctrine, Michigan courts have not addressed the choice of law rules applicable to corporate law issues. And to make matters more complicated, courts have not reached a clear consensus as to whether issues involving successorship liability and veil-piercing should be treated as corporate, contract, or tort issues—a distinction which matters because Michigan, like other states, applies different choice of law rules depending on the area of law at issue. * * * And to do so, the Court may look to the Second Restatement to help fill the gaps in Michigan's jurisprudence. * * *

The choice-of-law analysis likely is beyond the scope of a 1L course. Boiled down, the court undertook an extended analysis under the Restatement and decided to apply Michigan, and not Texas law (as the state of the company's incorporation), to resolve the transfer issue.

Ascertaining the State Law

In re Roman Cath. Diocese of Rockville Centre, 650 B.R. 765 (Bankr. S.D.N.Y. Apr. 19, 2023).

Students sometimes forget that problems of ascertaining state law are not limited to diversity-jurisdiction cases. This case illustrates the broader scope of the problem. The Bankruptcy Court sustained objections by the Chapter 11 debtor, a Roman Catholic diocese, to proofs of claims alleging sexual abuse at churches and schools after considering the elements of state law. (Although the Bankruptcy Court cannot assess the substantive merits of the personal injury tort claim, it could make a threshold finding of whether the claim could be sustained as a matter of law.) To determine the sufficiency of the claim, the court applied Federal Rule 12(b)(6) but looked to decisions of New York state courts to determine what claimants had to plead to allege control by the Chapter 11 debtor. The court also considered what a New York court would deem sufficient to dismiss the claims. The court explained that in the absence of a decision on point by New York's high court, it was required to "apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State." The court further noted that although New York's pleading standard is "less exacting" than that of federal law, "New York courts have also dismissed sexual abuse complaints asserting liability against a diocese supported only by conclusory allegations." Students might consider how the case would have been resolved if New York's courts accepted allegations that the bankruptcy court considered conclusory as support for the claim.

Brady v. Sumski, 647 B.R. 835 (D.N.H. 2022).

In this case, the Chapter 13 trustee objected to the debtor's homestead exemption on behalf of her non-debtor husband. The Bankruptcy Court sustained the trustee's objection, and on appeal, the district court certified the exemption question to the New Hampshire Supreme Court, finding the legal question to be "nuanced," "novel," implicating "significant public policy matters," and with no clear answer and only "mixed signals" from the state court or state legislature. As the district court explained:

> * * * When the law is unclear but the signposts are only modestly blurred, the federal court may assume that the state court would adopt an interpretation of state law that is consistent with logic and supported by reasoned authority. * * * However, this court is and should be hesitant to blaze new, previously uncharted state-law trails. Accordingly, when a dispositive legal question is novel and the state's law in the area is unsettled, certification is often appropriate. * * *
>
> The New Hampshire Supreme Court has yet to address the nuanced issues presented in this case. Moreover, resolution of those issues implicates significant public policy matters for the State of New Hampshire. Indeed, the New Hampshire Department of Justice, Consumer Protection Division, has asserted that resolution of the issues presented in this case "will have a broad impact on the ability of New Hampshire consumers to obtain a fresh start through bankruptcy and may endanger home ownership for married consumers outside of

> bankruptcy ....” * * * Accordingly, the prudent course at this stage is to certify the dispositive questions of state law. Otherwise, our Court of Appeals would likely have to revisit the question of certification—a situation that does not represent an efficient use of either judicial or the litigants’ resources. And, even if the Court of Appeals decided to resolve the matter on the merits, lingering doubt would still remain until the New Hampshire Supreme Court authoritatively construed New Hampshire's statutes and reconciled New Hampshire legal precedent. * * *

Lelchook v. Société Générale de Banque au Liban SAL, 67 F.4th 69 (2d Cir. 2023).

The decision illustrates use of certification in connection with a motion to dismiss for lack of personal jurisdiction. U.S. citizens who were harmed and estate and family members of a U.S. citizen who was killed in rocket attacks in Israel sued a foreign bank’s successor, alleging it had provided financial assistance to a terrorist organization leading up to the attacks. The district court dismissed the action, concluding the successor bank did not “inherit” the original bank’s status for purposes of specific jurisdiction because there had not been a merger of the two entities. On appeal to the Second Circuit, the appeals court concluded that it was unable to predict how the forum state’s substantive law would resolve the question of successor status, noting that the New York state courts “have not spoken on the precise issue presented,” and the issue was “important.” It therefore certified two questions to the New York Court of Appeals:

> 1. Under New York law, does an entity that acquires all of another entity’s liabilities and assets, but does not merge with that entity, inherit the acquired entity’s status for purposes of specific personal jurisdiction?
>
> 2. In what circumstances will the acquiring entity be subject to specific personal jurisdiction in New York?

Finite Res., Ltd. v. DTE Methane Res., LLC, 44 F.4th 680 (7th Cir. 2022).

Is certification always warranted when a federal appeals court is uncertain about the meaning of state law? In this decision, the Seventh Circuit explained when certification may be inappropriate. Coal mine owners sued vacuum permit holders in state court, alleging that the use of the pumps caused methane to drain from the owners’ mines. Defendants removed. The district court held that under the rule of capture, the owner did not own the gas (because it could not be owned until the gas was extracted from the property), and granted summary judgment for defendants. On appeal, the owners argued that Illinois law applied, and that the state doctrine of correlative rights negated the rule of capture and barred the use of the pump. To the extent state law was not clear on this question (the Illinois Supreme Court had never addressed it), the owners asked the appeals court to certify the question. The Seventh Circuit declined to certify. Certification is appropriate when “the issue in the case is likely to recur in other cases,” “the

question to be certified is outcome determinative of the case," when the state supreme court "has yet to have an opportunity to illuminate a clear path to the issue," and when the federal appeals court "feel[s] genuinely uncertain about an issue of state law." Those factors were not present in this case. The Illinois state court had limited authority over energy regulation, it was unlikely the problem would recur, the owners did not show that the issue was outcome determinative, and sources other than a state supreme court decision satisfied the court on the issue.

Pitman Farms v. Kuehl Poultry, LLC, 48 F.4th 866 (8th Cir. 2022).

The decision illustrates that "law" for purposes of ***Erie*** and ***Klaxon*** includes not only rules of decision and conflicts rules, but also rules of statutory interpretation. The case involved chicken production contracts between chicken producers and chicken processors. Plaintiff sought a declaratory judgment that two Minnesota statutes and a rule promulgated by the Minnesota Department of Agriculture, establishing the liability of a parent company for the unmet contractual obligations of a subsidiary under certain types of agricultural contracts, did not apply to the dispute. On appeal, the Eighth Circuit acknowledged that the case turned on the interpretation of Minnesota law, and that statutory interpretation "is substantive rather than procedural because it concerns the meaning and application of state substantive law." The appeals court thus applied Minnesota law in interpreting the statutes and the effect to be given to regulation, and acknowledged that under Minnesota law the object of statutory interpretation "is to ascertain and effectuate the intention of the legislature." In the end, the appeals court reversed the district court's interpretation of state law, finding:

> Here, the legislature clearly expressed its intent to protect producers of agricultural commodities from economic harm due to parent business entities using their organizational form to avoid liability for their subsidiaries' actions. Ironically, should LLCs be excluded from the operation of the law due to the lack of amendment it will achieve the exact opposite without any meaningful rationale. Accordingly, we hold that the use of the phrase "corporation, partnership, or association" in the relevant statutes and Rule is intended to include LLCs for the purpose of parent-company liability.

(For another example of a federal diversity court applying state statutory rules of construction, see **George v. SI Grp., Inc., 36 F.4th 611 (5th Cir. 2022),** involving Texas statutes governing the liability of property owners for certain on-the-premises injuries, where the Texas Supreme Court had not provided guidance and the statute did not define the terms.)

Federal "Common Law"

United States v. Honeywell Int'l Inc., 47 F.4th 805 (D.C. Cir. 2022).

This case illustrates a straightforward application of the ***Clearfield Trust-Kimbell Foods-Boyle*** standard for determining whether a federal court may devise a common law rule of decision for a lawsuit in place of a state common law rule; students might be asked whether ***FDIC v. Rodriguez*** would affect the analysis. As a matter of first impression, the Court of Appeals held that the pro tanto rule is the appropriate measure of settlement offsets when calculating damages under the False Claims Act, a federal statute that allows the United States and its assignees to sue contractors and others that defraud the government. The specific question was whether state or federal law should govern the rule for calculating settlement offsets under the Act. Analogizing the FCA right of action to the government's contract rights, the Court of Appeals found a "uniquely federal interest," and that it was appropriate to create a federal rule of decision because the lack of uniformity would subject federal interests to "exceptional uncertainty," creating the required "significant conflict" between federal interests and use of state law.

Federal Law in the State Court

Gray v. BNSF Ry. Co., No. 2:22CV103 JM, 2023 WL 2972658 (E.D. Ark. Apr. 17, 2023).

The dispute involved the validity of a release under the Federal Employers' Liability Act, which ***Dice*** held is a federal question to be decided by federal and not state law. The terms differed from ***Dice*** in that they referred to future claims. In 2004 the worker signed a release settling a claim related to an accident that occurred in 2002, and included language that also released the employer from "any and all other claims, whether known or unknown." In 2017, the worker signed a release referring to claims "arising out of or resulting from any alleged exposure to toxic or harmful substances." In 2019, the worker was diagnosed with bladder cancer and the question was whether the release barred his negligence claims. Looking to FELA, the district court held that both releases were invalid under 45 U.S.C. § 55 and denied the employer's motion for summary judgment. In reaching this decision, the court noted that there is a split among the circuit as to the validity of a release of future claims under FELA. The Sixth Circuit has adopted a "bright-line" standard and to be valid it must reflect a "bargained-for-settlement of a known claim for a specific injury." The Third Circuit has adopted a "fact-intensive" approach; a release does not violate FELA if executed for valid consideration, but the scope of the release must be "limited to those risks which are known to the parties at the time the release is signed."

(For a case similar to ***Gray***, reaching a different result, see ***Fisher v. BNSF Ry. Co.***, 650 S.W.3d 880 (Tex. App. 2022); among other things, counsel failed to raise the existence of a fact issue on intent about future risks in the trial court and the appeals court held the issue was waived.)

Chapter 8—Modern Pleading

The Complaint

Johnson v. Everyrealm, --- F.Supp.3d ---, 2023 WL 2216173 (S.D.N.Y. Feb. 24, 2023).

Yost v. Everyrealm, Inc., --- F.Supp.3d ---, 2023 WL 224450 (S.D.N.Y. 2023).

These companion cases (discussed later in this memo in connection with Chapter 18 concerning the impact of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act on a motion to compel arbitration) present excellent and contrasting fact patterns for students to consider and apply the Rule 12(b)(6) plausibility standard in situations of workplace gender-based discrimination.

Williams v. Tech Mahindra (Americas) Inc., 70 F.4th 646 (3d Cir. 2022).

The decision offers a good illustration of ***Swierkiewicz*** and of the ***McDonnell Douglas*** burden-shifting framework for employment discrimination cases in a discrimination case arising under different federal statute, 42 U.S.C. § 1981. It also draws attention to the different pleading burdens in making out a prima facie case of discrimination by a class plaintiff and by an individual plaintiff. A fired employee sued his former employer. On appeal, the Third Circuit held that to survive a motion to dismiss, the putative class action complaint was not required to allege but-for causation on an individual basis given the availability of the pattern-or-practice method of proof at later stages of the case.

Clinton v. Security Benefit Life Ins. Co., 63 F.4th 1264, 1274 (10th Cir. 2023).

The dispute involves a somewhat complicated financial instrument—an equity-indexed deferred annuity—but provides a good problem for applying Federal Rule 8 and Federal Rule 9 with respect to plausibility and particularity. The gist of the complaint is that defendants induced plaintiffs to buy annuity products using such devices as misleading marketing materials, and violated the federal racketeering statute through mail fraud and fraud. The district court dismissed the complaint, and the Tenth Circuit reversed, with a dissenting opinion arguing the majority's opinion "may stifle security markets." The majority's Rule 9(b) analysis is clear and methodical, with the court walking through the allegations of the complaint and focusing on which non-conclusory allegations specify the who, what, where, and when of the alleged fraud. In particular, the majority insisted that its review must be holistic: "[I]n evaluating the particularity of fraud allegations under Rule 9(b), we must ask whether the complaint, taken as a

whole, 'sufficiently apprise[s]" the defendant of its involvement in the alleged fraudulent conduct.'" Further, "even where 'not *all* of the plaintiffs' allegations' are pleaded with particularity, * * * a complaint may nonetheless satisfy Rule 9(b)'s requirements when its allegations are sufficiently particularized when '*taken as a whole*,' * * *." The decision also provides a good discussion of when materials not contained in the pleading may be considered on a Rule 12(b)(6) motion.

Amendments

Rodriguez v. McCloughen, 49 F.4th 1120 (7th Cir. 2022).

As a matter of first impression, the Seventh Circuit agreed that delay caused by screening of prisoner's pro se complaint was good cause for belated service, which increased the time for relation back. The record showed that the prisoner's amended complaint substituting named agents for defendants originally identified only by code names related back to original complaint, and the prisoner's belief that using code names necessary to preserve agents' undercover status counted as mistake within Federal Rule 15(c). An additional opinion appears at **2022 WL 4534787 (7th Cir. 2022)** (amendment would not be futile as to all claims and dismissal order vacated in part).

Salmon v. Lang, 57 F.4th 296 (1st Cir. 2022).

