To: Civil Procedure Professors

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

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Re: 2024–2025 Update Memo

The 2024-2025 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, 2023, and 2024 that are pertinent to the first-year course. We have made some additions to the Rules Supplement. In addition to the local rules for the Eastern and Southern Districts of New York, we include those of the Eastern District of Virginia known for its “rocket docket.” Our sampling of court papers has been expanded to include MDL orders and standing orders related to the use of artificial intelligence.

This Update Memo highlights Supreme Court cases decided since publication of the Thirteenth Edition of the casebook, and also provides summaries of new state and lower court federal cases that that might prove helpful for class preparation or discussion. We do not aim to be comprehensive; our selection is eclectic. 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. In addition, some of the cases provide good vehicles for discussing how procedure affects judicial access, enforcement, and broader notions of fairness or equality within an adversary system. A number of the cases presented raise questions of professional

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responsibility and judicial role. 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 underscore that time constraints make it impossible to incorporate all of the suggested material in a first-year course. Please note that generally we do not provide pin cites or internal citations but where appropriate provide sources in footnotes; as with the casebooks, alterations are marked with asterisks, not ellipsis.

Part I of this memo provides a quick overview of material that appears in the 2024-2025 Rules Supplement.

Part II highlights other recent cases that might be of interest to your course preparation organized by chapter. In some instances, we offer suggestions on how one might integrate materials into class discussion. Some of the cases are complex; others are single issue and suitable for classroom hypotheticals or short writing exercise.

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 2024-2025 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


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


These four cases address whether particular statutory requirements affect the subject-matter jurisdiction of federal courts or whether they are, instead, conditions that pertain to the merits of the dispute. (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. Harrow involves the 60-day deadline for appealing decisions by the Merit Systems Protection Board to the U.S. Court of Appeals for the Federal Circuit. In all four cases, the Court found that the requirements were not jurisdictional, and were therefore subject to waiver and forfeiture.

Chapter 8. Modern Pleading

National Rifle Association of America v. Vullo, 602 U.S. 175, 144 S.Ct. 1316, 218 L.Ed.2d 642 (2024) (summary).

This case is a recent example of the Supreme Court applying the Iqbal pleading standard. The National Rifle Association (NRA) sued a New York state official alleging that she violated
its First Amendment rights by threatening enforcement actions against entities that refused to
dissociate from the NRA. In a unanimous opinion by Justice Sotomayor, the Court found that the
complaint was sufficient to survive a motion to dismiss.


This case received considerable media attention: a federal court filing that counsel
outsourced to ChatGPT contained non-existent case names, citations, and quotations 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.

Chapter 10. Class Actions

Harrington v. Purdue Pharma L.P., 603 U.S. ___, 144 S.Ct. 2071, 219 L.Ed.2d 721
(2024) (summary).

This case is another example of parties using bankruptcy proceedings to resolve future
mass tort liability, as discussed in the Casebook, p. 865, Note 2. It involves high-profile litigation
arising from the opioid epidemic, during which Purdue Pharma, a leading opioid manufacturer,
filed for bankruptcy. The Supreme Court decision arises from the bankruptcy court’s order
extinguishing claims against members of the Sackler family—owners of Purdue Pharma—as
individuals in exchange for them contributing approximately $6 billion to the Purdue bankruptcy
estate that could then be used to pay claims. In a 5-4 decision, the Supreme Court held that the
Bankruptcy Code did not authorize the order discharging claims against the Sacklers. The
majority opinion was authored by Justice Gorsuch and joined by Justices Thomas, Alito, Barrett,
and Jackson. Justice Kavanaugh authored the dissenting opinion, joined by Chief Justice Roberts
and Justices Sotomayor and Kagan. The excerpts include discussions by the majority and

2 See, e.g., Benjamin Weiser, Here’s What Happens When Your Lawyer Uses ChatGPT, N.Y. Times (May 27,
dissenting opinions of the practical costs and benefits of the bankruptcy judge’s release order in terms of providing funds to compensate injured individuals.

Chapter 14. Trial


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.


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.


In a 6-3 decision, the Supreme Court held that the Seventh Amendment guarantees a right to a jury trial when the Securities and Exchange Commission (SEC) seeks civil monetary penalties for securities fraud. The decision effectively overrides a federal statute authorizing the SEC to initiate enforcement actions seeking such penalties before an Administrative Law Judge without a jury. The majority opinion by Chief Justice Roberts reasoned that the civil penalties sought were common law remedies for purposes of the Seventh Amendment because they were
designed to punish and deter. The majority opinion also noted “the close relationship between federal securities fraud and common law fraud.”

The majority then rejected the argument that the “public rights” exception discussed in *Atlas Roofing* (Casebook, p. 1070) and *Granfinanciera* (Casebook, p. 1072) took such SEC enforcement actions outside the realm of the Seventh Amendment. The dissenting opinion—authored by Justice Sotomayor and joined by Justices Kagan and Jackson—argued that agency adjudication of claims by the federal government for civil penalties had a long historical pedigree and was constitutional under the public-rights doctrine.

**Chapter 16. Appellate Review**

*Shoop v. Twyford, 596 U.S. 811, 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
- Proposed Stop Helping Outcome Preferences (SHOP) Act
- Proposed End Judge Shopping Act (2024)

**Sample Orders**

We have added to the Rules Supplement (Part V) a sampling of orders—local rules and specific judge’s rules—regulating the use of artificial intelligence in preparing papers filed with the court. We also have included orders that illustrate aspects of multidistrict litigation (MDL) practice, before both the Judicial Panel on Multidistrict Litigation and the individual MDL judges to whom centralized cases are assigned for pretrial proceedings.
Part II. Additional Decisions and Materials of Interest

Chapter 1. A Survey of the Civil Action

Law students typically do not take a course in professional responsibility until their second or third year. Nevertheless, it can be useful at the outset of the 1L course to raise and frame issues of role and obligations—to make clear that lawyers are not simply “hired guns” for their clients, but also officers of the court. Moreover, their action or inaction in many situations will be binding on their clients. As the following case illustrates, a lawyer’s negligence can have important consequences for a party.

Reynolds v. United States, 2024 WL 1008590 (5th Cir. 2024).

Plaintiff was in a car accident with a Postal Service driver and filed an administrative claim for damages under the Federal Tort Claims Act. He then filed a federal action, but after the filing period had closed. The district court granted summary judgment for defendant. On appeal, the Sixth Circuit refused to find that equitable tolling of the limitations period was warranted simply because the party’s original lawyer had left her firm and the “case then got lost in the administrative chaos.” As the appellate court explained, “negligence... on the part of [an] attorney and his staff does not entitle [a litigant] to equitable tolling—a party is bound by the acts of her lawyer.” Moreover, the district court’s granting only a six-day extension to respond to the summary judgment motion after learning of counsel’s departure did not violate due process; notice of the motion was made via the court’s electronic filing system and that notice was “reasonably calculated, under all the circumstances,” citing Mullane, to alert counsel to case developments.

Thomas v. Jacobs, 2024 WL 631404 (2d Cir. 2024).

This unreported decision highlights the obligations of a counseled litigant to a pro se party, it introduces students to the Local Rules, and it suggests that having representation can make a difference to the disposition on the merits. Plaintiff, incarcerated in New York, filed a pro se action against the New York State Department of Corrections and Community Supervision challenging the constitutionality of a search and restraint that involved use of pepper
spray. The district court denied a request for appointment of counsel but stated it would reconsider the request “if the case appeared likely to have merit.” 2022 WL 504787 (S.D.N.Y. 2022). After discovery, marked by delays in plaintiff’s receipt of documents, defendants moved for summary judgment and the district court granted the motion. Pro bono counsel represented plaintiff on appeal, and the circuit court vacated and remanded. Defendants accompanied their motion with a form notice as required under Local Rule 56.1, but omitted the full text of Federal Rule 56 and Local Civil Rule 56, as required under Local Civil Rule 56.2. Failure to give actual notice usually provides grounds for vacatur, unless the pro se litigant demonstrates a “clear understanding” of the nature and consequences of a motion for summary judgment and an understanding of the need to present evidence of any genuine issue of material fact. Plaintiff’s Rule 56 response did not show such an understanding; it was only a single page and did not include evidence. The form notice was deficient because it failed to advise plaintiff that his response needed to be specific as to each material fact, and the district court erred by treating the deficiency as harmless.

