2023 Update to Spencer's *Civil Procedure: A Contemporary Approach* (6th Ed.)

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Dear Adopters:

Thank you for using my book in your course. This update is offered to highlight major developments relevant to a first-year civil procedure course since the publication of the 6th Edition in 2021:

Amendments to the Federal Rules of Civil Procedure:

Disclosure of party citizenship under Rule 7.1 **(Chapters 3 and 6).** The Federal Rules of Civil Procedure were amended on December 1, 2022, to require that parties and intervenors in an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a) disclose the citizenship of every person or entity whose citizenship can be attributed to the party or intervenor. This rule is not currently discussed in the casebook, but students should be made aware of this development during the discussion of pleading as well as the discussion of diversity jurisdiction.

Recognition of Juneteenth as a Legal Holiday **(Chapter 6).** Although there is currently no discussion of Rule 6 in the casebook, it should be noted that as of December 1, 2023, Rule 6 will be amended to add "Juneteenth National Independence Day" as a legal holiday, which affects time computation.

Amendments under Rule 15(a) **(Chapter 6).** As of December 1, 2023, Rule 15(a)(1) will be amended to replace the word "within" with "no later than." This change should be noted on page 492 of the casebook once it takes effect.

Amendments to Rule 72 and new Rule 87. Amendments to these rules that take effect on December 1, 2023, are not particularly relevant to a first-year civil procedure course. For the sake of completeness, however, they are mentioned here. Revised Rule 72 instructs clerks to "immediately serve" copies of a magistrate judge's disposition rather than "promptly mail" it. New Rule 87 addresses emergency rules that can take effect during a "civil rules emergency," something it was felt was necessary to address circumstances such as the COVID-19 global pandemic.

Cases:

General Jurisdiction Based on Consent **(Chapter 1).** In *Mallory v. Norfolk Southern Ry.*, 143 S. Ct. 2028, 2023 WL 4187749 (2023), the Supreme Court held that Pennsylvania's statute requiring out-of-state corporations to consent to personal jurisdiction as a condition of registering to do business in the state did not violate the Due Process Clause, thus rendering the defendant corporation amenable to jurisdiction on a claim arising entirely out of dealings distinct from the company's activities within the forum state, Pennsylvania. Justice Alito, in a concurrence, indicated his sympathy for the argument that exercises of jurisdiction pursuant to this statute violated the dormant commerce clause, but indicated that that issue was not before the Court. It would be appropriate to discuss this case as part of the coverage of consent to personal jurisdiction that begins on page 164 and the discussion of general jurisdiction that begins on page 128.

Specific Jurisdiction Based on Intentional Wrongs **(Chapter 1).** In *Mofus, LLC v. Cardata Consultants, Inc.*, 23 F.4th 115 (1st Cir. 2022), the court held that the commission of trademark infringement via a website that was viewable in the home state of the trademark holder was insufficient to constitute purposeful availment of Massachusetts for purposes of exercising specific

personal jurisdiction. The court acknowledged that intentional tortious conduct can subject a defendant to jurisdiction under *Calder v. Jones*, 465 U.S. 783 (1984), when the conduct is directed at a particular victim. However, when it is unclear that the conduct is tortious, and when the existence or identity of a victim is unclear, "Taking the *Calder* approach when such torts are based on web publications would create a substantial risk that defendants would be dragged into court in foreign jurisdictions with which they had little to no actual contact simply because a trademark holder happened to reside there." It would be appropriate to mention or discuss this case after the discussion of *Calder* on page 65 and *Young v. New Haven Advocate* on page 124.

Horizontal Choice-of-Law Questions **(Chapter 5).** In *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 142 S. Ct. 1502 (2022), the Supreme Court held that a court in a Foreign Sovereign Immunities Act (FSIA) case raising non-federal claims against a foreign state or instrumentality should determine the substantive law by using the same choice-of-law rule that would be applicable in a similar suit against a private party rather than a federal choice-of-law rule. Thus, under the rule of *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), the court must consult the choice-of-law rule of the forum state in which it sits. This case would be relevant to a discussion of the material contained on page 430 of the casebook.