The decision draws attention to the important differences between Federal Rule 15(c)(1)(A) and 15(c)(1)(C). In June 2019, a public school teacher and former president of the local teachers' union sued various public school officials in federal court alleging retaliation for union advocacy, in violation of the First Amendment and state law. In February 2020, plaintiff sought leave to amend the complaint to add a new claim against the town under the state whistleblower statute. The district court granted the amotion to amend to the extent the new claim was based on actions occurring since February 2018 (and so within the state statute's two-year limitation period) and denied the request for "relation back" under Federal Rule 15(c)(1)(C). Plaintiff moved for reconsideration under Rule 60 and argued, for the first time, that relation back was permitted under Rule 15(c)(1)(A) because the state whistleblower statute, which provided the applicable statute of limitations, allowed relation back. The district court rejected that argument, reasoning that Federal Rule 15(c)(1)(C) imposed "specific limitations" on amendment and should apply in an action not premised on diversity jurisdiction to avoid having the federal court's exercise of inherent authority run afoul of the Rules Enabling Act. On appeal, the First Circuit affirmed the denial as within the court's discretion, finding it was not a manifest error of law to reject a "belated argument on reconsideration": "We have not before determined whether Rule 15(c)(1)(A) displaces Rule 15(c)(1)(C) with less restrictive state law. Indeed, it does not appear that any federal court of appeals has. Moreover, even if Massachusetts Rule

15(c) controlled, it is far from manifest that relation-back would still be appropriate in [this] case."

Provisions to Deter Frivolous Pleadings

King v. Whitmer, --- F.4th ---, 2023 WL 4145049 (6th Cir. June 23, 2023).

The Sixth Circuit has resolved the appeal in the Michigan presidential election case (the district court decision is discussed in the Thirteenth Edition, Notes and Questions, p. 715).

First, the appeals court reversed the district court's finding that counsel violated Rule 11(b)(1) because "trying to use the judicial process to frame a public 'narrative" was not a proper purpose for a lawsuit. To the contrary, the framing of a public narrative is speech, and "Rule 11 cannot proscribe conduct protected by the First Amendment"; as the Supreme Court has made clear in other contexts, "attorneys are free to use litigation 'as a vehicle for effective political expression."

Second, the appeals court delivered a mixed assessment of whether counsel's prefiling investigation violated Rule 11(b)(3), finding some of the allegations baseless, some of them legitimately based on expert affidavits, and some of them reflecting a failure to inquire whether the statements relied upon remained plausible. Overall, however, "the affidavits cited in the complaint did not afford counsel a credible basis to allege that 'tens of thousands' of fraudulent votes were counted * * *. Those allegations therefore lacked the requisite basis in evidence" under Rule 11(b)(3). Further, a reasonable prefiling inquiry would have included reading the three-page statute at issue in the case. However, the Sixth Circuit found that counsel reasonably relied on affidavits based on personal observations of Election Day voting and allegations that election workers "mistreated, intimidated, and discriminated against Republican election challengers."

Third, the appeals court rejected the district court's finding that "the entire complaint was independently sanctionable under Rule 11(b)(2)." To be sure, the equal protection, due process, and Michigan Constitution claims "relied exclusively on frivolous allegations of widespread voter fraud," but they were already sanctionable under Rule 11(b)(3) and so it was unnecessary to consider whether they also were sanctionable under Rule 11(b)(2). However, the district court correctly determined that the remaining claims rested on frivolous legal contentions—given the Board of Canvassers' sovereign immunity, "counsel never should have asserted any claims" against that entity; and federal claims against the Governor were "obviously" not supported. By contrast, the appeals court found a claim for selective enforcement not sanctionable, although it might not have survived a motion to dismiss, and a remaining state law claim likewise was not sanctionable.

The appeals court rejected the argument that the complaint was adequate given time constraints "inherent in election contests:

> * * * Rule 11 imposes a safe-harbor period to protect attorneys from sanctions for hasty mistakes. A party may seek sanctions only after providing notice of the alleged violations, which the opposing party then has 21 days to cure. Fed. R. Civ. P. 11(c); *see also* advisory committee's note to 1993 amendment ("[T]he timely withdrawal of a contention will protect a party against a motion for sanctions."). Here, the City sent plaintiffs a detailed letter specifying the allegedly sanctionable material. Plaintiffs could have avoided sanctions by abandoning frivolous claims and allegations and concentrating the attention of the court on what remained. They did not do so, and that is why we uphold much of their Rule 11 sanctions today.

Finally, the appeals court reversed the imposition of sanctions on specific individual attorneys; trimmed the award of attorney fees, to distinguish between sanctionable and non-sanctionable parts of the complaint; affirmed referral of counsel for disciplinary proceedings as within the local rules; and rejected arguments that non-monetary sanctions violated the First Amendment. Further, the Sixth Circuit made clear that inherent authority may be invoked as an alternative basis for sanctions to Rule 11 or 28 U.S.C. § 1927 only upon a showing of bad faith as well as frivolousness.

Wesco Insurance Co. v. Roderick Linton Belfance, LLP, 39 F.4th 326 (6th Cir. 2022).

The case introduces students to the imposition of sanctions outside the Rule 11 and § 1927 setting, and addresses an important question of professional practice: when is an order of attorney fees a sanction and so excluded from a lawyer's liability insurance policy? Boiled down, parents sued a school district alleging a violation of their children's rights under the Individuals with Disabilities Education Act. The districts won, and as prevailing parties were eligible for attorney fees on the ground that the suits were frivolous or filed for an improper purpose. The insurer that issued a liability policy for the law firm and attorneys representing the parents then brought a declaratory action seeking to establish that it had no duty to defend or indemnify because the fees were a sanction. The firm and attorneys filed a counterclaim against the insurer, and attorneys filed a crossclaim against the firm, and the firm responded by filing crossclaims against the attorneys. The district court granted summary judgment for the insurer and dismissed the crossclaims without prejudice. On appeal, the Sixth Circuit, looking to Ohio law, held that the awards of attorney fees were sanctions within a policy even though they also had a compensatory purpose, emphasizing that the districts were required to show that the attorneys engaged in misconduct, and so were excluded from the definition of covered damages, and so the insurer had no duty to defend.

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

Joinder of Claims

Charlotte-Mecklenburg County Board of Education v. Brady, 66 F.4th 205 (4th Cir. 2023).

The procedural issue focuses on whether a parent's effort to secure disability-related educational services for their child arose by way of permissive counterclaim, compulsory counterclaim, or some other joinder device. If the request arose by way of compulsory counterclaim, the parent's request was not subject to the federal statute's pre-suit requirements and was not time barred by a one-year limitations period. The facts are not tidy and illustrate the complexities individuals without lawyers face in navigating complicated federal statutes that, in principle, have been enacted for their benefit. In brief, the parent emailed the child's disability team requesting an IDEA evaluation. At that point, the school board was required to send the parent a copy of the IDEA's procedural requirements and written notice of a refusal to conduct the review; the board did not. The parent then challenged the denial at an administrative hearing, but the Administrative Law Judge dismissed the action as time-barred under the one-year limitations period. The parent then successfully appealed the dismissal to a state hearing review officer. The Board then filed an original action in federal district court for a declaration that the statute of limitations barred the parent's administrative action. The parent then asserted a counterclaim, requesting the federal court to resolve the underlying administrative claim. The district court agreed that the one-year period did not bar the IDEA claim, but dismissed the counterclaim for failure to exhaust administrative remedies. On the parent's cross-appeal, the Fourth Circuit affirmed the district court's timeliness ruling, and reversed the dismissal, finding that because the counterclaim was compulsory, exhaustion was not required under the statute.

As the Fourth Circuit explained, the IDEA's pre-suit exhaustion requirements to filing an action in federal court apply only to the party "bringing the action." A compulsory counterclaimant is not a party "bringing the action." Under Federal Rule 13, a counterclaim is compulsory if it "arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim" and does not require the addition of another party over whom there would be no jurisdiction. The Fourth Circuit has held that "[a] counterclaim may still arise from the same 'transaction or occurrence'[ ] as a logically related claim even though the evidence needed to prove the opposing claims may be quite different." In cases under the IDEA, the Fourth Circuit earlier held that a counterclaim is compulsory "where 'it arises from the same administrative hearing and review officer's decision, involves the same child and school district, and evokes consideration of the same law.'" Thus, although the Board's complaint concerned only the timeliness question, a "logical relationship" existed between the timeliness question and the services provided, and the Fourth Circuit comfortably treated the counterclaim as compulsory.

Crossclaims

Nautilus Insurance Co. v. S&A Pizza, Inc, 2022 WL 319743 (W.D. Mo. 2022).

A summary of the facts and jurisdictional issues in this case appears earlier in this Memo in the section on Subject-Matter Jurisdiction. Consider asking the students to explain why the Pipeline parties' claim met the requirements of Federal Rule 13(g).

Permissive Joinder Under Rule 20

Dorsey v. Varga, 55 F.4th 1094 (7th Cir. 2022).

The case involves the intersection of the Prison Litigation Reform Act and Federal Rule 20 permissive joinder. Plaintiff was detained in state prison. His Third Amended Complaint alleged Eighth Amendment claims under § 1983 against correction officers, a nurse, and a doctor for inadequate back-pain treatment and nonconsensual medication. The district court dismissed for misjoinder, finding that the Eighth Amendment claims "involved distinct conduct by separate sets of defendants and were legally and factually distinct from each other." The Seventh Circuit reversed, applying a de novo standard of review and finding an error of law and so abuse of discretion. As the appeals court explained, the complaint met the requirements of Federal Rule 20(a)(2); it asserted an Eighth Amendment claim against all defendants, and the claim required prisoner to prove that his injury constituted objectively serious medical need and that each defendant was deliberately indifferent to it, which necessarily involved common questions about the alleged back pain and treatment.

The appeals court rejected the argument that dismissal for misjoinder was erroneous under Federal Rule 21, which provides, in part, that misjoinder "is not a ground for dismissing an action." But the appeals court did find that the district court abused its discretion in dismissing the complaint for the party's failure to comply with its order to cure "misjoinder in … [the] complaint." Because the order requiring plaintiff to replead was invalid—the joinder was valid—dismissal was outside the court's discretion.

Finally, in a lengthy dictum, the appeals court provided guidance to district courts on how to screen complaints under the PLRA when claims are asserted against multiple parties. In particular, the court recommended reviewing joinder before reaching the merits, as a way to make clear the appropriate filing fee and the number of strikes that would result from dismissal.

Joinder of Required Parties Under Rule 19

Sorenson v. Sorenson, 64 F.4th 969 (8th Cir. 2023).

The case illustrates the multiple consequences of characterizing a party as indispensable. The facts (discussed in connection with Chapter 4 on collusive joinder and diversity jurisdiction) are easy to understand and present a simple setting for the complicated question of whether a party is a required party under Federal Rule 19. On appeal, the Eighth Circuit applied a conventional two-step process, (1) first determining whether the non-joined sibling party was required under Rule 19(a)(1), and (2) if required, then conducting a multi-factor analysis under Rule 19(b) to determine whether "in equity and good conscience" the action should proceed or be dismissed. Although the district court found that the third sibling, having assigned his complete interest, no longer had an interest in the litigation, the wife did not appeal that finding, and so the appeals court did not proceed to the second step of the analysis.

Klamath Irrigation Dist. v. United States Bureau of Reclamation, 48 F.4th 934 (9th Cir. 2022, petition for cert. docketed (U.S. No. 22-1116 May 15, 2023).

Those of you who teach ***Republic of the Philippines v. Pimentel*** will find this case a useful teaching vehicle to explore the intersection of sovereign immunity and Rule 19, in the context of tribal immunity. The case concerns the distribution of waters in the Klamath Water Basin by the Bureau of Reclamation, which owns and operates the Kamath Project, a federal irrigation project. A number of irrigation districts appealed the dismissal of their action challenging the Bureau's operating procedure, designed to maintain specific lake levels and instream flow to comply with the Endangered Species Act and to protect federal reserved water and fishing rights of the Hoopa Valley and Klamath Tribes. The districts alleged that compliance with the procedures violated federal law by depriving them of waters they claim were lawfully appropriated to the districts in a state court proceeding. The Tribes intervened as of right in the action, but then moved to dismiss on the ground that they are required parties who cannot be joined because of tribal immunity. The district court agreed, and the appeals court affirmed, holding that the Tribes were required parties whose interest in maintaining their reserved water rights would be impaired if the districts prevailed, and that their interest could not be adequately represented by the Bureau; and further, that there was no way to shape relief in their absence because the claims to water were mutually exclusive. (Judge Bumatay concurred, focusing on the districts' McCarran Amendment arguments and its effect on immunity and the adequacy of representation by the federal government, issues that are outside the coverage of most 1L procedure courses.)

Intervention

Guenther v. BP Ret. Accumulation Plan, 50 F.4th 536 (5th Cir. 2022).

This is a complicated and complex case involving the relation between intervention of right and a class action. Employees sued an employer and a retirement plan alleging a violation of the Employee Retirement Income Security Act. The Magistrate Judge recommended class certification. At that point, plaintiffs in a separate action challenging the same plan moved to intervene as a way to opt out of the certified class, or alternatively to be named plaintiffs in the certified class. The putative intervenors argued that they asserted distinct interests from those of the class plaintiffs and sought a broader range of relief. The district court denied the motion, and the Fifth Circuit affirmed, finding no distinct interest but rather only differences in litigation strategy between the two groups. The appeals court explained:

> Similar factual allegations underpin the claims in both actions. Both groups of plaintiffs allege the same primary harm based on violations of the same provision in ERISA. Most importantly, both [the class plaintiffs and the putative intervenors] share the same ultimate objective: they all seek for their retirement plans to be made whole * * *. It is unnecessary for a complaint to allege every fact or theory that is conceivably relevant so that a plaintiff may ultimately obtain relief. A complaint opens the door to litigation; it is not the final word on the matter. Plaintiffs are given many opportunities to amend their pleadings throughout the course of an action, including stages later than where the [class action] currently stands.