**Local Rules and Motion Practice**

**Patterson v. Chambers, 2023 WL 6937405 (7th Cir. 2023).**

The decision illustrates difficulties of a pro se party navigating federal judicial practice. The opening paragraph of Judge Easterbrook’s order headlines the issues and the role of the local rule:

Litigants who want a ruling on the motions they file in the Eleventh Judicial Circuit Court of Illinois must request a hearing date. Ill. 11th Jud. Cir. Ct. R. 5(C). If no hearing is sought, the motion need not linger on the docket; after 90 days, the judge “may strike the motion without notice.” * * * Here, after the circuit court dismissed Wayne Patterson’s state lawsuit, he filed a motion to reconsider—but did not request a hearing date. The trial judge, relying on Local Rule 5(C), struck the motion, leaving the judgment against Patterson intact. Patterson alleges he did not learn of this until it was too late to appeal or seek other state-court relief. So he turned to federal court, suing Circuit Judge John Jason Chambers and claiming that Local Rule 5(C) violated his rights to due process
and equal protection. But the district court dismissed the action, concluding, among other things, that judicial immunity barred Patterson’s suit against Judge Chambers and that Patterson had not stated a claim for relief on any remaining theory. Patterson’s complaint also mentioned two unnamed state-court employees, but the district court dismissed them from the suit because Patterson did not say what they had done. We affirm.

Chapter 2. Jurisdiction over the Parties or Their Property

The Growth of State-Long Arm Statutes

One of the skills that the 1L Procedure course helps to develop is that of statutory interpretation. The three district court cases that we summarize below could easily be adapted as classroom problems focusing on the interpretation and application of state long-arm statutes in a range of factual contexts.


The case focuses on New York’s enumerated-act long-arm statute, which does not reach the full extent permitted by the federal Constitution, together with the Montreal Convention, a multilateral treaty governing claims arising out of international air transport of cargo. The dispute concerned damage to vitamin pallets shipped from Chicago to South Korea. National Union was the insurer and it sued UPS as the carrier in New York federal court. UPS then filed a third-party complaint against its Taiwanese contractor, EVA Airways. Eventually the district court dismissed EVA from the action for lack of personal jurisdiction, and UPS and National Union settled. On appeal, the Second Circuit affirmed the dismissal.

First, it held that UPS failed to meet the requirements of the New York long-arm statute, which in relevant part limits jurisdiction to disputes in which the tortious act caused injury in the

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3 Portions of the statute appear in Part III of the Rules Supplement. As the Second Circuit summarized it, New York CPLR 302(a)(3) confers jurisdiction over a non-domiciliary when five elements are met:
state. UPS alleged that the relevant claim was for indemnification and compensation for damages it paid to the insurer, which resulted in the impleader action—the grievance was “that it was sued (and had to pay up) in New York.” The appellate court rejected that analysis; under New York precedent, the situs of the injury “is the location of the original event which caused the injury, not the location where the resultant damages are felt by the plaintiff”; this could not be New York, which was not on the transport route from Chicago to South Korea.

Second, the Second Circuit declined to read the Montreal Convention as a personal-jurisdiction conferring treaty. The Convention, like the statute at issue in BNSF (Casebook, p.170), addressed subject-matter jurisdiction: it “permits claims arising under the treaty to be brought in particular nations, it does not guarantee plaintiffs the unconditional right to litigate in those nations’ courts. Rather, the treaty expressly leaves room for nation-states to impose their own venue, jurisdictional, or other procedural requirements. We conclude that personal jurisdiction is such a requirement.”

Finally, the appellate court also rejected UPS’s consent-based theory that EVA, by choosing to do business as an air carrier governed by the Montreal Convention, consented to the personal jurisdiction of any court in which a party properly brought a Montreal claim, finding that there was no evidence of a “meeting of the minds as to EVA’s consent to jurisdiction.”

(1) The [plaintiff stated a colorable claim that the] defendant committed a tortious act outside the state; (2) the cause of action arose from that act; (3) the act caused injury to a person or property within the state; (4) the defendant expected or should reasonably have expected the act to have consequences in the state; (5) the defendant derives substantial revenue from interstate or international commerce. (brackets in original)

These cases stem from the Lebanese financial crisis that began in 2019. In response, Lebanon placed a moratorium on the transfer of bank funds abroad; at the time, over 70 billion U.S. dollars were held by the Lebanese Central Bank. In each case, a bank account holder with large amounts of money on deposit requested that funds be transferred to the United States, and sued for breach of contract when the bank did not honor the request. Along the way there have been procedural battles about the mandatory and exclusive selection of Beirut courts in the bank agreement’s forum clauses and forum non conveniens. In these decisions, the district court dismissed each action, finding no basis for jurisdiction under New York’s long-arm statute, CPLR 302(a)(1): the contract to transfer funds failed to happen in Lebanon, not New York; opening a bank account in New York for the purpose of effecting the transfers did not count as the bank’s transacting business in New York; and the fact that the customers lived in New York could not be attributed to the banks.

Pace v. Cirrus Design Corp., 93 F.4th 879 (5th Cir. 2024).

The case combines an enumerated acts statute with a registration statute. Plaintiff, a pilot, sued multiple corporate defendants in Mississippi state court for personal injuries that resulted from a plane crash in Texas. Defendants removed to federal court. The district court dismissed claims against the out-of-state defendant for lack of personal jurisdiction (and also held that two Mississippi defendants were fraudulently joined, so remand was not required, discussed with Chapter 4, below). On the statutory issue, the Fifth Circuit affirmed the district court’s finding that neither the claims nor their consequences in Mississippi qualified as a tortious effect under
the tort prong of the Mississippi long-arm statute.\(^4\) Moreover, due process did not support the exercise of specific jurisdiction over the airplane manufacturer. Boiled down, the appeals court held: “The record here more closely resembles that of *Bristol-Myers Squibb* than that of *Ford*. Yes, the corporate defendants serve the forum, but all their relevant alleged conduct occurred in other states, Pace’s injury occurred in Texas, and the only connections to Mississippi related to this litigation are Pace’s residency and the aircraft’s hangering there. The needed relationship for specific jurisdiction is lacking.”

**Burgaer v. Premier Trust, Inc., 2024 WL 2978303 (M.D. Fla. 2024)**

The case turned on application of the Florida trust-specific long-arm statute, which authorizes the exercise of personal jurisdiction “so long as the trust’s principal place of administration is in Florida,”\(^5\) and Federal Rule 19; also at issue was a § 1404 transfer request. The district court held that personal jurisdiction was present and there was no failure to join indispensable parties, and further denied the motion to transfer venue. Do students agree that the

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\(^4\) The state long-arm statute authorizes personal jurisdiction in three circumstances: if the defendant (1) makes a contract with a resident of Mississippi to be performed in whole or in part in Mississippi; (2) commits a tort in whole or in part in Mississippi; or (3) conducts any business or performs any character of work in Mississippi. Miss. Code Ann. § 13-3-57.

\(^5\) The court quoted the relevant language from the statute as follows:

**2) Personal jurisdiction.**

(a) Any trustee, trust beneficiary, or other person, whether or not a citizen or resident of this state, who personally or through an agent does any of the following acts related to a trust, submits to the jurisdiction of the courts of this state involving that trust:

1. Accepts trusteeship of a trust having its principal place of administration in this state at the time of acceptance.

5. Commits a breach of trust in this state, or commits a breach of trust with respect to a trust having its principal place of administration in this state at the time of the breach.

7. Performs any act or service for a trust having its principal place of administration in this state.

(b) A court of this state may exercise personal jurisdiction over a trustee, trust beneficiary, or other person, whether found within or outside the state, to the maximum extent permitted by the State Constitution or the Federal Constitution.

*Fla. Stat. § 736.0202.*

When the trust instrument does not validly designate the principal place of administration, "the principal place of administration . . . is the trustee’s usual place of business where the records pertaining to the trust are kept or, if the trustee has no place of business, the trustee's residence.”

*Fla. Stat. § 736.0108(2).*
facts of the case warrant a different result than in *Hanson v. Denckla* (Casebook, p.103)? Plaintifff alleged that defendant, after being wrongfully appointed temporary trustee of a marital trust, sold Florida property. Defendant had its principal place of business in Florida when it accepted trusteeship of the trust, but did not have an office in Florida, did not have a Florida bank account, did not pay taxes in Florida, signed relevant documents pertinent in the sale in Nevada, and took actions under Nevada law that were purposefully directed at a transaction and party located in Florida. The district court found that these actions were not so “‘random, fortuitous, or attenuated’” that Defendants could not have reasonably anticipated being haled into a Florida court.”

**Specific Jurisdiction in State Court**

*Wade v. Pottawattamie Cnty.*, 100 F.4th 991 (8th Cir. 2024).