Repleading After a Motion to Dismiss; Amendments Under Rule 15(a) **(Chapter 6).** *City of Miami Fire Fighters' and Police Officers' Retirement Trust v. CVS Health Corp.*, 46 F.4th 22 (1st Cir. 2022), offers the view that if a plaintiff wants permission to amend their complaint in the event it is dismissed, they should expressly make such a request under Rule 15 rather than signaling that desire as being conditioned upon the court's ruling on the motion to dismiss: "[P]laintiffs simply included in their memorandum opposing the motion to dismiss a brief note asking for a conditional opportunity to move for leave to amend, 'if the Court grants any portion of the [m]otion [to dismiss].' No motion or argument was advanced in support of this request. Nor was any proposed amendment filed. The district court treated this 'contingent' request as holding 'no legal significance.' We see no reason to treat it otherwise." This case is relevant to the discussion of repleading after a motion to dismiss on pages 478–479 of the casebook, but also worth emphasizing during the discussion of amendments under Rule 15(a) that occurs on pages 496–497. This decision echoes the decisions in *Chaidez v. Ford Motor Co.*, 937 F.3d 998 (7th Cir. 2019), and *Kibela v. Boris*, 923 F.3d 680 (7th Cir. 2019).

Intervention of Right under Rule 24 **(Chapter 7).** *Berger v. North Carolina State Conference of the NAACP*, 142 S. Ct. 2191 (2022), ruled that because North Carolina law expressly authorized legislative leaders to defend the state's practical interests in litigation of the kind involved in this case (a challenge to the state's voter ID law), the legislative leaders seeking to intervene satisfied the interest requirement of Rule 24(a)(2). Discussion of this case would be appropriate during the discussion of the material that appears on pages 596–597 of the casebook.

Arbitrability of Disputes—Waiver **(Chapter 9).** *Morgan v. Sundance*, 142 S. Ct. 1708 (2022), is relevant to the discussion of the Federal Arbitration Act that occurs on page 786 of the casebook. This case concerned the appropriate standard courts should use to determine whether a litigant has waived the right to compel arbitration. The Eighth Circuit had applied a two-part test that required a finding that the party had acted inconsistently with the right to arbitrate and that these inconsistent actions prejudiced the other party. In *Morgan* the Supreme Court held that the prejudice requirement was not properly viewed as a component of the waiver analysis because such a requirement is not a component of procedural waiver law more generally. The Court emphasized that the FAA does not require the development of policies and practices that favor arbitration; rather, it requires that agreements to arbitrate be put on the same footing as other contracts. Thus, courts are not to craft arbitration-specific procedural rules as the Eighth Circuit had done here.

Arbitrability of Disputes—California Private Attorneys General Act (PAGA) **(Chapter 9).** In *Viking River Cruises, Inc v. Moriana*, 142 S. Ct. 1906 (2022), the Supreme Court held that the former employer (the defendant) was entitled to enforce an arbitration agreement with respect to the plaintiff-former employee's individual PAGA claim. Interestingly, Justice Thomas dissented on the ground that he believes the FAA does not apply to proceedings in state court, a view he explained in detail in his dissent in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995). *Viking River Cruises* could be noted when discussing the FAA on page 786 of the casebook.

Relief from Judgment under Rule 60(b) **(Chapter 10).** In *Kemp v. United States*, 142 S. Ct. 1856 (2022), the Supreme Court indicated that a "mistake" under Rule 60(b)(1) includes a judge's errors of law and that there is no reason to limit that to "obvious" mistakes. Because the plaintiff's Rule 60(b) motion alleged such a legal error, it was cognizable under Rule 60(b)(1) and thus was subject to the applicable one-year deadline for seeking relief under that rule. This case would appropriately be discussed when covering pages 915–917 in the casebook.

The Collateral Order Doctrine **(Chapter 11).** In *Shoop v. Twyford*, 142 S. Ct. 2037 (2022), the Supreme Court held that a district court's orders—under the All Writs Act—to transport an inmate for medical purposes was immediately appealable under the collateral-order doctrine because they "(1) conclusively require transportation; (2) resolve an important question of state sovereignty conceptually distinct from the merits of the prisoner's claims; and (3) are entirely unreviewable by the time the case has gone to final judgment." This was a 5–4 decision; Justice Breyer dissented on the ground that such orders were not sufficiently important, while Justice Gorsuch would have dismissed the case as improvidently granted because the jurisdictional issue was not the basis for the Court's acceptance of the case. Discussion of this decision would be appropriate when covering pages 945–946 in the casebook.

Reviewability on Appeal **(Chapter 11).** In *Dupree v. Younger*, 143 S. Ct. 1382 (2023), the Supreme Court held that a party whose summary judgment motion was denied on "purely legal" grounds can challenge that denial on appeal even though they did not challenge the denial via a Rule 50 motion at trial or via a post-trial motion before the district court. This contrasts with a summary judgment motion that is denied on sufficiency of evidence grounds; a challenge to such a decision must be raised at trial and in a post-trial motion to be preserved for appellate review. This case could be discussed along with material that appears on pages 949–950 of the casebook.