Moreover, the Fifth Circuit held that denying intervention of right would not deprive the putative intervenors of their right to due process. Admittedly, the class action could have broad preclusive effect. However, because the putative intervenors did not show "a unique interest of their own," they likewise failed to show "how a determination in the [class] action could have future detrimental preclusive effect."

Campaign Legal Ctr. v. Federal Election Commission, 68 F.4th 607 (D.C. Cir. 2023).

The District of Columbia Circuit affirmed the denial of a motion to intervene as of right, filed post-judgment, as untimely. In 2018, Campaign Legal Center filed an administrative complaint with the Federal Election Commission against Heritage Action. In 2021, Campaign sued the Commission, seeking a declaration that its failure to act on the administrative complaint contrary to law. In March 2022, the district court granted the Campaign's motion for a default judgment, ordered the Commission to act on the complaint within a set time period, granted Heritage Action leave to file an amicus brief, and granted Campaign's motion for an order

finding that the Commission had failed to conform to the default judgment, and that Campaign could sue Heritage Action directly in a citizen suit, and the next day ordered the case closed. That month, Campaign sought documents from the Commission pertinent to the administrative complaint. Two days after the case was closed, the Commission acknowledged the existence of the documents. On May 10, Heritage Action moved to intervene for reconsideration or to appeal the district court's order in Campaign's suit, and the district court denied the motion as untimely and, further, found that any interests could be raised in Campaign's citizen suit.

On appeal, the D.C. Circuit assessed timeliness from the perspective of whether Heritage Action "sought to intervene as soon as it became clear that its interests would no longer be protected by the parties in the case" (internal quotations omitted)—which the district court found would have been known prior to the entry of judgment. It rejected Heritage Action's argument that timeliness should be analyzed with respect to the change in circumstances that triggered the motion to intervene—in this case, the Commission's production of documents after the closing of the case. In particular, the appeals court emphasized that Heritage Action could have submitted its document request earlier in the proceedings, and that the district court did not abuse its discretion in denying the post-judgment motion.

Cahoo v. SAS Inst., Inc., --- F. 4th ---, 2023 WL 4014172 (6th Cir. 2023)

This case, which we earlier discussed with Chapter 3, also involved the timeliness of a motion to intervene whether as of right or permission after the denial of class certification. The putative intervenor argued that the inadequacy of representation became apparent only after certification was denied, and she sought to appear as the class representative. The Sixth Circuit rejected what it called a "wait-and-see" approach, emphasizing the four-year delay in moving to intervene, and argued granting the motion would require "re-traveling these same roads and re-reaching these same milestones, all while adding considerable delay and cost to the litigation."

Chapter 10—Class Actions

Operation of the Class Action Device

Eddlemon v. Bradley University, 65 F.4th 335 (7th Cir. 2023).

This fact pattern may interest students—a putative class action by students against a university alleging breach of contract and unjust enrichment for holding remote classroom instruction during the COVID-19 pandemic. The district court certified two classes: all students "who paid, or on whose behalf payment was made" for tuition and activity fees. The Seventh Circuit vacated the district court's orders as an abuse of discretion. The University argued that the district court failed to "conduct the required rigorous analysis" before concluding that both the commonality and predominance requirements were met, and the appeals court agreed. The

record failed to show that the district court considered how plaintiff planned to "prove his allegations with common evidence"; it "merely accepted [plaintiff's] proffered common questions without referring to the common evidence presented to answer those questions"; it failed to identify the elements of the claims to understand the relation between the common and individual questions; and instead "repeatedly and heavily relied on a non-precedential opinion * * * to summarily conclude that 'common questions predominate over individual questions.'" As to remedy, the district court simply stated it "is confident that … it will be able to fashion an appropriate formulate" for unjust enrichment damages.

Allen v. Ollie's Bargain Outlet, Inc., 37 F.4th 890 (3d Cir. 2022).

The decision focuses on numerosity. The lawsuit was brought by customers who use wheelchairs for mobility against the operator of 400 retail stores alleging a violation of the Americans with Disabilities Act. The Third Circuit held that the district court abused its discretion in finding that plaintiffs satisfied numerosity (as well as commonality). Plaintiffs supported their motion with community survey estimates of the number of persons using wheelchairs in the same zip code-areas as the stores, with video evidence of customer usage over a seven-day period, and 12 e-mails from customers complaining about a lack of access. The appeals court emphasized that it increasingly has given the numerosity requirement "real teeth," citing prior circuit precent that required plaintiffs, when they cannot directly identify class members, to "show sufficient circumstantial evidence specific to the products, problems, parties, and geographic areas actually covered by the class definition to allow a district court to make a factual finding. Only then may the court rely on 'common sense' to forgo precise calculations and exact numbers." On this standard, the appeals court held it could not infer numerosity from the larger pool of residents. Further, the district court failed to consider whether joinder was practicable, and was directed to do so on remand.

Duncan v. Governor of Virgin Island, 48 F.4th 195 (3d Cir. 2022).

The decision focuses on typicality and adequacy of representation. A taxpayer filed a putative class action challenging the alleged practice of the Virgin Islands to delay payment of income tax refunds for most taxpayers but to expedite payment for favored taxpayers and government employees. During the pendency of the suit the taxpayer received her tax refund. The district court denied class certification, on grounds of justiciability and Rule 23. The Third Circuit vacated the district court's order, calling the merging of standing and typicality "an understandable but significant misstep" and also clarifying that the Article III issue was that of mootness, and not standing. These jurisdictional issues likely are beyond the 1L course, but the defendant's practice of "picking off" small-claims plaintiffs could be addressed as part of the appeals court's discussion of Rule 23 typicality and adequacy. The appeals court agreed that the district court acted within its discretion in finding that the taxpayer was no longer typical of the class after having received her tax refund check, but observed the remaining claims, for

mandamus, declaratory relief, and injunctive relief, were unlikely to raise the same atypicality concerns. As to adequacy of representation, the majority emphasized that plaintiff's burden to show adequacy "need not present evidence of the sort one might expect at summary judgment;" "[r]ather, the definition of a class, the factual allegations of the complaint, and the relief sought are themselves highly indicative of a putative class representative's theory of the case and whether she will seek relief that benefits the entire class." A dissenting judge would have affirmed the judgment on grounds of atypicality.

Murray v. Grocery Delivery E-Services USA Inc., 55 F.4th 340 (1st Cir. 2022).

The decision focuses on adequacy of representation in a consumer action against HelloFresh, alleging three types of violation of the federal Telephone Consumer Protection Act. After filing suit, the parties entered into a mediated settlement discussion at which counsel for the named plaintiffs acted jointly on behalf of all prospective class members regardless of their claim. Eventually, the district court certified the class (of about 4.8 million customers and former customers) for purposes of settlement and approved the settlement agreement (requiring payment of about $14 million), which included incentive payments to the named representatives. An objector appealed, focusing in part on the size of the negotiated payout relative to the value of statutory damages, which she put at $2.4 billion, and argued that a single lawyer should not have conducted the negotiations given material differences among the claims. The First Circuit vacated and remanded, finding that the district court lacked a sufficient basis for finding adequacy of representation. The decision offers a good discussion of when intra-class conflicts exist that require separate counsel to conduct negotiations. It also clarified that incentive payments are not per se barred under Rule 23(e) and do not automatically render a named plaintiff an inadequate class representative.

Hyland v. Navient Corp., 48 F.4th 110 (2d Cir. 2022).

The decision focuses on cy pres and incentive awards to the named plaintiffs. The action was filed by student loan borrowers who, as public sector workers, were eligible for loan forgiveness after meeting certain conditions. The district court dismissed all claims other than a claim under New York law for deceptive practices; at multiple hearings and conferences, the judge expressed skepticism about class certification. Nevertheless, a mandatory nationwide class for settlement purposes was later certified under Rule 23(b)(2) and approved over objections. As part of the settlement, defendant agreed to provide more accurate information to borrowers and to contribute $2.25 million as a cy pres award to establish a nonprofit organization that would provide financial counseling to borrowers; in exchange, class members released their non-monetary claims but retained the individual right to sue for damages. The court also granted $15,000 incentive awards to the named plaintiffs.

On appeal, the Second Circuit rejected arguments that certification under Rule 23(b)(2) was not appropriate, finding that all class members benefited from the proposed injunctive relief, and did not impermissibly deprive class members of opt-out rights. The appeals court also declined to find that cy pres awards are impermissible because they provide no direct benefit to class members or act as compelled speech in violation of the First Amendment. Nor was it feasible in this case to distribute the cy pres funds directly to the class because the settlement fund was not a damages award. The appeals court also rejected arguments that service awards are categorically barred, relying on Second Circuit precedent and distinguishing a pair of nineteenth-century Supreme Court decisions on which appellants relied. The awards were fair and reasonable in this case because the named plaintiffs had opened their lives to scrutiny and faced vitriol during the litigation.

(For a later Second Circuit decision involving service awards to the named plaintiffs, see ***Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 730 (2d Cir 2023)**, an antitrust action. Judge Jacobs, who wrote the majority opinion, also wrote a concurring opinion questioning the appropriateness of service awards and endorsing the approach taken by the Eleventh Circuit in ***Johnson v. NPAS Sols, Inc.*, 975 F.3d 1244 (11th Cir. 2020)**, and questioning the need for payment of such incentive payments: "Perhaps class actions that plaintiffs lack incentive to bring are class actions that need not be brought.")

In re Niaspan Antitrust Litigation, 67 F.4th 118 (3d Cir. 2023).

The decision focuses on ascertainability. The lawsuit involved drug pricing, alleging that the manufacturer of the drug Niaspan "paid off a potential manufacturer of a generic version of the drug to delay the generic's launch" in violation of antitrust and consumer protection laws. The action was brought by so-called end-payors—insurance plans that do not directly purchase drugs at pharmacies but instead pay a portion of the drugs' price. The class action sought to recover damages based on inflated prices, and the district court denied class certification holding, after discovery, that plaintiffs did not meet their burden to "identify, without individualized inquiry" the members of the class. On interlocutory appeal under Rule 23(f), plaintiffs attempted "to shore up their methodology for demonstrating ascertainability," but the Third Circuit held those arguments, because not raised before the district court, were forfeited. The decision began with a solid summary of Third Circuit caselaw on ascertainability; declined to overrule prior precedent; and affirmed as not clearly erroneous the district court's finding that the prevalence of intermediaries in the pharmacy-benefit-managers data posed ascertainability problems.

Braidwood Management, Inc. v. Equal Employment Opportunity Commission, 70 F.4th 914 (5th Cir. 2023).

The fact pattern offers the basis for a good classroom problem about ascertainability in the wake of the Supreme Court's decision in ***Bostock*** interpreting Title VII to bar discrimination

against persons "for being homosexual or transgender." Two Texas employers brought a class action for a declaratory judgment that:

> 1. The Religious Freedom Restoration Act compels exemptions to ***Bostock***'s interpretation of Title VII ("RFRA claim");
>
> 2. The Free-Exercise Clause compels exemptions to ***Bostock***'s interpretation of Title VII ("free exercise claim");
>
> 3. The First Amendment right of expressive association compels exemptions to ***Bostock***'s interpretation of Title VII ("expressive association claim");
>
> 4. Title VII, as interpreted in ***Bostock***, does not prohibit discrimination against bisexual employees ("bisexual orientation claim");
>
> 5. Title VII, as interpreted in ***Bostock***, does not prohibit employers from establishing sex-neutral rules of conduct that exclude practicing homosexuals and transgender people from employment ("sex-neutral rules of conduct claim").

Plaintiffs sought certification of two classes: (1) "every employer in the United States that opposes homosexual or transgender behavior for religious or nonreligious reasons" and (2) "all employers that oppose homosexual or transgender behavior for sincere religious reasons" The district court certified the first class and modified the second class to a "Religious Business-Type Employer Class." The Fifth Circuit reversed the certification order on the ground that the definitions were vague, the boundaries of the class were not ascertainable, and commonality was not shown given the centrality of religious sincerity to the claims, which "can be made only on a case-by-case basis and not at this level of abstraction at the class-certification stage."

(For another case involving the effect of religious belief on class certification, see **Doster v. Kendall, 54 F.5th 398 (6th Cir. 2022)**, involving a class-wide challenge by Air Force servicemembers to the COVID-19 vaccine mandate. The Sixth Circuit affirmed certification of a class defined as all members of the Air Force whom a military chaplain had found to be a sincerely held religious belief burdened by the mandated, even though the claims generally required an individual inquiry into why the Air Force denied an exemption.)

Notice

Bakov v. Consolidated World Travel, Inc., 68 F.4th 1053 (7th Cir. 2023).