The case provides an accessible and clear example of when “even a single act” can suffice to create “a substantial connection with the forum state” and provide the basis for specific jurisdiction if the litigation also arises out of or relates to the state. A high-speed police chase started in Iowa and ended with a collision in Nebraska. An injured third party sued the Iowa county police defendants in Nebraska district court, and the court dismissed for lack of personal jurisdiction. The Eighth Circuit reversed, relying largely on *Ford, Burger King*, and *Hess*. As the circuit court explained, defendants purposefully availed themselves of the benefits of the forum by making the conscious choice to continue their chase even as they knew they were crossing over the Iowa border. Moreover, a driver has reason to “reasonably anticipate” it will be “haled into court” if “something went wrong,” and “something did go wrong” when the deputies crashed into plaintiff’s car. Further, the defendant, the forum, and the litigation “are all related.”

It makes no difference that the deputies entered Nebraska for a good reason. They were in the middle of a high-speed chase with a car driving dangerously and had nowhere to turn around. Still, they knew exactly where they were, and radio chatter confirmed that they were undeterred by the fact that the border was approaching. Once they made the conscious decision to cross and continue their
pursuit, they purposefully availed themselves of the "benefits and protections of
[Nebraska’s] laws."

**Exxon Mobil Corp. v. Arjuna Capital, LLC, 2024 WL 2331803 (N.D. Tex. 2024).**

The case combines interesting questions of personal jurisdiction in the context of climate
change and securities law. Two activist investors—an association organized under the law of the
Netherlands and a Delaware limited liability company—gathered enough votes to propose at
Exxon’s annual meeting that the company make improvements to combat climate change. Exxon
then filed a declaratory judgment action in Texas federal court that the proposal was excludable
from the company’s proxy statement. Defendants moved to dismiss for lack of personal
jurisdiction. The district court agreed that personal jurisdiction could not be exercised under the
Exchange Act, but found that it did meet the requirements of the Texas long-arm statute and due
process.

The Exchange Act provides for nationwide service of process and, as the court explained,
the relevant inquiry is “whether defendant has minimum contacts with the United States.” That
standard was met. However, the district court held that the Exchange Act did not apply to
Exxon’s declaratory judgment action and so it could not support a finding of personal
jurisdiction. Turning then to the Texas long-arm statute, the inquiry was simply that of federal
due process because the statute’s reach was coterminal with the Constitution, and here three
issues were addressed: whether defendants purposefully directed activity to the state; whether the
case arose out of or resulted from the forum-directed activity, and whether it was “fair and
reasonable” to exercise jurisdiction. As the district court stated, “The first two questions are easy.
*First*, Defendants have submitted multiple shareholder proposals to Exxon in Texas. * * *
*Second*, “it is undisputed that ExxonMobil’s cause of action arises from those contacts.” * * *
Accordingly, the case comes down to the “fair and reasonable” inquiry. * * * This is where
things get tricky.” No Fifth Circuit precedent deemed “submission of a shareholder proposal
sufficient by itself” as a basis for personal jurisdiction, although in certain situations a single act
directed at Texas could be constitutionally sufficient. In the court’s view, the reasonableness
factors came down to three interests: “Defendants’ interest in not litigating an away game * * *
Exxon’s interest in litigating a home game * * *, and Texas’s interest in hosting * * *,”

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emphasizing that “Texas has a strong paternal interest in this case because an outcome will elucidate rights important to a key player in the Texas economy.” In the end, the district court held jurisdiction would be unreasonable as to the Netherlands defendant, but reasonable as to the Delaware defendant. The court also denied Exxon’s request for jurisdictional discovery: “jurisdictional discovery is generally unpopular where it could become a fishing expedition for ties with a defendant domiciled in a foreign nation.” (The case also can be discussed in connection with venue, with attention to the company’s change in the location of its headquarters, see footnote 3 of the opinion.)

**Ward v. AlphaCore Pharma, LLC, 89 F.4th 203 (1st Cir. 2023).**

The decision raises strategic questions of when a plaintiff might seek jurisdictional discovery and how the evidentiary record affects the appellate standard of review. Plaintiff, who died during the course of the appeal, was a Massachusetts resident who had a rare genetic deficiency and came to suffer from stage-5 kidney failure. He postponed dialysis treatment to participate at an NIH facility in Maryland as the only subject in a long-term trial of defendant’s experimental drug. After participating for about a year plaintiff withdrew from the trial because he was in urgent need of dialysis. Three years later he sued defendants in state court, alleging he had been fraudulently induced to participate in the trial in order “to set the table for a sale” of the defendant company to MedImmune. Defendants removed and moved to dismiss for lack of personal jurisdiction, and the district court granted the motion. On appeal, the First Circuit affirmed, stating at the outset of the decision that the appeal “tests the margins of a court’s in personam jurisdiction.” The appellate court called the record “nearly empty,” refusing to credit plaintiff’s post-complaint submissions that defendants reimbursed his travel expenses, sending money to Massachusetts, or that they sent medicines into Massachusetts, and emphasized that plaintiff did not seek jurisdictional discovery.

**B.D. by & through Myer v. Samsung SDI Co., 91 F.4th 856 (7th Cir. 2024.)**

An Indiana consumer, a minor, suffered severe injury when the battery in his e-cigarette exploded while in his pocket. Plaintiff obtained the battery from his step-father who had purchased it for his own e-cigarette. Plaintiff sued the manufacturer of the battery, a Korean
company, in Indiana state court, and defendant removed. The district court found that plaintiff made out a prima facie case of specific jurisdiction. The Seventh Circuit “is among those that apply the stream-of-commerce theory in products liability cases,” and it applies a “knowledge” version of the theory, not a “targeting” version, relying on Justice Brennan’s concurring opinion in *Asahi*: “[a]s long as a participant in [the stream of commerce] is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.” The district court relied on the stream-of-commerce theory and *Ford* to find specific jurisdiction in the case; the circuit court, however, found that the record did not contain sufficient facts to support that finding and that *Ford* was distinguishable, but it did find that plaintiffs made out a prima facie case sufficient to warrant a remand for jurisdictional discovery.

Students can discuss what facts would be needed to support a finding that defendant delivered its batteries into the stream of commerce in the United States with the expectation that the batteries would be purchased in the forum state. The decision highlights these questions and some of the gaps in the record:

- Did Samsung SDI know individual 18650 batteries reached consumers in Indiana?
- Did Samsung SDI expect that its 18650 batteries would reach consumers in Indiana?
- What if any efforts did Samsung SDI make to control distribution of its 18650 batteries?

Further, students can discuss how this case differs from *Ford*. The Seventh Circuit emphasized that the record did not show that defendant “advertised, sold, or serviced” the batteries in Indiana.


The decision is interesting for its discussion of when an agency relationship might support specific jurisdiction. A customer whose garbage and recycling were not picked up filed a putative class action in Pennsylvania against a Pennsylvania trash and recycler hauler, its parent company (a Canadian corporation), and a management company (a Delaware corporation) for
fraud, misrepresentation, and violation of a Pennsylvania consumer protection statute. Defendants moved to dismiss on a number of grounds, including lack of personal jurisdiction. The district court denied jurisdictional discovery and granted the motion as to the parent company. The complaint alleged only that the company contacted with the state “through the ‘regular[] dispatch[ing] of financial risk managers’ to the headquarters of subsidiaries.” It otherwise had no employees, offices, property, or tax obligations in the state. Moreover, the district court explicitly held that the complaint insufficiently alleged an agency relationship between the parent and the subsidiary to support personal jurisdiction over the parent under the narrow basis Daimler seemed to support:

[If] if [the parent] had an agency relationship with [the in-state subsidiary], which of course has a significant presence in Pennsylvania, jurisdiction might be proper. ***; see also In re Chinese-Manufactured Drywall Prods. Liab. Litig., 753 F.3d 521, 531 (5th Cir. 2014) (“Daimler therefore embraces the significance of a principal-agent relationship to the specific-jurisdiction analysis, though it suggests that an agency relationship alone may not be dispositive.”). But [the] Amended Complaint does not adequately plead such a relationship. He alleges only that: (1) [the in-state company] became a wholly owned subsidiary of [the parent] after its acquisition in 2022; (2) [the parent] is “a publicly traded company that regularly monitors its wholly-owned subsidiaries’ financial risk arising from operating activities and regularly dispatches financial risk managers to their headquarters;” and, (3) [a Delaware company with its principal place of business in Texas] “oversees WCI’s operations in the United States.” However, “the mere fact that one corporation owns a controlling interest in another does not render the subsidiary the agent of the parent.”

Oklahoma Firefighters Pension & Ret. Sys. v. Banco Santander (Mexico) S.A. Institucion de Banca Multiple, 92 F.4th 450 (2d Cir. 2024).

The Second Circuit vacated and remanded the district court’s jurisdictional dismissal of a putative class action brought by institutional investors against Mexico-based subsidiaries of several international banks. The suit, filed in New York federal court, alleged price-fixing
violations of the Sherman Act and unjust enrichment from defendants’ sales of bonds at allegedly inflated prices through the banks’ affiliated dealers in New York that acted as “clearinghouses.” Defendants argued that all of the wrongdoing occurred in Mexico and that the brokers’ conduct should not be attributed to them for jurisdictional purposes. The district court, relying on Second Circuit precedent, held that the complaint did not make out a prima facie case of specific jurisdiction and also rejected jurisdiction under the effects test. The circuit court emphasized that under its precedent the complaint plausibly alleged that the Mexican banks “sold billions of dollars’ worth of price-fixed bonds through their agents in New York”; that the New York brokers acted as agents for the banks, were controlled by defendants, and conducted their activities for defendants’ benefit; and that the agents’ forum-based activity could be imputed to defendants for jurisdictional purposes. As the Second Circuit explained:

Perhaps unsurprisingly, using a New York agent as the sales hub for billions of dollars’ worth of bonds subjects the principal to specific jurisdiction. * * This is not to say that an affiliate’s in-forum marketing, sales, and distribution can always be pinned to an out-of-state defendant. * * * [D]efendant’s knowledge of, control over, and benefit from the agent’s conduct are the key considerations. This case, however, does not involve any difficult line-drawing questions. The complaint alleges that Defendants were in charge of every step of every deal, thousands of times over during the alleged class period.

Moreover, the price-fixing claims arose directly out of those contacts, and the forum state’s interest was strong:

Plaintiffs want to sue Defendants where *Defendants* have allegedly elected to conduct their U.S. sales operations. New York has a strong interest in regulating businesses in the state, of course, and Defendants chose to take advantage of New York's market and laws. So they can’t complain.

*Cappello v. Rest. Depot, LLC, 89 F.4th 238 (1st Cir. 2023).*

Cappello, a New Hampshire resident, contracted an E. coli infection after eating a salad at Il Panino in New Jersey, resulting in several surgeries. Cappello filed tort claims and a breach
of warranty claim against multiple parties, including Restaurant Depot (the lettuce wholesaler) and D’Arrigo Brothers (the lettuce distributor). The district court held that Cappello failed to show that his claims against these two defendants arose out of or related to their contacts with New Hampshire. The First Circuit Court affirmed with “somewhat different reasoning,” finding that Cappello did not demonstrate relatedness. Regarding the tort claims, Cappello did not proffer evidence showing that the defendants’ contacts with New Hampshire were related to a consumer contracting a salad-derived E. coli infection in New Jersey, finding that the relationships did not satisfy Ford; relatedness was not met simply because “the type of product” that injured plaintiff is the type of product “that Restaurant Depot reaps a benefit from its business contacts in New Hampshire.” By contrast to Ford,

Restaurant Depot did not cultivate a market for its food products in the forum state or have the product malfunction there. Nor did Restaurant Depot “extensively promot[e]” sales or service of lettuce in New Hampshire. * * *. Personal automobiles and like vehicles serve to make their consumers mobile (such as between jurisdictions); lettuce does not. Personal vehicles are durable goods. Lettuce is not a durable good; it is meant to be consumed once. Personal vehicle manufacturers like Ford provide service centers and aftermarket products to “ensure[ ] that consumers can keep their vehicles running long past the date of sale” and to ensure their convenient use by the ultimate consumer throughout the country***; lettuce distributors do not. Personal vehicles are also the subject of a nationwide market of consumer-to-consumer sales; lettuce is not.

As to D’Arrigo Bros., they had no “knowledge its lettuce could end up in a salad in New Hampshire was in any way related to the consumption of a salad in New Jersey.” Jurisdiction also was not present over the breach of warranty claim; Cappello did not show that the defendant’s activity in New Hampshire was instrumental in forming or breaching the contract.

Securities & Exchange Commission v. Gastauer, 93 F.4th 1 (1st Cir. 2024).

The Securities and Exchange Commission (SEC) brought an enforcement action against a son and his father, the latter as the “relief defendant,” alleging that the son “facilitated a scheme
enabling corporate insiders to sell stock while evading statutory and regulatory registration and disclosure rules.” The father is a German resident who resides in Germany and has not had contact with the United States since 2009. The district court entered a judgment against the father and ordered him to pay the SEC $3.3 million, concluding that the Massachusetts federal court had personal jurisdiction over the father because he received $3.3 million from his son who obtained the money by committing securities fraud in the United States. The father appealed. The First Circuit reversed, declining to adopt the SEC’s theory that a federal court can “impute” contacts from the defendant-in-interest to the relief defendant. Precedent established that in “extraordinary circumstances” it was “not error for the district court to have joined * * * alter ego entities and exercised jurisdiction over them.” In this case, however, the father could not be treated as an alter ego or as a successor in interest:

The extent of his alleged participation in any wrongdoing is as an after-the-fact recipient of funds that were previously obtained fraudulently. The SEC does not even claim that he knew that the money he was receiving was the fruit of illegal activity. Indeed any accusation that Gastauer was involved in wrongdoing might well render him an unsuitable relief defendant.

As the First Circuit emphasized, “due process prohibits the imputation of contacts to a relief defendant like Gastauer, whose only involvement in the case is his receipt of a unilateral transfer of money from a third party. Haling him into court on the basis of that involvement alone would accomplish exactly what due process prohibits.”

**Shambaugh & Son, L.P. v. Steadfast Ins. Co., 91 F.4th 364 (5th Cir. 2024).**

Shambaugh & Son, L.P., an insured company, sued Steadfast Insurance Company (Steadfast), its parent company’s insurer, in a Texas federal court to recover discovery expenses it incurred during separate multi-district products liability litigation in South Carolina. The insurance policies at issue were negotiated outside of Texas. The Fifth Circuit affirmed the district court’s dismissal for lack of personal jurisdiction because Steadfast’s connection to Texas was too attenuated. Although the policies insure Shambaugh, a Texas resident, “an insurer’s securing an insurance contract with a Texas resident ‘does not, on its own, establish minimum
contacts between [the insurer] and Texas.’’ Furthermore, “specific personal jurisdiction could not be secured against an insurer based on ‘worldwide coverage language in the policy;’” this would allow for specific personal jurisdiction against nationwide insurers “virtually anywhere.” Finally, the circuit court rejected the argument that the relation of this suit to multi-district litigation would alter the jurisdictional rules: “Every federal court to have considered the issue has affirmed that ‘the transferee court can exercise personal jurisdiction to the same extent that the transferor court could.’” Moreover, the circuit court declined to treat the insurance company’s involvement in other Texas lawsuits as part of the multi-district proceeding as a related contact. To be sure, the MDL was “necessarily related to this action because it triggered the instant dispute over [plaintiff’s] discovery expenses.” Boiled down, defendant’s “contacts with Texas, incident to unrelated litigation * * * are too attenuated to warrant exercising specific jurisdiction”; “Steadfast could not have reasonably anticipated being haled into court in Texas simply because Shambaugh’s records were kept in an office (in Austin) maintained by a division (Northstar) of a subsidiary (Shambaugh) belonging to the original Connecticut-based contracting party (EMCOR).”

**Conti 11. Container Schiffarts-GMBH & Co. KG M.S., MSC Flaminia v. MSC Mediterranean Ship. Co. S.A., 91 F.4th 789 (5th Cir. 2024).**

Three chemical tanks were loaded on Conti’s cargo vessel at the Port of New Orleans and subsequently exploded during Atlantic transit. An arbitration panel awarded Conti $200 million against the Mediterranean Shipping Company (MSC), a Swiss corporation. Conti brought suit in Louisiana federal court to confirm the award. When analyzing personal jurisdiction to confirm an arbitral award under the New York Convention, the Fifth Circuit held, as a matter of first impression, that “a court should consider contacts related to the underlying dispute – not only contacts related to the arbitration itself.” However, the Fifth Circuit reversed the district court’s ruling that it had personal jurisdiction over MSC, reasoning that the sole forum contact, loading tanks in New Orleans, did not confer specific personal jurisdiction over MSC because the “contact arose from the unilateral activities of other parties whose actions are not attributable to MSC.”

Hawkeye Gold, LLC, a judgment creditor, sued the judgment debtor’s parent company in Iowa federal court to recover on a default judgment, after the judgment debtor, which had been the wholly owned subsidiary of the parent, dissolved without paying. The parent is registered and incorporated in China; it did not lease or own property in Iowa; did not advertise or sell products in Iowa; did not hold assets or accounts in Iowa; and did not maintain a registered agent or license to do business in Iowa. The district court dismissed for lack of personal jurisdiction, and the Eighth Circuit affirmed. As a threshold matter, the circuit court rejected the argument that defendant waived its personal jurisdiction defense by failing to include it in a motion to set aside a default judgment.