The decision addresses the district court's authority to impose the cost of class notice on a defendant that has been found liable to the class. In "the unusual circumstances" of the case, the Seventh Circuit affirmed the existence of such authority and found that it was not an abuse of

discretion to order defendant to bear the cost. The case has an unusual procedural history. The complaint alleged claims under the federal Telephone Consumer Protection Act. The district court initially certified a class limited to Illinois, on the view that ***Bristol-Myers Squibb*** required a finding of no personal jurisdiction for claims by proposed class members who did not live in Illinois. Plaintiffs then covered the cost of identifying and sending notice to 28,239 Illinois class members. Six months later the district court granted summary judgment in favor of the class. Shortly after, the Seventh Circuit decided ***Mussat v. IQVIA, Inc.***, holding that Bristol-Myers Squibb does not apply to a nationwide class action filed in federal court under a federal statute. After briefing, the district court then issued a revised order certifying a nationwide class and entered summary judgment in favor of that class, finding that members of the nationwide class were entitled to notice and an opportunity to opt out. The parties disputed whether cost-shifting was appropriate; the district court ordered defendant to bear the cost, emphasizing that defendant's liability had already been established. Defendant filed a notice of appeal, but did not, as the circuit court underscored, request that plaintiffs post a bond for the cost of notice. The appeals court found that it was within the district court's discretion to shift the costs of notice when liability had already been found. Although the liability ruling could be reversed on appeal, defendant can protect itself by seeking a bond. Moreover, the court emphasized that under Rule 23 plaintiff should not delay class certification "in the hopes of obtaining a merits ruling and a shift in costs."

Interlocutory Appeal

In re White, 64 F.4th 302 (D.C. Cir. 2023).

Former employees and the son of a deceased former employee sued Hilton Hotels Retirement Plan alleging they were unlawfully denied vested retirement benefits. The district court denied their motion for class certification on the ground that they had proposed an "impermissibly 'fail-safe' class," meaning "a class definition for which membership can only be ascertained through 'a determination of the merits of the case." As a matter of first impression, the D.C. Circuit held on interlocutory review under Rule 23(f) that it was an abuse of discretion for the court to deny certification based a stand-alone and extra-textual rule rather than applying Rule 23's specified terms. The decision also includes an extended and clarifying discussion of why Rule 23(f) review is appropriate given the nature of the issue.

Rule 23(h) Attorney's Fees

Fikes Wholesale, Inc. v. HSBC Bank USA, N.A., 62 F.4th 704 (2d Cir 2023).

Judge Jacobs' concurring opinion included a provocative discussion of attorney fees. The average award for each class member in this antitrust suit was $325. The substantive issue, in the eyes of the concurrence, was "whether a handful of standard-form contracts between the card

issuers and the merchants (and their banks) violated the antitrust law)" a question that Judge Jacobs did not think would require "heroic labors" to litigate. Nevertheless, "lawyers for the plaintiffs billed 630,000 hours. That is over 300 lawyer years. One of the plaintiffs' lawyers billed over 14,000 hours; * * *. They are to be richly rewarded: compensation to Plaintiffs' counsel will be half a billion dollars." He questioned the Second Circuit's practice of awarding fees based on the percentage-of-the-fund method, which typically yields an amount that exceeds the lodestar method—in this case, by more than $300 million. And although the lodestar is expected to operate as a cross-check on the reasonableness of the fee award, instead it operates, in Judge Jacobs' view, as a perverse "incentive for counsel to prolong litigation and maximize billable hours to arrive at a lodestar that does not operate as a cap on a percentage award."

Jurisdiction and Venue

Fischer v. Federal Express Corp., 42 F.4th 366 (3d Cir. 2022).

Relying on ***Bristol-Myers Squibb***, the Third Circuit (joining the Sixth and Eighth Circuits) held that in a collective action in federal court under the Fair Labor Standards Act, where the court lacks general jurisdiction over the defendant, all opt-in plaintiffs must establish specific jurisdiction over the defendant with respect to their individual claims under the Fourteenth Amendment, and so with the forum state. By contrast, the First Circuit has held that although the court must be able to assert personal jurisdiction under the Fourteenth Amendment with respect to the original plaintiff's claims, the opt-in plaintiffs' claims must show minimum contacts under the Fifth Amendment, and so with the nation. In particular, the Third Circuit declined to analogize a FLSA collective action to a class action, emphasizing that the latter after certification "acquires an independent legal status," affords "critical protections" to absent class members, and "the relevant claim is the claim of the class." Rather, the appeals court found that that FLSA collective action bore a stronger relation to the mass action at issue in ***Bristol-Myers*** which, under California law, permitted the coordination of "civil actions sharing a common question of fact or law" that are pending in different courts, but designates no particular party as a representative party and lacks the "stringent procedural protections" of Rule 23.

Williams v. Tech Mahindra (Americas) Inc., 70 F.4th 646 (3d Cir. 2022).

The decision discusses ***American Pipe*** tolling and the related, but different tolling doctrine of wrong-forum tolling. An employee who was fired from his job sued his former employer alleging a pattern or practice of race discrimination against non-South Asians in violation of 42 U.S.C. § 1981. The employee had earlier tried to join another class action against the same employer, but after that case was stayed, filed this suit as a putative class action—"years after his termination." The district court dismissed the complaint as untimely under ***American Pipe*** but did not consider the applicability of wrong-forum tolling. On appeal, the Third Circuit vacated and remanded. Under ***American Pipe***, the filing of a putative class action

suspends the statute of limitations for absent class members' individual claims, but the Supreme Court later declined to extend that rule to successive class actions. The Third Circuit held that ***American Pipe*** does not, however, foreclose the application of other equitable tolling rules to class claims upon an "individualized" showing that plaintiff "pursued his claim with diligence and that extraordinary circumstances beyond his control prevented a timely and proper assertion of his rights."

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

Planning for Discovery

Colyer v. Leadec Corp., 2023 WL 4075502 (E.D. Mo. June 20, 2023).

The order concerns modification of the discovery order in a civil rights suit alleging race discrimination and retaliation. The district court granted plaintiff's motion in part by extending the discovery schedule, finding good faith in light of defendant's belated supplemental production of documents. The court also ordered defendant to submit an affidavit "reciting in detail the manner and nature of the searches) related to the supplemental production, including any search terms, custodians and other parameters," and to produce a privilege log for any documents withheld or redacted. and required defendant to provide more evidence under supplemental document production. After that, the court stated it would order parties to meet and confer to discuss further discovery, the reopening of depositions, and appropriate limits to any such depositions. Although declining to enter any sanctions for defendant's failing to make a key witness available for a deposition, the court admonished both parties about their Rule 26 obligations:

> [T]he Court notes that much of the parties' dispute could have been avoided had the parties engaged in early discussions regarding the scope and format of discovery, including any relevant custodians, topics, and sources of electronically stored information. Indeed, the Order Setting Rule 16 Conference issued early on in this case * * * directed the parties to do just that. Further, the parties could and should have brought their discovery disputes to the Court's attention more promptly after they failed to reach accord.
>
> Nevertheless, it appears from the record before the Court that both parties have contributed to the discovery failures in this case and that direction from this Court will assist the parties in advancing any remaining discovery in the most efficient and expeditious manner as possible.
>
> * * *

> The Court expects the parties to approach these conferences in good faith with the goal of targeting any remaining discovery to the specific needs of the case, completing any such discovery promptly, and carefully tailoring any additional depositions in both time and scope to address only the supplemental discovery provided.

The Mechanics of Requested Discovery

Depositions

U.S. v. Umbrella Financial Services, 2023 WL 4109697 (N.D. Tex. June 21, 2023)

The discovery dispute illustrates the application of Rule 26(b)(1) and (2)(C) in a complex government action seeking to enjoin operation of a tax-preparation business. The complaint sought restitution of ill-gotten gains and alleged "that, over the course of multiple years, in multiple states, [defendant] licensees prepared fraudulent tax returns," and "resulted in millions of dollars in tax harm." Early in the litigation, the government moved under Rule 30(a)(2) for leave to take 140 hours of depositions, identifying 101 individuals with relevant information. The court rejected defendant's argument that because the government had not yet taken any depositions, it could not show that more than ten depositions were necessary. The court also rejected defendant's argument that the depositions were not relevant, explaining that "[f]or most of the witnesses whom the government seeks to depose, it has identified exactly how the individuals are associated with the company (e.g., whether they are customers, licensees, employees, etcetera)." Defendant's argument that the depositions were not proportional to the needs of the case likewise failed, with the court reciting the six factors listed in Rule 26(b)(1) and emphasizing the public importance of the suit.

The court did, however, reject the government's request for additional depositions as measured by the total number of deposition hours, as distinct from the number of depositions, finding no precedent for that approach. Instead, the court granted leave to take up to twenty depositions not to exceed seven hours each, and without prejudice to a future motion for additional depositions upon a showing of necessity of each additional deposition and of all the depositions already taken.

Interrogatories

Garrard v. Rust-Oleum Corp., 2023 WL 3602792 (N.D. Ill. May 23, 2023)

The decision is short, lively, and an unfortunate indictment of some lawyers. The case is a putative class action concerning paint. The immediate issue was how to count subparts for purposes of Rule 33, which limits the number interrogatories, absent leave, to 25 including

subparts, and whether a document request has been satisfied. Along the way the magistrate judge discussed discretion, counsel's failure to confer in good faith, and proportionality. The court's attitude toward the dispute can be gleaned from the opening paragraph:

> There is a well-worn simile to describe something that is rather tedious and boring – "like watching paint dry." Discovery is often like that – and worse. Indeed, we have it on the best of authority that "protracted discovery, [is] the bane of modern litigation." * * * So, imagine what discovery regarding paint drying must be like. That is along the lines of what we have here, and counsel in this case – about a dozen of them – have been arguing over it for about four months. To make things a bit more tedious, the disputes they have been incapable of resolving are, to varying degrees, over trivial, routine matters. Why counsel in this case seem to have decided to take a "no-prisoners" stance * * * on these particular disputes is not clear. What is clear is that whatever the reason, it is not a justifiable or persuasive one.

In the end, the court ordered defendant to answer all of the sub-parts, but declined to order defendant to produce more documents, noting defendant already had produced 900,000 documents in response to an ESI order. Discretion and proportionality are the guiding rules:

> No one, including the defendant, wants the wood on their deck rotting. And while a case presenting the issues that this one does is significant, especially to the parties, the reality is that this is not a wrongful death or wrongful conviction case, or a medical malpractice case in which the doctor's blunder has caused the death of a patient. Nor is it a case involving a claimed violation of the Constitution. This is a case about a product that purportedly did not work the way it was supposed to when it was purportedly used the way it was supposed to be used. The product isn't one that caused death or disfigurement or disability. What is involved is a $35 can of paint; or, in each case, several $35 cans of paint. * * * The fact that plaintiff's counsel wants to certify a large class of allegedly cheated paint buyers doesn't change what the case is actually about.

Special Problems Regarding the Scope of Discovery

Privileges and Work Product—the Extent of Protection

City of Chicago v. DoorDash, Inc., 2023 WL 3654529 (N.D. Ill. 2023).

The dispute involves claims for consumer deception and unfair practices brought by the City of Chicago against DoorDash. The district court denied defendants' motion to dismiss, 2022 WL 704837 (N.D. Ill. 2022), and later granted, in part, plaintiff's motion to strike defendant's

affirmative defenses. **--- F.Supp.3d ---, 2022 WL 13827788 (N.D. Ill. 2022)**. In this next chapter, DoorDash has moved to compel discovery pertinent to one of its remaining affirmative defenses, which alleged that the City's contingency fee arrangement with private outside counsel violated defendant's due process rights and the City's ethics ordinances because it gives the firm a financial incentive that runs counter to the City's obligation to act in the public interest. At issue are two requests for production and an interrogatory: a request for "all documents related to the City's retention of Cohen Milstein, including any fee agreements" "all nonprivileged communications between the City and Cohen Milstein and is not limited to communications related to this litigation;" and for the City to "[d]escribe its relationship" with Cohen Milstein, including "the role Cohen Milstein plays in identifying, investigating, and litigating" the allegations of the Complaint and "the nature of the contractual agreement" between the City and Cohen Milstein." The decision carefully explains why it found some of the requests to be overbroad, not relevant, and not proportional to the needs of the case; why it was denying DoorDash's request for attorney's fees made in its reply brief; why it did not view DoorDash as having satisfied its obligation to attempt in good faith to obtain the documents without court intervention; and provided a general statement about the court's attitude toward discovery:

> Although all discovery is, to some extent, a fishing expedition, DoorDash casts its line too far from the figurative pier with these broad discovery requests supported mostly by speculation and conjecture. Judge Cole often quotes former Judge Moran in these situations, and this Court finds that is merited here: "[a]s Judge Moran has incisively noted, the discovery rules are not a ticket to an unlimited, never-ending exploration of every conceivable matter that captures an attorney's interest. 'Parties are entitled to a reasonable opportunity to investigate the facts - and no more.' " * * *

Expert Information

Duval v. United States Department of Veteran Affairs, 69 F.4th 37 (1st Cir. 2023).

The case illustrates the difficulty of overturning erroneous discovery rulings on appeal. A veteran sought treatment for a heart attack at a VA hospital; complications resulted after surgery, and he died. The estate filed a medical malpractice suit against the United States under the Federal Tort Claims Act, arguing the surgeon had improperly placed a Perclose suture in a coronary intervention—it was found in the rectus muscle—causing bleeding, infection, and death. During a bench trial, an expert for the government testified that the suture could have "migrated" from its original, proper location in decedent's body. The estate three times moved to strike the testimony as outside the scope of the expert's pretrial disclosure, which nowhere mentioned the migration theory, and three times the district court denied the motion. On appeal, the estate challenged the ruling as an abuse of discretion and sought to vacate the judgment in favor of the government and remand for a new trial. In particular, the estate argued that the

district court could not have concluded that the doctors met their duty of care, without also concluding that the suture had migrated, given where it was found. The estate also argued that an adverse ruling "might encourage misbehavior by litigants" in meeting their Rule 26 obligations. The Fourth Circuit held that the trial court's error, if any, was harmless because it did not directly relate to whether the surgeon breached the duty of care and did not "substantially sway" the district court's judgment. The appeals court urged, however, that its decision should "in no way be read to condone Rule 26 violations."

Judicial Supervision of Discovery and Sanctions

Hamilton v. Wal-Mart Stores, Inc., 39 F.4th 575 (9th Cir. 2022).

Employees filed state court "PAGA" actions (see discussion with respect to Chapter 6), the employer removed, and the district court dismissed some of the PAGA claims as a sanction for failing to disclose estimated damages under Rule 26(a). The Ninth Circuit reversed. Rule 26(a) applies to damages. PAGA claims seek civil penalties, and so Rule 26(a) did not apply.

In re Buscone, 61 F.4th 10 (1st Cir. 2023).

The procedural history is complicated, involving dischargeable claims in bankruptcy, but the fact pattern is a good platform for discussing presumptions judicial estoppel, and judicial discretion to order sanctions. As to the facts, the opening paragraph of the decision sets the stage: "A tale as old as commerce: Two friends, next door neighbors in fact, enter, and exit, business together, leaving behind unmet expectations and financial acrimony. Sprinkle in a default judgment or two, alongside a tortured discovery dispute, and we reach today's appeal."

Two friends, M and A, began frozen yogurt business. A filed for bankruptcy and did not list any claims against M, and received a Chapter 7 discharge. Years later, A sued M in state court and obtained a default judgment against M for over $90,000. M then filed a Chapter 7 bankruptcy, and A began an adversary proceeding for a determination that her claim against M was nondischargeable, alleging false and fraudulent representations during their business dealings. M moved to dismiss, which the bankruptcy court converted into a motion for summary judgment, arguing that A's complaint was barred by the doctrine of judicial estoppel because A had not included the claims against M in her own bankruptcy. The bankruptcy court denied M's motion and there was a long and drawn-out discovery dispute, leading to the entry of a default judgment against M as a sanction for her failure to comply with the court's orders. The First Circuit affirmed the decision. The appeals court held that the district court acted within its discretion in refusing to apply the doctrine of judicial estoppel at the summary judgment stage when the case required greater factual development, and it was not an abuse of discretion to grant dismissal as a discovery sanction. In the end, A did not reveal her claim in the first bankruptcy, but the appeals court held that despite the omission the claim was not dischargeable

in the second bankruptcy and upheld M's sanction. There is a circuit division on whether a failure to disclose should be presumed innocent or subject to some "ulterior motive."[13]

Greco v. Federal Express Corp., 2023 WL 4079502 (E.D. La. June 20, 2023).

The dispute arose from a highway collision. The action was filed in state court and then removed. Plaintiff cancelled his deposition twice, failed to appear for the rescheduled deposition four times, despite an order to appear and an express warning that failure could result in dismissal, and stopped responding to his attorney's outreach about the deposition. The district court granted defendant's unopposed motion under Federal Rule 37 to dismiss the complaint with prejudice, and the Fifth Circuit affirmed, finding that the failure was "willful" and that plaintiff was "not blameless," that a lesser sanction was not possible given the failure of communication between the party and his lawyer, and that the "refusal to be deposed for over a year has prejudiced FedEx's ability to prepare for trial, as plaintiff's testimony regarding the collision is critical to this case."

Consumer Financial Protection Bureau v. Brown, 69 F.4th 1321 (11th Cir. 2023).

The Consumer Financial Protection Bureau (CFPB) sued debt collectors and their service providers under the Fair Debt Collection Practices Act for engaging in a fraudulent debt collection scheme. The Fifth Circuit's decision, together with prior district court decisions, provides an excellent window into the mechanics and the strategic uses of discovery in obtaining dismissal of claims that previously had survived a Rule 12(b)(6) motion. It also raises the question of when deposing plaintiff's counsel is appropriate, especially when the plaintiff is a government agency.

Two months after the case was filed, Pathfinder, one of the defendants, moved for Rule 11 sanctions on the ground that the case lacked a basis in fact or law and "was merely an

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[13] Commenting about the case, Judge Meredith Jury, Bankruptcy Judge, C.D. CA, Ret., wrote:

> In my circuit, the Ninth *** there is almost a presumption that failure to disclose is based on an ulterior motive. No such presumption is available in the First Circuit or perhaps this case would have come out differently. What this opinion offers to practitioners is a treatise on [Judicial Estoppel] Doctrine, which can provide guidance for whichever side of the issue they might find themselves. One good point to keep in mind is that the Doctrine is usually raised as affirmative defense, placing the burden on the party asserting it, to be satisfied with admissible evidence.

Hon. Meredith Jury, First Circuit Upholds Decision to Deny Debtor's Motion for Summary Judgment That Was Based on Affirmative Defense of the Doctrine of Judicial Estoppel, 2023-11 Comm. Fin. News. NL 121 (Mar. 13, 2023).

exercise in government overreach." **CFPB v. Universal Debt Solutions, 2017 WL 3887187 (N.D. Ga. 2017)**. Eighteen months later, fact discovery was complete, and the defendant renewed its Rule 11 motion.

Meanwhile, other defendants served the CFPB with deposition notices, to which the CFPB objected, arguing the information had been provided in responses to contention interrogatories, the withheld information was subject to deliberative privilege, and the deposition was an improper attempt to depose counsel and obtain counsel's mental impressions. The district court refused to categorically bar counsel's depositions, which then triggered additional deposition notices from the other defendants. The CFPB moved for a protective order. The district court denied a protective order on topics that sought facts relevant to the claims (for example, facts related to the allegation that a particular party knowingly provided assistance to the unlawful conduct). Eventually a deposition went forward, and Pathfinder and other defendants objected to the witness's responses, and because other depositions were scheduled for that week, the court held a telephone conference, focusing on the witness's use of "memory aids" and plaintiff's counsel extensive use of privilege objections. The district court provided guidance at that conference: "[W]hen the question is asked, you look at what it goes to, and if it goes to an element of the claim, then that is a fair question. If it's asking the witness to analyze it beyond offering the facts then you're out of bounds and you're arguably getting over into work product...." Defendants eventually moved for sanctions under Rule 37(b) and Rule 37(d), arguing the CFPB did not present a knowledgeable witness and the use of privilege objections were obstructionist.

The district court denied the Rule 11 motion, finding that it reflected a disagreement with defendant about inferences about the evidence, and was "not the proper procedural mechanism" for resolving the disagreement—Rule 56 was. As to the discovery sanctions, the district court found that the CFPB's "pattern of conduct warrant[ed] substantial sanctions" and that further discovery would not be "fruitful."

The Fifth Circuit affirmed the discovery sanction, finding no abuse of discretion, without reaching the question whether a 30(b)(6) witness who is physically present but refuses to offer meaningful testimony has "failed to appear" pursuant to Rule 37(d). The Rule 11 ruling was not a part of the appeal.

The appeals court rejected CFPB's argument that it made "all reasonable efforts" to comply with the court's "unclear instructions." In a footnote, the appeals court stated:

> As a starting principle, district courts are not required to hold a litigant's hand and guide him through the basics of discovery. By repeatedly telling the CFPB what was expected during a deposition, the district court was already going out of its way to provide extra instruction to an off-track party. Unfortunately, the CFPB

> was not an unsophisticated litigant that merely misunderstood the rules, but rather an arm of the federal government that sought to overrun them.

The appeals court recited portions of deposition transcripts to show support for the district court's exercise of discretion in imposing a sanction and held that its factual findings were not clearly erroneous, focusing on its findings of bad faith usage of objections and memory aids, and counsel's "repeated insistence that there were no exculpatory facts in the voluminous record." Although the record did show proper work product objections and answers to fact-based questions, the Eleventh Circuit found those actions irrelevant: "We think it obvious that a splash of proper conduct amidst an expansive sea of impropriety is insufficient to save the CFPB from sanctions." The appeals court also rejected the argument that the sanction of dismissal was too severe, again under the abuse of discretion standard, and rejected the argument that the providers were not prejudiced by the behavior. It also rejected the argument that CFPB's time in preparing its witness should be credited in assessing the reasonableness of the sanction: "We are unaware of any rule or case law that recognizes preparation time as a metric of measuring compliance with the Federal Rules of Civil Procedure and it is not clear why preparation time—rather than level of preparedness exhibited during the deposition, for example—should be considered at all."

Chapter 12—Case Management

The Operation of Rule 16

Bye v. MGM Resorts International, Inc., 49 F.4th 918 (5th Cir. 2022).

This case also can be discussed in connection with Rule 15, amending the complaint, and Rule 56, summary judgment. A working mother sued her employer for pregnancy discrimination under Title VII. In response to defendant's motion for summary judgment, she asserted a claim under the Fair Labor Standards Act, and the district court dismissed the claim as untimely. On appeal, plaintiff relied on the statement in ***Johnson v. City of Shelby, Miss.*** that "[f]ederal pleading rules … do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." The Fifth Circuit affirmed; among other grounds, it insisted that ***Johnson*** did not "upset the case management framework articulated in Rule 16," and that case management steps had occurred multiple times over the course of "the two-year pendency of the case," yet plaintiff had never referenced a possible FLSA claim. Raising the claim now, before trial, "was an abuse of the opposing party and the court, and it was no abuse of discretion for the district court to deny an amendment." Judge Ho, concurring in part and dissenting in part, rejected the panel majority's interpretation of ***Johnson***. In particular, the dissenting opinion explained that, as in ***Johnson***, the complaint "informed" defendant "of the factual basis" for the complaint, and it was "*unnecessary* to set out a legal theory for the plaintiff's claim for relief":

> Other circuits have interpreted *Johnson* similarly. The Seventh Circuit summed it up this way: Under *Johnson*, "[c]omplaints plead *grievances*, not legal theories." *Koger v. Dart*, 950 F.3d 971, 974 (7th Cir. 2020). So it didn't matter that a complaint "initially relied only on the First Amendment"—the plaintiff could still invoke the Due Process Clause "at later stages of the suit." *Id.* at 975. What's more, the plaintiff "did not [even] need to amend the complaint to do so." *Id.* The Second Circuit has taken the same approach. *See Quinones v. City of Binghamton*, 997 F.3d 461, 468 (2nd Cir. 2021) ("[T]he complaint identifies a single cause of action for retaliation and does not similarly label a cause of action for discrimination. But this failure is not fatal here.") (following *Johnson*).
>
> To be sure, I can understand the temptation to reconceptualize *Johnson.* After all, the plaintiffs there plainly alleged a constitutional violation by the city—their complaint just neglected to mention 42 U.S.C. § 1983. It would surely be "obvious" to any defendant—and certainly to any municipal lawyer worth their salt—that a complaint that alleges a constitutional violation by a city surely means to seek relief under § 1983. *See ante*, at 926 (noting "the *obviousness* of Section 1983 as the vehicle under which the claim had proceeded" in *Johnson*) (emphasis added).
>
> So it would have been easy for the Court to decide *Johnson* based on the inherent obviousness of § 1983 claims, and nothing more.
>
> But it didn't. *Johnson* is premised not on § 1983, but on general pleading principles.

Financial Fiduciaries, LLC v. Gannett Co., Inc., 46 F.4th 654 (7th Cir. 2022).

This case also can be discussed in connection with Rule 15. The dispute stemmed from a Wisconsin newspaper's coverage of a judicial proceeding and subsequent defamation proceedings. After the district court granted in part defendant's motion to dismiss, plaintiff's former de facto trustee sought leave to amend and the district court, applying Rule 16(b)(4), denied the motion believing the request sought to modify the scheduling order and finding that the movant had failed to establish good cause. On appeal, the Seventh Circuit noted that there was "some confusion about which procedural rule applied." The district court had set a deadline for amending the pleadings, telling the parties, "After that, Federal Rule of Civil Procedure 15 applies, and the later a party seeks leave of the court to amend, the less likely it is that justice will require the amendment." In the appeals court's view, the scheduling order did not need to be amended; plaintiff was "requesting that the court apply the standard it said it would apply for late amendment requests: Rule 15's 'interest of justice' standard." In the end, the panel found the district court's error applying Rule 16 to be harmless, for the Rule 16 analysis also applied to

Rule 15 given the time and resources the parties and the court had spent on plaintiff's prior unsuccessful dispositive motion.

Chapter 13—Adjudication Without Trial or by Special Proceeding

Summary Judgment

Tekmen v. Reliance Standard Life Ins. Co., 55 F.4th 951 (4th Cir. 2022).

This case also can be discussed in connection with trials. A worker who had been injured in a car accident challenged the insurer's denial of disability benefits as a violation of the Employment Retirement Income Security Act. Both parties moved for summary judgment, and in opposing defendant's motion, plaintiff asked that the court resolve the case under Federal Rule 52, and defendant did not address this request in its reply. The court heard argument on the Rule 56 motions, later denied the motions, conducted a bench trial, and awarded judgment to plaintiff. On appeal, the insurer argued that in the Fourth Circuit, district courts are required to resolve ERISA denial-of-benefit cases by summary judgment. The appeals court rejected that argument, holding summary judgment inappropriate when there is a dispute about an individual's impairment and fact determinations must be made:

> The difficulty with employing summary judgment in the ERISA denial-of-benefits context arises where the parties disagree as to key facts. Although in such cases the court will decide the ultimate legal question of whether the individual meets the relevant plan definition of disability, * * * it may first need to resolve competing factual contentions within the administrative record about the cause, severity, or legitimacy of an individual's impairment. But the court's role at the summary judgment stage is not to resolve disputed questions of fact. * * *

The fact that an ERISA claim initially is presented to a plan administrator did not change the analysis or alter the usual presumptions that apply; disputed issues of fact can arise even when Rule 56 review is based on an administrative record.