We have never held that a party waives potential Rule 12(b) defenses by failing to include them in a motion to set aside a default. The argument is contrary to the plain language of Rule 12(g)(2), which expressly limits its application to motions made after prior motions “made under this rule,” meaning Rule 12 motions. Rule 55 governs default procedures. Rule 55(a) provides that the Clerk is required to enter a default against a party who fails to plead or defend once that failure is shown. When a default is entered, Rule 55(c) provides that it can be set aside upon a showing of good cause. A motion under Rule 55(c) is not a motion under Rule 12, nor does Rule 55 require a party to present defenses in seeking to set aside a default. It says nothing about defenses being waived if not raised. Thus, a Rule 55(c) motion to set aside a default does not trigger the waiver provisions of Rules 12(g)(2) and 12(h).

The circuit court then affirmed the dismissal. The parent was not a party to the contract between plaintiff and the judgment debtor. As such jurisdiction could not be based on the contract’s “consent to jurisdiction provision.” Moreover, the parent was not acting as the agent of the subsidiary or as its alter-ego. On the agency theory, the circuit court rejected the argument that
when a purchase contract is between a foreign buyer’s United States agent and an Iowa seller, the foreign buyer becomes a party to the contract and is therefore subject to specific personal jurisdiction in Iowa because the buyer, named as consignee of the goods to be shipped, was a disclosed principal, even if the agent was not subject to the principal’s control.

The Eighth Circuit emphasized that its reading of Iowa law was consistent with policies that the Iowa Supreme Court would endorse:

It is common for foreign importers to use U.S. subsidiaries or purchasing agents in effecting international export/import transactions, in part because both the United States seller and the foreign buyer “fears [breach of contract] litigation in the other party’s ‘home court.’ ” * * *. Adopting [the judgement-creditor’s] unprecedented contention -- that the purchase of Iowa agricultural products by such an agent without more makes the foreign buyer a party to a breach-of-contract action and therefore subject to the jurisdiction of Iowa courts -- could have a disastrous impact on this important part of Iowa's economy. Foreign buyers will simply purchase agricultural products from U.S. sellers in another State or from sellers in a foreign country that does not impose this potentially significant cost. Avoiding unfavorable dispute resolution requirements -- a form of non-tariff barrier -- is a significant part of international economic competition. Therefore, we conclude the Supreme Court of Iowa would not adopt this contention. Moreover, even if consistent with Iowa law, the contention does not satisfy governing due process standards. A foreign corporation with no other minimum contacts with Iowa does not “reasonably anticipate being haled into court there” when it receives goods shipped abroad by its U.S. subsidiary but was not a named party in the purchase agreement.
Consent as Another Basis of Jurisdiction

Waldman v. Palestine Liberation Org., 82 F.4th 64 (2d Cir. 2023).
Fuld v. Palestine Liberation Org., 82 F.4th 74 (2d Cir. 2023).

The facts of this pair of cases are of important topical interest: whether a federal court may exercise personal jurisdiction over the Palestinian Liberation Organization and Palestinian Authority for violent attacks in Israel that killed U.S. citizens. Moreover, the Second Circuit invalidates a federal jurisdictional statute as a violation of Fifth Amendment due process.

Together, the cases have long procedural histories. In Waldman v. Palestine Liberation Org., 835 F.3d 317 (2d Cir. 2016), the Second Circuit held that the district court lacked general or specific jurisdiction over the PLO and PA with respect to attacks done in the early 2000s, given their lack of presence or related conduct in the forum. In response, Congress passed the Promoting Security and Justice for Victims of Terrorism Act (PSJVTA), Pub. L. No. 116-94, §903(c), 133 Stat. 2534, 3082). The PSJVTA provides that the PLO and the PA “shall be deemed to have consented to personal jurisdiction” in any civil action pursuant to the Anti-Terrorism Act, 18 U.S.C. §2333, irrespective of “the date of the occurrence of the act of international terrorism” at issue, upon engaging in certain forms of post-enactment conduct, namely (1) making payments, directly or indirectly, to the designees or families of incarcerated or deceased terrorists, respectively, whose acts of terror injured or killed a United States national, or (2) undertaking any activities within the United States, subject to a handful of exceptions. 18 U.S.C. §2334(e).

In Fuld, the Second Circuit affirmed the district court’s invalidation of this deemed consent provision. Although acknowledging that a showing of consent may be based on a “variety of legal arrangements,” the appeals court maintained that consent cannot “be found based solely on a government decree pronouncing that activities unrelated to being sued in the forum will be ‘deemed’ to be ‘consent.’” The court rejected an analogy to Carnival Cruise, which it treated as an express consent suit given the ticket’s forum-selection clause; nor was there evidence of “submission” as discussed in Justice Kennedy’s plurality opinion Nicastro in exchange for in-forum benefits—the statute conferred no benefits, federal law barred defendants
from engaging in US-based activity with the exception for protected UN-related conduct and offices. Likewise, Mallory was considered inapposite because consent in that case was part of the defendant’s “bargain” to do business in the state.

    In short, when a potential defendant accepts a government benefit conditioned on submitting to suit in the forum, such conduct may fairly be understood as consent to jurisdiction there. The same is often true when a defendant engages in litigation conduct related to the existence of personal jurisdiction. But in the PSJVTA, Congress has simply declared that specific activities of the PLO and the PA — namely, certain payments made outside of the United States, and certain operations within the United States (which remain unlawful) — constitute “consent” to jurisdiction. No aspect of these allegedly jurisdiction-triggering activities can reasonably be interpreted as evincing the defendants’ “intention to submit” to the United States courts Congress cannot, by legislative fiat, simply “deem” activities to be “consent” when the activities themselves cannot plausibly be construed as such.

    In addition, the statute’s “fair warning’ of the relevant jurisdiction-triggering conduct” sufficed only for minimum due process requirements, and not for implied consent; in a later part of the decision the court bolstered this analysis by drawing upon Eleventh Amendment cases that refused to find constructive consent from a statute enacted under Congress’s Article I power. The court also rejected analogies to cases involving a party’s waiver of other constitutional rights, including to proceed before an Article I tribunal rather than an Article III court. Finally, the court shrugged off the suggestion that deference was owed to Congress in this context because the statute involves foreign affairs.


    The suit, similar to Fuld and Waldman, involved fatal violent actions against U.S. citizens who were worshipping at a synagogue in Jerusalem. Rejecting the argument that the PLO and Palestine Authority are not persons entitled to due process protection, the district court
held that the consent-to-jurisdiction provision of the PSJVTA is unconstitutional and that Mallory was inapplicable. The court also rejected out of hand that Federal Rule 23.2, permitting class actions against unincorporated associations, provided a basis for specific jurisdiction.

**Bright Data Ltd. v. BI Sci. (2009) Ltd., 2023 WL 5605658 (Fed. Cir. 2023).**

The case provides a good complement to Insurance Company of Ireland on the question of when litigation conduct can be treated as consent to personal jurisdiction. A Texas-based tech company sued an Israel-based tech company in Texas district court for patent infringement. The district court entered a final judgment that incorporated all terms of the parties’ mediated settlement and all terms of an arbitration award that followed the district court’s enforcement of the settlement. On cross-appeals, defendant argued that the district court erred in rejecting its motion to dismiss for lack of personal jurisdiction and by finding a binding agreement between the parties. Defendant conceded that if the appellate court affirmed the determination that a binding agreement was formed, then the district court had jurisdiction over defendant “for purposes of enforcing that settlement agreement—i.e. it had consented to personal jurisdiction at least to that extent.” Affirming the determination that a settlement had been reached, the appellate court did not reach the jurisdiction objection. Further, the jurisdictional issue did not impact the cross-appeal, which involved plaintiff’s counterclaim of patent invalidity.

**Rabinowitz v. Kelman, 75 F.4th 73 (2d Cir. 2023).**

The case illustrates the distinction between subject matter jurisdiction, which cannot be waived or based upon parties’ consent, and personal jurisdiction, which can. Plaintiff filed a petition in New York federal court to confirm a $4 million arbitration award issued by Bais Din Maysharim, a rabbinical court, and the district court dismissed for lack of subject matter jurisdiction relying on a forum clause in the parties’ arbitration agreement that required any confirmation action be brought in the state courts of New Jersey or New York. The Second Circuit reversed. The parties by contractual agreement could not “strip a court of its subject matter jurisdiction,” which in this case could be based on diversity. Nor did the forum clause deprive the court of personal jurisdiction; the clause set out “permissive arrangements that merely allow litigation in certain fora, rather than mandatory provisions that require litigation to
occur only there.” The court read the clause as “ensuring that [the specified] * * * courts would have jurisdiction but also “sweeping in far more courts than those in Toms River or Tel Aviv.”