Crane v. City of Arlington, Texas, 50 F.4th 453 (5th Cir. 2022).

The case offers an application of ***Scott v. Harris*** in a civil rights action turning on dashcam video from a patrol car. The complaint alleged that Arlington police used excessive fatal force during a traffic stop. The panel found that because the dashcam video did not reveal what actually happened within the plaintiffs' car, the video footage failed to "resolve the relevant factual disputes." Given the failure of the video footage to "clearly contradict" the plaintiffs' account, on appeal the panel found that the district court had "erred by applying its own interpretation of the video" and accepting the defendant police officer's factual account of the

stop over the plaintiffs': "***Scott*** was not an invitation for trial courts to abandon the standard principles of summary judgment by making credibility determinations or otherwise weighing the parties' opposing evidence against each other any time a video is introduced into evidence."

Dominick v. Mayorkas, 52 F.4th 992 (5th Cir. 2022).

Cleveland v. Auto-Owners Ins. Co., No. 22-1109, 2023 WL 4044477, at *1 (10th Cir. June 16, 2023).

Outlaw v. Plantation Pipe Line Co., No. 21-11787, 2022 WL 2904084, at *4 (11th Cir. July 22, 2022).

These three cases consider Rule 56(d) and illustrate the court's requirement that the party seeking a continuance show that it diligently but unsuccessfully pursued discovery. In ***Dominick***, for example, a former federal employee sued her employer alleging race-based discrimination in violation of Title VII. Defendant moved for summary judgment (based on the administrative record) together with its answer. Plaintiff sought a 30-day continuance to pursue discovery; defendant suggested a 60-day period. The court granted the continuance, setting July 6 as the response date to the Rule 56 motion. Plaintiff took no action until July 2, suggesting to counsel deposition dates in August. Receiving no reply over the holiday weekend, plaintiff timely opposed the summary judgment motion and included a Rule 56(d) motion for more time for discovery. The district court granted summary judgment in favor of the employer and denied the request for additional discovery. The Fifth Circuit affirmed, finding the employee had not diligently pursued discovery. The panel also found no error in the district court's permitting the Rule 56 motion prior to the Rule 26(f) conference and formal discovery, emphasizing that Rule 56 "does not require than any discovery take place before summary judgment can be granted."

Voluntary Dismissal

Morrow v. United States, 47 F.4th 700 (8th Cir. 2022).

The case is a good vehicle for discussing when and whether a district court should deny a plaintiff's motion for voluntary dismissal. It also highlights, outside the ***Erie*** context, the distinction between substantive and procedural rules. A veteran died of lung cancer after delayed treatment at the Iowa VA hospital. His wife and the executor of his estate filed a Federal Tort Claims Act against the United States alleging medical malpractice. Under the FTCA, state law governs the liability; federal law governs procedure. Iowa law requires medical malpractice complaints to be accompanied by a certificate of merit signed by an expert witness within 60 days of the filing of the answer. Plaintiffs failed to file that certificate—instead, they filed unverified medical records—and the government moved for summary judgment, asking for dismissal. That same day, plaintiffs filed an out-of-time certificate. Two days later, plaintiffs

moved for voluntary dismissal without prejudice under Federal Rule 41(a)(2); granting the motion would have given plaintiffs the opportunity to refile the complaint within the applicable statute of limitations. The district court denied the motion with prejudice. On appeal, plaintiffs argued that permitting voluntary dismissal would serve the interests of justice and would not subject defendants to undue prejudice; after all, the unverified medical records showed that the suit had merit. The appeals court rejected that argument and affirmed, reading Iowa law to require dismissal with prejudice when a plaintiff fails to "substantially comply" with the certificate requirement. In a diversity action would the result be the same?

Mitchell v. Roberts, 43 F.4th 1074 (10th Cir. 2022).

The Tenth Circuit affirmed as within the district court's discretion its denial of a motion for voluntary dismissal without prejudice and its order dismissing with prejudice instead. The significant question, which currently divides the circuits, is how the loss of a statute of limitations defense ought to weigh in the balance of the equities under Rule 41. The facts of the case are compelling and topical. The complaint, filed by a former witness at a murder trial, alleged that the former federal prosecutor sexually assaulted her when she was a minor. Defendant moved to dismiss, and the district court certified questions to the Utah Supreme Court concerning the validity of Utah's Revival Statute, which permitted certain claims for child sexual abuse to proceed notwithstanding the statute of limitations. The Utah Supreme Court responded, stating that the Utah legislature lacked authority to retroactively revive time-barred claims in ways that deprived defendants of vested statute of limitations defenses. The appeals court found no abuse of discretion and held that a proposed curative condition based on a hypothetical amendment to the Utah Constitution would not cure prejudice to defendant, and that the district court gave adequate weight to plaintiff's equities. The fact pattern also raises questions about ascertainment of state law outside the conventional ***Erie*** context, and could be discussed in connection with Chapter 6.

Tillman v. BNSF Railway Company, 33 F.4th 1024 (8th Cir. 2022).

The dispute arose from a fatal collision between a car and train. The estate filed a state court action against the railroad-defendant, and defendant removed. Plaintiff moved under Rule 41(a)(2) for voluntary dismissal based on a pending state court action arising from the same collision that could not be removed to federal court, and the district court granted the motion, finding the desire to avoid the multiplicity of actions and the risk of inconsistent verdicts valid reasons for seeking the dismissal. Defendant argued that it was error for the district court not to address plaintiff's purported forum shopping, and that the district court insufficiently weighed prejudice to its interests. The Eight Circuit affirmed, and held it was not error for the district court not to have explicitly addressed forum shopping; under the multi-factor analysis of ***Hamm v. Rhone-Poulenc Rorer Pharms. Inc.,*****187 F.3d 941, 950 (8th Cir. 1999), cert. denied, 528 U.S. 1117, 120 S.Ct. 937, 145 L.Ed.2d 815 (2000)**, the district court must only determine

whether the stated purpose for the voluntary dismissal is proper. The appeals court acknowledged that use of a Rule 41(a)(2) motion to dismiss without prejudice "to avoid federal jurisdiction is a recurring tactic," but context matters to the disposition. A party is not permitted to dismiss to "escape an adverse decision," as when, for example, a motion for summary judgment is pending. However, that factor was not present in this case.

VS PR, LLC v. ORC Miramar Corporation, 34 F.4th 67 (1st Cir. 2022).

The decision presents a question of statutory interpretation: whether Rule 41(a)(2) requires that an action be dismissed with prejudice following a voluntary dismissal pursuant to a court order. Looking at the text of Rule 41(a)(1) and (2), and focusing on the "[e]xcept as provided" phrase in Rule 41(a)(2), the First Circuit held it did not; rather Rule 41(a) "requires that an action must be dismissed with prejudice following a voluntary dismissal pursuant to a court order only when the court order so provides."

(For another but complex case involving voluntary dismissal, see **United States ex rel. Polansky v. Executive Health Resources, Inc., 599 U.S. ___, 143 S.Ct 1720, ___ L.Ed.2d ___ (2023)** (holding that the United States can move to dismiss a *qui tam* action over a relator's objection provided it has intervened in the action, whether during the period the complaint is under seal or later).)

Chapter 15—Securing and Enforcing Judgments

Preliminary Injunctions and Temporary Restraining Orders

Fromhold v. Insight Glob., LLC, No. 3:23-CV-0048-X, 2023 WL 2529563 (N.D. Tex. Feb. 23, 2023), appeal filed (5th Cir. No. 23-10275 March 20, 2023).

A former employee sued his former employer to declare a noncompete clause as invalid and to enjoin its enforcement after he left the company for religious reasons, following the company mandated vaccines during the COVID-19 pandemic. The employer moved for a TRO and preliminary injunction to enforce the agreement and to restrict the employee's use of confidential information. The district court denied the motion. The decision illustrates how the governing substantive law affects application of the remedial factors. It also reflects growing legal divisions about the role of religion in employment.[14] As a threshold matter, the parties

[14] The decision opened:

> At a legal conference three years ago, a professor pulled me aside. He confided that he was an atheist, he knew I believed in God, but he wanted to apologize for the treatment people of faith in America are receiving. I didn't fully know what he meant. I do now. Religious discrimination in modern America is becoming socially acceptable. But it is legally intolerable. Justices and Judges

agreed that Texas law applied, and the court considered whether the covenant was overbroad within the standard announced by the Texas Supreme Court (with respect to clients, lookback period, and scope of activity). If found to be overbroad, then the Texas remedy of reformation was required, which would limit the noncompete to cover only the former employer's "legitimate business interest." The district court found the contract to be overbroad, assumed that a reformed noncompete governed, and on that basis found that the employer failed to show a substantial likelihood of success on the merits or irreparable harm. (For example, on clients, the employee testified that he was not asked to solicit any of the former employer's clients or customers and that any attempt to do so would be a distraction; on scope of work, the evidence showed that his job was to lock in nationwide clients to exclusive staffing contracts, but the employee's new company's founder testified that they do not offer such a program or have any plans to do so.) The district court also considered the public interest and balance of equities as an alternative basis for denying the injunctive relief, and concluded that the employer "likely violated Title VII's prohibition on religious discrimination" given the employee's request for a religious exemption from the vaccine policy.

Miller v. Little, No. 3:21-CV-01941, 2022 WL 2070282 (M.D. Pa. June 8, 2022).

The decision raises questions about court access and could usefully be discussed in connection with Chapter 3. Plaintiff, detained in a Pennsylvania prison, filed a pro se federal civil rights action claiming prison officials violated his First and Fourteenth Amendment rights to court access and due process. In particular, the complaint alleged that the officials "rejected certain mailings sent to him by state and federal courts because the envelopes containing the correspondence did not display a control number assigned by the state department of corrections, and they did so without providing him with notice of the rejections." Plaintiff sought interim relief directing the prison officials to cease rejecting future mail received from state and federal courts without providing him with notice of each rejection.

The district court denied the motion. First, the court held that the plaintiff did not establish irreparable injury:

> The motion papers discuss two civil actions—a small claims action in a New Jersey state court and a federal civil rights action in a federal district court. Both of those actions have been dismissed at the trial level—ostensibly due to prison officials' rejection of past mailings from those courts, without providing any notice * * *, which allegedly caused him to miss court deadlines that formed the

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on the higher courts have sounded the alarm on such cases. This Court must too. In the past few months, this Court has had to enjoin Southwest Airlines from further discriminating against its flight attendants for their religious beliefs. This case is the second verse of the same song.

> basis of dismissal in both cases. But the dismissal of those two other civil actions does not constitute irreparable harm justifying preliminary injunctive relief in this action, as such a dismissal order is amenable to appeal or reconsideration.

Nor did the plaintiff show imminent harm:

> The pleadings and motion papers discuss past incidents in which mailings from state and federal courts were rejected for failure to satisfy the requirements of the legal mail policies of the state department of corrections. But the plaintiff has failed to articulate any facts or cite any evidence to support his speculative claim that prison officials will continue to reject his legal mail from state and federal courts in the future.

Evergreen Pharmacy, Inc. v. Garland, 621 F.Supp.3d 861 (N.D. Ill. 2022).

The case is part of the ongoing opioid crisis. Evergreen Pharmacy challenged the Drug Enforcement Administration's immediate suspension of its registration to distribute controlled substances. In the interim, it moved for an order dissolving the Immediate Suspension Order under 21 U.S.C. § 824(d) or alternatively for a TRO enjoining enforcement of the ISO pending final decision on the merits of ongoing administrative proceedings. The district court construed the requests as or a preliminary injunction, stating that the standard for a TRO is the same as that for a preliminary injunction which places the burden on the party seeking request and did not call for de novo review of the administrative record. The court found that pharmacy failed to show that it was likely to succeed on merits of their claim that the government acted arbitrarily and capriciously in issuing the suspension, and so did not consider the remaining factors. In particular, it rejected the argument that the burden is met if the requestor can show a "better than negligible chance of succeeding." Rather, the burden is "significant," and typically required a showing of how the requestor would prove the key elements of the claim, which normally includes a demonstration of how the applicant proposes to prove the key elements of its case. The court explained:

> All things considered, Evergreen's arguments boil down to a matter of weight—i.e., the DEA did not have enough evidence of actual abuse or diversion to show that there was an immediate harm to the public interest. But under the arbitrary and capricious standard, the Court is limited to considering whether the DEA had a mere rational connection from the facts to its decision. Evergreen has failed to show that it could succeed in proving that the DEA lacked such a rational articulation in this case. Although the DEA's administrative record is thin and may be found inadequate at a later administrative hearing; at this juncture, Evergreen has failed to demonstrate that it is likely to succeed in showing that the DEA's initial decision to issue the ISO.

McBreairty v. School Board of RSU 22, 616 F.Supp.3d 79 (D. Me. 2022).

The case is part of on-going and localized efforts to remove books from public schools on the ground that they are obscene, offensive, or contrary to community norms. A Maine resident sued the regional school board and its chair, challenging its temporary ban on his attending school-related meetings as a violation of the First Amendment. He sought a TRO in order to attend an upcoming meeting, and the court granted the motion.