Registration Statutes

Pace v. Cirrus Design Corp., 93 F.4th 879 (5th Cir. 2024).

The case provides an excellent teaching companion to Mallory and an opportunity for the close reading of a registration statute. A Mississippi resident sued multiple state corporate defendants in Mississippi state court for personal injuries, and defendants removed to federal court (questions about fraudulent joinder are discussed below). The district court dismissed claims against the out-of-state defendant for lack of personal jurisdiction. Among other things, the court declined to base consent jurisdiction on the defendant’s having registered to do business in the state. The Mississippi Registered Agents Act provided that a registered agent of an entity is authorized to receive service of process of any notice to the entity and then forward that service to the entity itself. Miss. Code Ann. §§ 79-35-13, 79-35-14.


The case raises the question of consent-by-registration in the context of conditional certification of a collective action under the Fair Labor Standards Act. A courier driver working in Utah sued defendant in Utah federal court for unpaid overtime wages. One of the defendants was a Utah corporation with its principal place of business in Utah; as to that defendant, the district court held that under Daimler general jurisdiction could be exercised even as to claims brought by out-of-state opt-in plaintiffs. The other defendant was incorporated in Ohio with a principal place of business in Florida. The circuits currently are divided on whether jurisdiction may be exercised over the claims of out-of-state plaintiffs if the initial party’s complaint

6 The forum clause recited: “Any arbitration award of the Bais Din shall be final and binding on each of the Parties, their successors and personal representatives, and judgment may be rendered thereon in any court having jurisdiction thereof. The Parties each hereby submit to the jurisdiction of the New Jersey State Courts located in Ocean County or the courts of Israel, as the case may be, for the enforcement of any arbitration award pursuant to this paragraph or for any equitable relief related to the rights and responsibilities contained in this Agreement.”
established personal jurisdiction over the claims. The district court, endorsing the analysis of the Third Circuit and rejecting the contrary position of the First Circuit, held instead that “while opt-in plaintiffs do not need to serve the defendant anew upon opting in, jurisdiction is only maintained over the defendant when the claims of the opt-in plaintiffs arise out of the defendant’s minimum contacts with the forum state.” The complaint did not allege specific jurisdiction; Plaintiff sought to establish general jurisdiction under Mallory on the basis of the Utah registration-to-do-business statutes. Defendant argued that the Utah statute expressly did not equate registration with jurisdiction: “In fact, Utah Code Ann § 16-17-401 expressly provides that the “appointment or maintenance in this state of a registered agent does not by itself create the basis for personal jurisdiction over the represented entity in this state.” The district court’s analysis looked to sister-state statutes and surveyed state court decisions (including Skyline Trucking and Abbott Labs discussed in this memo) interpreting them, finding “a lack of uniformity” and holding that the lack of notice in the Utah scheme was fatal to basing jurisdiction on consent:

Thus, the issue comes down to whether Utah has expressly required consent to general jurisdiction in its registration statutes, or whether Utah has or should interpret its foreign corporation registration statutes to imply such consent. Indeed, the Supreme Court has noted that whether compliance with a registration statute constitutes consent is a question of state law. * * * As is the case in almost all the foreign registration statutes nationwide, and unlike the Pennsylvania statute

7 Plaintiff relied on a number of statutes:

The first is Utah Code Ann. § 16-10a-1501(1), which provides that a foreign corporation, such as DHL, “may not transact business in this state until its application for authority to transact business is filed by the division.” DHL filed such an application. Utah Code Ann. § 16-10a-1505(2) further states that “a foreign corporation authorized to transact business in this state is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on a domestic corporation of like character.” And under Utah law a foreign corporation seeking authorization to do business in Utah must also designate a “registered agent” in Utah for the purposes of receiving service of process. See Utah Code Ann. §§ 16-10a-1503(1)(e) & 16-17-203 (“Appointment of registered agent”). DHL has made such a designation. Plaintiff argues that this statutory scheme, and DHL’s compliance with it, establish general jurisdiction over DHL.
at issue in *Mallory*, there is no express language in Utah’s registration statutes mentioning consent to general jurisdiction.* * *unlike the statute at issue in *Mallory*, none of these Utah statutes expressly inform a foreign corporation, such as DHL, that it will be subject to general jurisdiction if it registers to do business in Utah. Because they do not do so, they cannot serve to establish DHL’s consent to general jurisdiction in Utah.

The district court thus limited the reach of the registration statute “only to actions concerning Utah residents or acts occurring in Utah,” finding that approach consistent with Utah’s public policy of protecting its citizens against nonresident actions, and not of protecting nonresidents from actions conducted outside the state.

**Skyline Trucking, Inc. v. Freightliner Truck Centercompanies, 684 F. Supp. 3d 1128 (D. Kan. 2023).**

Skyline Trucking, a Georgia company, sued three companies in Kansas state court, including Daimler Truck North America (DTNA), a Delaware limited liability company. DTNA moved to dismiss under Rule 12(2) and (6). The district court denied the jurisdictional motion, holding it could exercise general jurisdiction under the Kansas registration statute. That statute provides that “before doing business in the state of Kansas” foreign entities must register with the state and provide “an irrevocable written consent of the foreign covered entity that actions may be commenced against it in the proper court of any county where there is proper venue by the service of process.” K.S.A. § 17-7931(g). Earlier district court decisions in Kansas had found that “consent-by-registration did survive Daimler;” and the court concluded that this approach was consistent with the Supreme Court’s *Mallory* decision:

> [T]he Supreme Court recently held that “a variety of ‘actions of the defendant’ that may seem like technicalities nonetheless can ‘amount to a legal submission to the jurisdiction of a court.’ ” * * * One of those actions is filing paperwork to conduct business within a state, which doesn’t violate the corporation’s due process rights.

This case raises the question of jurisdiction based on registration in the context of one of the hundreds of actions consolidated by the Judicial Panel on Multidistrict Litigation in the Northern District of Illinois. The claims all involved allegations that defendants manufactured infant formula that caused necrotizing enterocolitis in babies born pre-term. In this decision, the district court granted without prejudice defendants’ motion to reconsider its prior holding that one of the defendants was subject to general jurisdiction in Missouri under that state’s corporate registration statute.

Under Missouri’s statute, before an out-of-state corporation can conduct business in Missouri it must receive a “certificate of authority” from Missouri's secretary of state. Mo. Ann. Stat. § 351.572. As part of that process, the company must appoint an agent there for service of process. * * * The effect of that certificate of authority is to grant the foreign corporation “the same but no greater rights and ... the same but no greater privileges” as domestic corporations, and to subject foreign corporations to “the same duties, restrictions, penalties, and liabilities now or later imposed on” domestic ones. Mo. Ann. Stat. § 351.582.

In its earlier order, this court concluded that Missouri’s requirement for appointing an agent for process and its language concerning the rights and privileges of foreign corporations implied consent to general jurisdiction. * * * The court also held that [State ex rel. Norfolk S. Ry. Co. v. Dolan, 512 S.W.3d 41, 52 (Mo. 2017) (en banc)], in which the Missouri Supreme Court held that Missouri's corporate registration statutes did not subject foreign corporations to general jurisdiction * * * was not controlling. * * * But with the benefit of further briefing, the court concludes this was in error.

On reconsideration, the district court deferred to the state high court’s reading of the state registration statute and found that the statute did not subject a foreign company through registration to consent jurisdiction. Mallory did not control because it addressed the
constitutionality of a different state’s statute. The court then considered and rejected basing specific jurisdiction under the Missouri long-arm statute; case law was read as not supporting jurisdiction in a case “in which a Missouri resident was injured in another state by tortious conduct in that other state.” Here, the injury occurred in Kansas. Students might consider why defendant fought so hard on the jurisdictional issue since dismissal was without prejudice—how would the forum state affect other procedural options available to the parties?

**Lumen Technologies Service Group, LLC v. CEC Group, LLC, 691 F.Supp.3d 1282 (D. Colo. 2023).**

The facts present a compact problem for analyzing a registration statute. The district court held that a foreign company’s registration to do business under the Colorado registration statute was not a basis for finding implied consent to jurisdiction; the statute did not provide sufficient notice of the jurisdictional consequences of registration, consent was not expressly set out in the statute, and state court decisions did not treat registration as consent to jurisdiction. Lumen purchased a building after CEC evaluated its structural capacity. After the building collapsed, Lumen sued CEC in Colorado district court, which then filed a third-party complaint against PJF, an Ohio-based company, which it had hired to do the structural analysis. Students might consider how the text of the Colorado registration statute differed from the Pennsylvania statute at issue in *Mallory.*

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8 A foreign entity shall not transact business or conduct activities in this state except in compliance with this part 8 and not until its statement of foreign entity authority is filed in the records of the secretary of state.