The case illustrates how the substantive law shapes the court's application of the three-part test for interim relief and the contextual nature of constitutional litigation involving the First Amendment. The court recited the accepted view that the requestor of interim relief has the burden on the motion and must show a likelihood of success on the merits. However, the court made clear that as a matter of substantive law, "the School Board shoulders much of the burden when it comes to the merits of the Plaintiff's First Amendment claim." The requestor's expression of school-related concerns at prior board meetings was clearly speech protected under the First Amendment, and although they referenced sex the comments did not appeal to prurient interests and so were not obscenity unprotected by the Constitution. The First Amendment then required the court to decide whether the board meeting was a forum open to the public or some more limited forum, a question that neither the First Circuit nor the Supreme Court has yet decided. Looking to state law, the court characterized the board meetings as a limited public forum, designed "for the purpose of inviting public comment on school-related matters." The requestor's speech fell within this legitimate content restriction, and so the Board had the burden of showing that its restrictions on his speech were reasonable and viewpoint neutral. Viewing the record de novo, the district court concluded that the Board's justifications for its restrictions were "evolving, ad hoc, and unsupported," that they suggested "pretext," and that they raised "the specter of viewpoint discrimination," calling the requestor's violations of the Board's neutral rules (for example, time limits on speaking) "questionable and perhaps overblown," and that an eight-month ban from attending meetings was not reasonable. The court made clear that with further factual development, and a different standard of review, "the decision of which party will ultimately prevail is a close call." But at this stage in the proceeding, the requestor of relief had met his burden in his as-applied challenged to the Board's restrictions on his speech.

Receivership

WB Music Corp. v. Royce Int'l Broad. Corp., 47 F.4th 944 (9th Cir. 2022).

Is it an abuse of discretion for a district court to extend a receivership even after the judgment debtor has satisfied the judgment? On the facts, the Ninth Circuit affirmed the lower court's decision denying termination of the receivership, finding valid reasons for doing so

"[g]iven Defendants' history of nonpayment"—protecting creditors, allowing time for a final accounting, ensuring the Receiver is compensated, and expenses paid. The facts of the case might be of interest to some students. Plaintiffs (including Yeah Baby Music, Uh Oh Entertainment, and Hi Mom I Did It) are the owners of copyrights of certain musical works. Defendants are the owners and operators of radio stations in California and Nevada. The action alleged copyright violations, and a jury, finding willful infringement, awarded statutory damages of $330,000. In 2018, the court entered judgment, and later amended the judgment to add $864,278.25 in attorney's fees and $55,284.71 in costs. Two years later, the judgment remained uncollected, despite efforts to enforce, and in 2020 the court granted motions under Rules 66 and 69(a) to appoint a receiver. Eventually, defendants deposited funds with the court, but refused to pay post-judgment fees and costs or certain unpaid sanctions. The procedural history is messy; motions to terminate the receivership, bankruptcy petitions, and automatic stays are all in the picture. On interlocutory appeal on the non-stayed defendants, the Ninth Circuit affirmed the trial court's denial as within its discretion. It rejected a challenge to the receivership as void ab initio finding it could not be raised for the first time on appeal and was forfeited. The court acknowledged that the primary purpose of a receivership "is to ensure that the judgment debtor satisfies the petitioning creditor's judgment," but emphasized that "[t]his general proposition, however 'is not absolute.'" Rather the district court retained discretion to continue the receivership even after satisfaction of the judgment, and its decision was well within the bounds of the facts and circumstances, equitable considerations, and statutory limitations.

Execution

Edmo v. Idaho Dep't of Correction, No. 1:17-CV-00151-BLW, 2022 WL 17177308 (D. Idaho Nov. 23, 2022)).

Plaintiff, a transgender prisoner, succeeded in an Eighth Amendment challenge to the course of treatment chosen by the Idaho Department of Corrections and its medical provider to alleviate gender dysphoria, alleging it was medically unacceptable and deliberately indifferent to medical need. As relief, the court ordered defendants to provide and pay for plaintiff's gender confirmation surgery. As the prevailing party in a federal civil rights suit, plaintiff was eligible for attorney fees under 42 U.S.C. § 1988 and the district court awarded $2,586,048.80 in attorney fees and $45,544.20 in litigation expenses. This decision concerns the court's issuance of a writ of execution. The court rejected defendants' argument that they were entitled to respond to the request for a writ before issuance of the writ:

> This Court's order awarding attorneys' fees was issued on September 30, 2022. Under Rule 62(a), execution was automatically stayed for thirty days. On November 2, 2022, after that automatic stay had expired, Plaintiff asked the Court to issue a writ of execution. Although that request was labeled a "motion" in the electronic filing system, it was simply the Rule 70(d) application for a writ of

execution. Thus, under the federal rules, the Clerk of Court was to issue the writ of execution without giving Defendants an opportunity to respond.

Local Rule 7.1(a)(6) is clear that the federal rule directing issuance of a writ of execution "on application by a party who obtains a judgment" is not superseded by CM/ECF's automatically-generated notice stating that responses were due by November 23, 2022.

In sum, despite the inaccurate automatically-generated response deadline, Defendants were not entitled to respond to Plaintiff's request for a writ of execution. Rule 62(b) permits defendants to obtain a stay by posting bond but does not otherwise permit them to delay execution of a valid judgment beyond the automatic 30-day stay.

Chapter 16. Appeals

The Principle of Finality

Jenkins v. Prime Insurance Company, 32 F.4th 1343 (11th Cir. 2022).

This case offers a compact fact pattern for determining when a judgment is final for appeal and the alternative pathways for interlocutory review. The case involved claims by an insured and the assignee of certain claims against an insurer, insurer's attorney, the settler of an insurance policy, and another entity. The district court dismissed the claims against the attorney and the seller, and transferred the remaining claims to the District of Utah. Plaintiffs appealed the dismissal, arguing the order was final with respect to those two defendants and those claims. The Eleventh Circuit dismissed the appeal. A final judgment is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. To constitute a final decision, the district court's order generally must adjudicate all claims against all parties. The district court's order was not final under this standard. See 28 U.S.C. § 1291.

Nor did the district court certify its judgment for immediate appeal under 28 U.S.C. § 1292(b). Under this pathway, which allows appellate courts with discretion to exercise appellate jurisdiction, a district court must "state in writing" that its order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Likewise, plaintiffs did not request and the district court did not enter a judgment under Federal Rule 54(b) "expressly' determining that although the judgment did not apply to

all claims or parties, there was "no just reason for delay."

Finally, on these facts the collateral order doctrine did not provide a pathway to appeal on these facts, where the judgment determined the merits of the dismissed claims. It did not (1) "conclusively determine" a disputed question, (2) "resolve an important issue completely separate from the merits of the action," and (3) present a question that would "be effectively unreviewable on appeal from a final judgment."

In particular, the Eleventh Circuit rejected the argument that plaintiffs would "lose their right to appeal altogether because of our dismissal":

> Most circuits have concluded that litigants in the appellants' position could appeal the relevant interlocutory order to the court of appeals in the circuit with jurisdiction over transferee court once the transferee court issues an appealable order. * * * But, unlike other circuits, "the Tenth Circuit has held that it lacks jurisdiction to review interlocutory orders issued by an out-of-circuit district court, even when the appealable decision comes from within its boundaries." * * * The appellants contend that if we dismiss their appeal here, they will lose their chance to appeal the dismissal of the claims against [the attorney and seller] because of the Tenth Circuit's rule. Notwithstanding the appellants' predicament, we have no authority to create exceptions to the limits of our appellate jurisdiction. We therefore must dismiss the appeal.

Strategically, students can consider what step plaintiffs could have taken to preserve their right to appeal the interlocutory order.

Departures from the Final Judgment Rule in the Federal Courts

Cases Involving Multiple Claims

Peden v. Stephens, 50 F.4th 972 (11th Cir. 2022).

The decision illustrates the use of Rule 54(b) as a vehicle for securing interlocutory review of a judgment that resolves some but not all of the claims in a multi-claim suit. The opening paragraph of Judge Pryor's decision provides the context:

> This summary-judgment appeal concerns adultery, defamation, and our appellate jurisdiction. Chase Peden, a sheriff's department employee, had an affair with the wife of a county administrator. The mistress allegedly conducted a smear campaign against Mrs. Peden and, when the affair ended, against Mr. Peden as well. The sheriff's department fired Mr. Peden, and a local prosecutor declined to prosecute the mistress for harassment. Suspecting the county

> administrator had a hand in both actions, the Pedens sued the mistress, the county administrator, and a host of other county officials for violating state and federal law. The district court entered a summary judgment in favor of the officials and certified that judgment as final even though claims against the mistress remained pending. See Fed. R. Civ. P. 54(b). Because the district court abused its discretion when it determined that the summary judgment warranted certification under Rule 54(b), we lack jurisdiction. So, we dismiss the appeal.

The Rule 54(b) requirement that there is no just reason for delay in certifying its decision as final and immediately appealable requires that the district court consider "judicial, administrative interests—including the historic federal policy against piecemeal appeals—and the equities involved." According to the Eleventh Circuit, the district court's reasoning—that "[n]othing ... indicates that [the officials] should endure the hardship of having to deal with the pendency of this litigation"—turned the presumption against Rule 54(b) certification "on its head." Equitable considerations are meant to limit Rule 54(b) appeals, not to expand the availability of piecemeal review. In this case, the district court rested its determination on a single factor—that the COVID 19 pandemic would potentially cause the litigation to remain pending for a lengthy time. There was no showing, however, that delay would reduce plaintiffs' ability to recover a judgment or otherwise increase efficiency.

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

Claim and Defense Preclusion

Save the Bull Trout v. Williams, 51 F.4th 1101 (9th Cir. 2022).

The case offers an interesting but complicated procedural situation for discussing the basic requirement of claim preclusion in federal court, namely, that it applies to all claims that were or could have been asserted in the first action. What happens if the court refuses to permit plaintiff to amend the complaint to add claims? Are these claims that could have been asserted in the first action? The case also illustrates that although not all Rule 12 dismissals are adjudications on the merits and accorded claim preclusive effect, a Rule 12 dismissal for failure to state a claim may be given claim preclusive effect if it resolves a case on legal or factual ground.

The dispute involved enforcement of the Endangered Species Act, which contains a citizen-suit provision that "empowers any person" to "commence a civil suit on his own behalf" against "the Secretary where there is alleged a failure of the Secretary to perform any act or duty * * * which is not discretionary * * *." Three conservation groups, called Save the Bull Trout, Friends of the Wild Swan, and Alliance for the Wild Rockies, sued the Forest Service in Montana district court challenging the Forest Bull Trout Recovery Plan. Friends and Alliance

had previously challenged the plan in Oregon district court, where the district court found that the complaint failed to state a claim for violation of a nondiscretionary duty. Noting that this defect also meant the court lacked jurisdiction under the citizen-suit provision, the court offered plaintiffs the opportunity to amend the complaint. They did not. The district court dismissed the claims for lack of jurisdiction. On appeal, Friends and Alliance argued new claims pertaining to a nondiscretionary duty, which the Ninth Circuit declined to address and instead affirmed the district court's decision.

Friends and Alliance then returned to the district court, moving under Federal Rule 60(b) and under Rule 15 to amend the complaint to assert "Additional Claims." The magistrate judge found no basis to set aside the judgment, but suggested plaintiffs "replead" and "then be heard on the merits," on the view that the Rule 60 denial would not be treated as a dismissal with prejudice. The district court adopted the magistrate judge's recommendation "in full," but did not affirm the comments about the effect of the decision on a future suit. Friends and Alliance chose not to appeal, and instead together with Save the Bull Trout, filed the Montana action against the Forest Service. Defendant moved to dismiss raising the affirmative defense of claim preclusion; the district court denied the motion, holding that the Oregon litigation was not a "final judgment on the merits." After losing on the merits, plaintiffs appealed.

Now before the Ninth Circuit, defendant argued that the Montana action was claim-precluded. As a threshold matter, the appeals court held that it was not necessary for defendant to have filed a cross appeal to raise the issue:

> A cross-appeal is necessary only where a party "attack[s] the decree" of the lower court either to enlarge its own rights or lessen the rights of an adversary. * * * Here, the Service offers claim preclusion as an alternate basis for affirming the district court's judgment. * * * [T]he court "may affirm on any ground supported by the record" * * *. Because the Service raised claim preclusion before the district court and in its briefing on appeal, this issue is properly before us.

The Ninth Circuit then easily found claim identity and privity—issues that plaintiffs had failed to contest or address either before the district court or on appeal. (Notably, the appeals court initially supported this conclusion by referring to the commonality of interest among the parties, but then amended the slip opinion.) Moreover, the appeals court held that the Oregon litigation was a final judgment on the merits of the claim, and that Friends and Alliance, having chosen not to appeal the first action, now had to "live with the consequences of their choice":

> We have applied claim preclusion to bar the subsequent filing of claims that were subject to the denial of leave to amend even where the denial was based on dilatoriness rather than the merits. * * * A contrary holding, we reasoned, would "create incentive for plaintiffs to hold back claims and have a second

> adjudication." * * * A second adjudication is precisely what Plaintiffs attempt here. Initially declining the opportunity to amend their Oregon complaint to add the Additional Claims, they instead decided to pursue an appeal. Only after losing on appeal did they move to amend their complaint, but the district court denied that motion. It is immaterial that the court's decision was unrelated to the merits of the Additional Claims. * * *

Issue Preclusion

Home Depot USA, Inc. v. Lafarge N. Am., Inc., 59 F.4th 55 (3d Cir. 2023).

This case focuses on the application of issue preclusion and law of the case to a multidistrict litigation (MDL) proceeding. The Third Circuit stated that "those doctrines generally apply to each case in this MDL in the same way as they apply to cases outside of it."

Home Depot, as an indirect purchaser, brought an antitrust claim against a drywall supplier. The district court excluded substantial portions of Home Depot's expert's testimony, relying on issue preclusion and law-of-the-case—the testimony concerned price-fixing activity at issue in a class action filed by direct purchasers as part of an MDL in the same court before Home Deport had filed its case. In the MDL, the district court found that the expert testimony was "fundamentally improper" because it was inconsistent with three litigation "events": a prior grant of summary judgment against one of the alleged coconspirators, another supplier had not been sued, and yet another conspirator settled early in the case. Over its objection, Home Depot's later filed suit was consolidated with the MDL.

The Third Circuit vacated the district court's decision: "Issue preclusion applies only to matters which were actually litigated and decided between the parties or their privies. But Home Depot was not a party (or privy) to any of the relevant events, and two of the three events to which it was 'bound' were not judicial decisions." Home Depot's only relationship to the litigation at the time of the grant of summary judgment was that of an absent member of a putative class, but an unnamed class member is not a party to the class-action litigation before the action is certified. Moreover, the appeals court found that Home Depot was not in privity with any party. To the extent Home Depot was not a party and not in privity with a party, it lacked the "full and fair opportunity" to litigate the issue as would be needed for preclusion to apply. Similarly, the doctrine of law of the case did not bar the testimony because that doctrine applies only to prior decisions made in the same case. But, as the Third Circuit explained, "Home Depot's case is not the same as the one in which the decisions were made, and as noted two of the three events were not decisions."

The circuit went on to acknowledge that the MDL court in this decade-long litigation had asked for appellate guidance, and proceeded to discuss "two aspects of finality—judicial

economy and fairness to litigants—and identify proper methods of vindicating these values." To promote economy, the Third Circuit suggested that "a court may rely on its prior decisions as persuasive, and demand good reasons to change its mind"; "[a] judge may formalize this process through the use of case management orders";[15] and "[a] transferee judge may also make use of consolidated complaints to simplify the litigation." As for fairness, and the need to avoid free-riding by later arriving plaintiffs, the Third Circuit suggested, by way of illustration, that the MDL court could make "use of appropriate discovery management orders" and assess common benefit fees by setting aside a fixed percentage of settlement proceeds. Above all, the appeals court emphasized, the district court in an MDL proceeding "must have discretion * * * that is commensurate with the task."

Sanchez v. JPMorgan Chase Bank NA, --- F.Supp.3d ---, 2022 WL 17404796 (D. Ariz. 2022).

The decision offers an accessible fact pattern for exploring issue preclusion, nonmutual offensive issue preclusion, and also Rule 56. A consumer who had fallen behind in credit card payments entered a settlement agreement with Chase Bank for less than the full balance. Chase then furnished information to consumer credit reporting agencies about the consumer, specifically, that the account was closed with a zero balance, that it was 120 days delinquent, and that it was settled for less than the full balance. Two years later, the consumer pulled her credit, and saw that the "Pay Status" indicated that the account at some point was late, and also included the notation, "[f]or accounts that have been paid and closed, sold, or transferred, Pay Status represents the last reported status of the account." She later was denied a new credit card. The consumer then sued Chase alleging a violation of the Fair Credit Reporting Act because of the error in reporting the delinquency in the Pay Status field. Chase moved for summary judgment, and the consumer argued Chase was estopped from arguing that its reporting was accurate because it had lost on this issue in two prior cases. The first case involved a settlement, and therefore the issues were not actually litigated as required for issue preclusion of any sort. As to the second case, the issues were not identical because there were "significant and material differences," e.g., the cases involved different loan types and different credit score impacts.

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[15] As examples, the court cited: Order of Jan. 24, 2018, ***In re Terrorist Attacks on Sept. 11, 2001***, No. 03-MD-1570, at 2 (S.D.N.Y. Jan. 24, 2018) ("Any order entered into, or decision rendered, in this MDL that relates to all actions shall apply to all Tag-Along Actions without the need for separate motions and orders, unless counsel in a Tag-Along Action show good cause why the order should not apply to that Tag-Along Action."); Order to Show Cause as to the B3 Claims Against the Clean-Up Responder Defendants, ***In re Oil Spill by the Oil Rig Deepwater Horizon***, No. 10-MD-2179 (E.D. La. Jan. 7, 2016) (similar); Order No. 50, ***In re Gen. Motors LLC Ignition Switch Litig.***, No. 14-MD-02543, at 8 (S.D.N.Y. Apr. 24, 2015) (implementing a show-cause procedure for applying rulings made on the basis of consolidated pleadings to non-consolidated actions).

In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig., 54 F.4th 912 (6th Cir. 2022).

The opinion offers a full discussion of the ***Parklane*** factors, holding that a chemical manufacturer was barred under the doctrine of nonmutual collateral estoppel from relitigating questions of duty, breach, and foreseeability in a suit by cancer patients and their spouses as part of multi-district litigation concerning contamination of drinking water. The district court held that offensive collateral estoppel was appropriate because three jury trials involving the same defendant were litigated to a final conclusion on the same questions of duty, breach, and foreseeability, leading to a unique settlement. The Sixth Circuit affirmed.

If your course covers ***Semtek***, the first question for students to consider is what law applies to determine the estoppel effect of a judgment in successive federal diversity actions. The Sixth Circuit recited the basic rule: state law applies as long as the rule is not compatible with federal interests. In this case, Ohio law governed, and issue preclusion generally would apply if, among other conditions, the issue "was actually and directly litigated in the prior action." Moreover, the Ohio Supreme Court has held that although mutuality usually is required, "flexibility and exceptions to such rule" will be permitted where a "party defendant clearly had his day in court on the specific issue brought into litigation" and "where justice would reasonably require" relaxation of mutuality. The Sixth Circuit then turned to the ***Parklane*** factors, rejecting the argument that additional restrictions apply in mass tort cases or in situations involving bellwether trials. Judge Batchelder, dissenting, argued that "in mass-tort multidistrict litigation, fundamental notions of due process require an additional safeguard before a court can issue a collateral estoppel order against a defendant based upon a small number of potentially unrepresentative bellwether trials. I would also hold that the general verdicts in the three early trials lacked the specificity to bind the thousands of remaining cases."

The interplay of the bellwether trials, settlement, and subsequent MDL litigation may be too complex for a 1L course. But certain issues seem to be at the core—for example, whether the issues in the first and later cases were identical. On this point, the court acknowledged factual differences, but emphasized that "the question is whether any of those factual differences are legally significant," pointing out that each trial focused on defendant's conduct and knowledge and in each the jury received identical instructions on the relevant legal issues. Moreover, the opinion makes clear the process by which a court determines whether estoppel applies, and the need to review the prior record.

Chapter 18—Alternative Dispute Resolution

Arbitration

Johnson v. Everyrealm, No. 22 Civ. 6669 (PAE) --- F.Supp.3d ---, 2023 WL 2216173 (S.D.N.Y. Feb. 24, 2023).

Yost v. Everyrealm, Inc., --- F.Supp.3d ---, 2023 WL 2224450 (S.D.N.Y. Feb. 24, 2023).

Mera v. SA Hospitality Group, LLC, --- F.Supp.3d ---, 2023 WL 3791712 (S.D.N.Y. June 3, 2023).

These cases involve the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which amended the Federal Arbitration Act. The EFAA defines a "sexual harassment dispute" as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." At the election of a person alleging "conduct constituting a sexual harassment dispute," the EFAA makes pre-dispute arbitration agreements unenforceable "with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual harassment dispute." The EFAA applies only to claims that accrued on or after March 3, 2022, the day it was signed into law. The Supreme Court has held that when a complaint contains both arbitrable and nonarbitrable claims, courts must compel arbitration "of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." **Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985)**.

Johnson held that for purposes of the EFAA, "state" law includes local law, which in this case triggered the protections of the New York City Human Rights Law. Moreover, if the complaint plausibly alleges a sexual harassment claim that comes within the arbitration agreement, then the EFAA bars arbitration of the entire "case" and not just the sexual harassment claim. In ***Johnson***, the court found a viably pled claim and so denied a motion to compel arbitration on the ground that the entire action was exempt. However, the court also left open the possibility of arbitration where claims "far afield might be found to have been improperly joined with a claim within the EFAA so as to enable them to elude a binding arbitration agreement."

In ***Yost***, the court dismissed the sexual harassment claims as not plausibly pled and held that the EFAA did not apply where the only bases for invoking its bar have been found to be implausibly pled.

In ***Mera***, the court held that where there is a plausibly alleged sexual harassment claim within the meaning of the agreement, the EFAA bars enforcement of the agreement only with respect to that claim, and not to the entire case. The additional claims in ***Mera*** arose under the Fair Labor Standards Act and New York Labor Law which, according to the court, did "not relate in any way to the sexual harassment dispute."

Immediato v. Postmates, Inc., 54 F.4th 67 (1st Cir. 2022).

Lopez v. Cintas Corp., 47 F.4th 428 (5th Cir. 2022).

These two cases addressed the arbitrability of claims by local delivery drivers. The Federal Arbitration Act exempts employment contracts for certain categories of workers, and the Supreme Court in **Southwest Airlines Co. v. Saxon, --- U.S. ---, 142 S.Ct. 1783, 213 L.Ed.2d 27 (2022)**, interpreted that provision to apply to transportation workers who play a "necessary role" in the interstate transport of goods. Immediato raised the question of whether couriers who deliver goods from local restaurants hired through Postmates, the online and mobile platform that allows customers to order take our meals and groceries, fit within the exemption. The appeals court agreed with the district court that the Postmates delivery drivers failed to meet the standards of the exception. Among other things, the record showed that 99.66 percent of orders placed in Massachusetts are fulfilled in-state and that on average a courier traveled about 3.7 miles while making a delivery. Looking to legislative history, the First Circuit explained that at the time of the FAA's enactment, the local retail of goods was not treated as a part of interstate commerce, and the term interstate commerce did not cover the intrastate sale of locally manufactured goods. It thus distinguished the couriers from the cargo loaders in ***Saxon***, concluding that although the couriers transport goods, "they do so as part of separate intrastate transactions that are not themselves within interstate commerce," and the fact that "the delivered items may have once travelled across state borders does not alter the equation." In ***Lopez***, the Fifth Circuit reached a similar result, holding that the federal disability claim of a local delivery driver was not within the transportation worker exemption (and found, further, that whether the arbitration provision was unconscionable was a question for the arbitrator, not the court).

Hawkins v. Cintas Corp., 32 F.4th 625 (6th Cir. 2022), cert. denied, 143 S.Ct. 564 (2023).

Courts frequently recite that arbitration is a matter of contract, and that a party must agree to arbitrate. This case considered who is bound by the agreement to arbitrate. Former employees sued their former employer for breach of fiduciary duties owed to the company's retirement plan, asserting class claims under the Employment Retirement Income Security Act of 1974 (ERISA). The company moved to compel arbitration arguing that each employee had signed arbitration agreements as part of their employment contracts. As a matter of first impression, the Sixth Circuit held that the individual arbitration agreements did not cover the ERISA claims, because

those claims, addressing plan losses, were derivative—they belonged to the "plan" and not the employees themselves. Thus, the ERISA claim was outside the scope of the individual employment arbitration agreements.

Early Neutral Evaluation

Musgrove v. Hanifin, No. 20CV614-JO(BLM), 2022 WL 17574075 (S.D. Cal. Dec. 8, 2022).

Does alternative dispute resolution live up to its promise of expanding access to justice, especially for unrepresented litigants? And how should federal courts adapt to the difficulties faced by pro se parties? The complaint in this case, filed in 2022, challenged termination of a federally subsidized housing voucher; it alleged that because of homelessness the family "has been torn apart" with a child placed in protective services; plaintiff has had to postpone hip surgery, and he has been diagnosed with depression. Two years later, and after numerous amendments to the complaint, plaintiff refused to attend a court-ordered Early Neutral Evaluation; he submitted a document entitled "Motion for Change of Venue Due to Fraud on the Court by Judge Curiel to 9th Circuit, Set Case Back to Rightful Place or Judgment on The Pleadings Due to No Affirmative Defense," stating "I WILL NOT attend and ENE, as if it's okay, an continue with not being heard or taken seriously" (as in original). The Magistrate Judge sua sponte imposed sanctions on plaintiff but declined to impose monetary sanctions, stating: "Plaintiff is reminded that the Court's orders are orders, not requests or suggestions * * *."

(As another example, see **Dhaliwal v. MHM Sols., LLC, No. 21-CV-00568-GMN-BNW, 2022 WL 2315553 (D. Nev. June 28, 2022),** holding that an oral agreement to settle during an ENE by a counsel who later withdrew from representation was legally binding and enforceable on the pro se litigant who sought to withdraw from the settlement and imposed sanctions. The decision recited:

> Though Plaintiff was proceeding *pro per*, as Magistrate Judge Youchah explained, Plaintiff is "a very highly educated intelligent human being, more so than many [...] plaintiffs." * * * Though Plaintiff may have been confused about the deadline, Plaintiff nevertheless knew about the potential sanctions if he withdrew. The Court thus agrees with Magistrate Judge Weksler's recommendation and grants the request for *reasonable* attorney's fees.")

APPENDIX

Thirteenth Comprehensive Edition Errata

p. xlvii: Mussat v. Iqvia, INC., 883 **change to** Mussat v. IQVIA, Inc., 883

pp. xxix, xlii & 1090: Google v. Oracle, **change to** Google LLC v. Oracle America, Inc.

p. 315: Plymer, **change to** Polymer

Thirteenth Compact Edition Errata

p. 230: Plymer, **change to** Polymer