* * *

A foreign entity that has authority to transact business or conduct activities in this state has the same rights and privileges as, but no greater rights or privileges than, and, except as otherwise provided by this title, is subject to the same duties, restrictions, penalties, and liabilities imposed upon, a functionally equivalent domestic entity. Colo. Rev. Stat. §§ 7-90-801(1), 7-90-805(2).

In addition, the statute requiring the designation of a registered agent in Colorado provides:

1. Every domestic entity for which a constituent filed document is on file in the records of the secretary of state and every foreign entity authorized to transact business or conduct activities in this state shall continuously maintain in this state a registered agent that shall be:
   a. An individual who is eighteen years of age or older whose primary residence or usual place of business is in this state;
   b. A domestic entity having a usual place of business in this state; or
   c. A foreign entity authorized to transact business or conduct activities in this state that has a usual place of business in this state.
Internet and Other Technological Contacts

New forms of technology have placed pressure on the traditional minimum-contacts test and its premise of territoriality as a source of judicial power. Early jurisdictional decisions tended to involve disputes in which a defendant hosted a website. We collect below a few cases touching on technology that enables a party to use software applications to profit from a consumer’s information and data, tweets, and whether the sharing a password can be treated as an intentional act directed at the forum state.


The First Circuit affirmed the district court’s dismissal for lack of specific personal jurisdiction. Rosenthal, a resident and citizen of Massachusetts, filed a putative class action against Bloomingdales, an Ohio limited liability company with its principal place of business in New York. The complaint alleged that Bloomingdales “had unlawfully intercepted and used information about his activity on its website” by inserting session replay providers (SRPs) on the Bloomingdales website to embed session replay code (SRC) on visitors’ internet browsers.

According to the plaintiff’s complaint, the plaintiff regularly visited Bloomingdales’ website, including while in Massachusetts. Bloomingdales, the complaint alleged, had commissioned third-party vendors (sometimes called “session replay providers” or “SRPs”), such as the Georgia-based company FullStory, to embed snippets of JavaScript computer code on its website. Unbeknownst to the plaintiff, this SRC was deployed onto his internet browser while he visited Bloomingdales’ website in order to intercept, record, and map his electronic communications with the website. Bloomingdales and the SRPs then used these communications to recreate the plaintiff’s visits to the website and to

(2) An entity having a usual place of business in this state may serve as its own registered agent.
(3) Any document delivered to the secretary of state for filing on behalf of an entity that appoints a person as the registered agent for the entity shall contain a statement that the person has consented to being so appointed. Id. § 7-90-701.

Without ordering any jurisdictional discovery, the district court dismissed the claims for lack of specific personal jurisdiction, finding the challenged conduct took place outside of Massachusetts and that Bloomingdale’s did not initiate the contact with Rosenthal, and there was no “demonstrable nexus” between the claims and in-state contacts. The First Circuit affirmed, applying the “classic prima facie approach,” which considers whether plaintiff has “proffer[ed] evidence which, taken at face value, suffices to show all facts essential to personal jurisdiction” and requires the plaintiff to “go beyond the pleadings and make affirmative proof.” At bottom, the First Circuit found that plaintiffs “failed to provide ‘affirmative proof’ that Bloomingdales purposefully deployed SRC to intentionally target users in Massachusetts.” It rejected the argument that by using the SRC, Bloomingdales sought to cultivate the Massachusetts market and benefited from that market; the complaint alleged only “that Bloomingdales commissioned SRPs to deploy SRC in a manner that would be recognized by the internet browsers of users located anywhere in the world (including Massachusetts).” Moreover, the circuit court emphasized that the complaint did not allege real-time visits by plaintiffs to any in-state stores, and that he did not search online for in-state stores, further proof of the failure to show that Bloomingdales knew it was targeting him while in Massachusetts.

Circuit Judge Thompson concurred dubitante, not questioning the majority’s application of First Circuit precedent (“for now our hands appear tied”), but rather making clear that he is “worried about where the law is in this area and where it might go (keeping in mind all the privacy-invading tech already out there, with more surely to come).” His concurrence focused on the common sense idea that the “Internet has no territorial boundaries” and the need to adapt due process analysis to deal with injuries caused by use of new forms of technology.

(For a variant involving a passive website and encoding software, see Curd v. Papa John’s Int’l, Inc., 692 F.Supp.3d 525 (D. Md. 2023), appeal dismissed, 2023 WL 11116006 (4th Cir. 2023)).
AMB Media, LLC v. OneMB, LLC, 2024 WL 2052151 (6th Cir. 2024).

The appeal involved whether Tennessee courts could hear trademark litigation brought against out-of-state website-based companies where sales to in-state consumers amounted to no more than one percent of their total sales. The district court dismissed the action and the Sixth Circuit, with one member of the panel dissenting, reversed and remanded the district court’s jurisdictional dismissal of the action, finding that defendants purposefully availed themselves of the benefits of the forum state by holding themselves out “as welcoming Tennessee sales” and conducting “a regular course of business in the state.”

Where sales are particularly sporadic—“as little as a single transaction”—affirmative targeting of a forum may be necessary to constitute purposeful availment. But no specific targeting is required when a defendant, as here, operates “a national [business] aimed at a nationwide audience” with regular sales into a given forum. Defendants here chose to repeatedly serve Tennessee customers without taking any “steps to limit [their] website's reach or block its use by [those] customers.”

Given that choice, “[t]here is no unfairness in calling [Defendants] to answer for [their products] wherever a substantial number ... are regularly sold”—including in Tennessee. After all, when a company has “shipped ... product[s] to [Tennessee] only after it had structured its sales activity in such a manner as to invite orders from [that forum and others] and developed the capacity to fill them,” that entity “cannot now point to its ‘customers in [Tennessee] and tell us, ‘It was all their idea.’” * * *

Moreover, defendant could have blocked Tennesseans from accessing their website but did not do so. Judge Batchelder dissented, arguing that the sales did not show a regular course of business manifesting purposeful availment via a website, and that the majority erred in “looking to the actions of a company’s customers rather than the conduct of the company.”

Plaintiff owned the copyright for a song entitled “The Twelve Patches of Christmas Tarkov Style.” He sued an alleged infringer in Texas district court under the federal Digital Millennium Copyright Act for uploading a video of the song with identical or similar lyrics as the copyrighted song on YouTube. Defendant posted the song from Australia and it could be viewed in Texas. Characterizing YouTube as a passive social media site, the district court held that although plaintiff felt the infringing effects in Texas, defendant could not reasonably have anticipated being haled into federal court in Texas. Moreover, defendant’s acknowledging YouTube’s takedown notification did not constitute consent to jurisdiction in Texas; the notice referred only to the “district in which YouTube is located,” which is the Northern District of California. The decision also provides a detailed discussion of service of process effected through means authorized under the Hague Convention under Federal Rule 4(f).

Herbal Brands, Inc. v. Photoplaza, Inc., 72 F.4th 1085 (9th Cir. 2023).

The Ninth Circuit considered whether a federal court in Arizona had personal jurisdiction over New York residents selling products to Arizona residents through online Amazon storefronts. Plaintiff Herbal Brands, a Delaware corporation with its principal place of business in Arizona, sued the defendant for selling Herbal Brands products without authorization. The appellate court reversed the district court’s dismissal for lack of personal jurisdiction, holding 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 has purposefully directed its conduct at the forum such that the exercise of personal jurisdiction may be appropriate.” The Ninth Circuit applied Calder’s effects test to find that the defendant purposefully directed activities at the forum. The appellate court further reasoned that there is personal jurisdiction because the plaintiff’s harms rose out of the defendant’s contacts with the forum and the exercise of jurisdiction over the defendant would be reasonable.

(Relying on Herbal Brands, the Ninth Circuit in Youngevity Int’l, Inc. v. Innov8tive Nutrition, Inc., 2024 WL 838707 (9th Cir. 2024), reversed and remanded the district court’s dismissal for lack of personal jurisdiction, reasoning that purposeful availment is shown where the defendant
in the regular course of business sold a physical product via an interactive website and caused that product to be delivered to the forum.)

**Impossible Foods Inc. v. Impossible X LLC, 80 F.4th 1079 (9th Cir. 2023).**

The district court dismissed a trademark action seeking a declaration that use of the all-caps version of the word “impossible” by Impossible Foods did not infringe the trademark of Impossible X. Impossible X, described as “now a Texas LLC,” is a one-person company run by “a self-described ‘digital nomad’” who operated the business for two years from San Diego. Defendant’s company has no employees, no outside investors, and no manufacturing or production facilities, and essentially is an “extension” of its founder. The Ninth Circuit reversed, finding a sufficient affiliation between the trademark dispute and California. In terms of contacts with the forum, Impossible X “previously operated out of California and built its brand and trademarks there.” The appeals court, relying on *Ford*, also held that the declaratory judgment action arose out of or related to those forum contacts. “Under trademark law, those rights are based on when and how the trademark holder used the mark. Impossible X’s trademark building activities in California are thus integral to the scope of the rights that are to be declared in this case. Those activities have a sufficient nexus to this dispute to satisfy due process.” In so holding, the court declined to extend the Federal Circuit’s approach to patent litigation, which looks only at enforcement activity, to trademark litigation. The Ninth Circuit instead included consideration of pre-enforcement commercialization activity (this part of the decision turns on technical issues of trademark law that likely are beyond the 1L scope).

**Briskin v. Shopify, Inc., 87 F.4th 404 (9th Cir. 2023).**

Briskin, a California resident, brought a putative class action against Shopify, a Canadian web-based payment processing platform, for deliberately concealing its involvement in consumer transaction in violation of California privacy and unfair competition laws. In a matter of first impression, the appellate court affirmed the district court’s decision to dismiss the case for lack of personal jurisdiction: “[w]hen a company operates a nationally available e-commerce payment platform and is indifferent to the location of end-users, the extraction and retention of consumer data, without more, does not subject the defendant to specific jurisdiction in the forum.
where the online purchase was made.” The court held that Shopify did not “expressly aim” its conduct at California because there was not “something more”; the website did not have a forum-specific focus nor did Shopify exhibit an intent to cultivate an audience in the forum.

**Johnson v. Griffin, 85 F.4th 429 (6th Cir. 2023).**

The opening sentence of the decision sets the stage:

Kathy Griffin, a California-based celebrity and social activist, sent a series of tweets to her two million Twitter followers asserting that Tennessean Samuel Johnson, the CEO of Tennessee-based VisuWell, had engaged in homophobic conduct. She encouraged her followers to make him “online famous” and tagged his company. She then asked his employer to “remove[]” him from the Board of Directors and threatened that the “nation w[ould] remain vigilant” if it did not. Within a day of her first tweets, the company fired Johnson and removed him from the Board. Johnson and his wife sued Griffin in federal court in Tennessee, claiming (among other things) that she tortiously interfered with his employment.

The district court dismissed the suit for lack of personal jurisdiction and the Sixth Circuit reversed. Relying on Calder and Walden, the appellate court found that “Griffin’s actions have more parallels to Calder than to Walden.” In particular, the tweets emphasized Johnson’s residence and his company’s home base in Tennessee, showing that the “focal point” of her tweets concerned Tennessee. The court rejected an analogy to Blessing v. Chandrasekhar, 988 F.3d 889 (6th Cir. 2021):

In that instance, Griffin posted about an “incident” involving Kentucky students on a trip to Washington, D.C. * * *. Her tweets encouraged followers to “[n]ame these kids,” “[s]hame them,” and “let [their school] know how you feel about their students’] behavior.” * * *. We concluded that Griffin’s actions did not satisfy Kentucky’s long-arm statute, then added that personal jurisdiction would not have satisfied due process even if they had. * * *. We reasoned that these tweets, all targeting actions in Washington, D.C., resembled Walden more than Calder because Griffin never took any “affirmative steps” to communicate with

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individuals in Kentucky when she tweeted about the student’s conduct. * * *. And the students felt the tweets’ harm “wherever [they] happened to be located,” not just in Kentucky. * * *

Missing in Blessing were allegations that Griffin had intentionally targeted Kentucky when provoking efforts to harass the students. * * *. The Johnsons’ complaint, in marked contrast, focuses on Griffin’s conduct that targeted Tennessee.

For other fact patterns involving electronic contacts see:

Kendall Hunt Publg. Co. v. Learning Tree Publg. Corp., 74 F.4th 928 (8th Cir. 2023) (minimum contacts not established by defendant’s maintenance of “a nationally-available website through which an Iowa resident purchased the allegedly infringing work”; the conduct was not “uniquely or expressly aimed at” Iowa, and there was no in-state advertising).

Malone v. Breggin, 2024 WL 1315910 (W.D. Va. 2024) (statements posted on social media did not support personal jurisdiction where complaint did not show defendants “intended to purposefully direct in a substantial way their electronic activity toward” the forum state)

Foresta v. Airbnb, Inc., 2024 WL 329524 (E.D. Pa. 2024) (operator of online marketplace “that makes money by brokering short-term housing rentals” subject to jurisdiction in forum state where it operated the website and collected fees).

Rodriguez v. Aquatic Sales Sols. LLC, 2024 WL 2804097 (C.D. Cal. 2024) (company subject to jurisdiction in California on claim that it allowed third party to eavesdrop on defendant’s website chatbox feature in violation of state privacy act where in addition to hosting interactive site it also sold physical goods in state).
Jurisdiction Based on Power over Property


These cases, also discussed above, arose out of the Lebanese bank crisis. In addition to dismissing for lack of in personam jurisdiction, in Raad, the district court also rejected basing jurisdiction on a quasi in rem theory—namely the attachment of certain of the defendant-bank’s funds held in accounts in New York.

In support of quasi in rem jurisdiction, the property pointed to as the basis for jurisdiction must be related to the plaintiff’s cause of action; the presence of the property alone is not enough to support jurisdiction. * * * Moreover, if a defendant has property in the state, the Court must still consider whether the exercise of jurisdiction over the Defendant would offend the Due Process clause of the Fourteenth Amendment. * * *. In short, the Court must ensure that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. * * *

* * * Plaintiffs do not sufficiently allege that the funds in Bank Audi’s New York accounts are tied to the specific claim set out in their complaint. Plaintiffs broadly allege that “Bank Audi uses The Bank of New York Mellon; Citibank, N.A.; JPMorgan Chase Bank, N.A.; and Standard Chartered Bank as its correspondent banks to conduct business in New York” and that “Bank Audi’s largest stake (30% of the share capital) is held by the Bank of New York Mellon in its capacity as depositary under the Bank's GDR program.” * * * However, Plaintiffs have failed to allege that any of those accounts or funds are tied in any way to the purported harms they experienced as set forth in the Amended Complaint.
In other words, the Amended Complaint does not include any allegation that Defendant’s New York correspondent accounts are in any way related to—or caused—the injuries on which their claim is predicated. * * * Plaintiffs’ sole claim “turn[s] on alleged measures taken by Lebanese banks in Lebanon to ensure that USD deposits remained” in Lebanon. * * * Plaintiffs fail to allege that the funds they seek to recover in this action—which have never left Lebanon—are related to Defendant’s correspondent accounts in New York.

Additionally, the case law in this District consistently sets out that quasi in rem jurisdiction is not proper where an order of attachment is not in place and the property at issue has not otherwise been seized. * * * Indeed, Plaintiffs filed a motion for attachment in the Supreme Court of the State of New York, New York County prior to this action’s removal in December 2020. * * * That motion, however, was subsequently mooted when the district court granted Defendant’s motion to dismiss the action in September 2021. * * *. However, in the over fourteen months since the Second Circuit vacated the district court’s decision, Plaintiffs have not renewed their motion for attachment.

**Jurisdictional Reach of the Federal District Courts**

*Doe v. WebGroup Czech Republic, a.s., 93 F.4th 442 (9th Cir. 2024).*

The suit was brought as a putative class action by a childhood sex trafficking victim who had videos and images of her sexual abuse sold and/or distributed on pornography websites (among the ten most trafficked websites in the world). The complaint alleged violation of a federal sex trafficking statute, as well as California’s bar on unauthorized distribution of private sexually explicit images. The Czech operator of the websites had no U.S. presence but contracted with various U.S.-based content delivery networks as well as operations platforms like Google and PayPal. The district court dismissed for lack of jurisdiction, and the Ninth Circuit reversed under Federal Rule 4(k)(2), focusing on as a matter of specific jurisdiction whether defendant purposefully directed activities toward the United States, applying the *Calder* and *Mavrix*
effects test; whether the claim arises out of or relates to the forum-related activities; and whether the exercise of power would be reasonable.

Precedent established that “maintenance of a passive website alone cannot satisfy the express aiming prong” of the Calder effects test. Moreover, the plaintiff in this case did not contend that she was individually targeted because known to be a forum resident. Rather,

the question here is whether express aiming at the U.S. market has been shown by virtue of what the evidence reveals about (1) how [defendants] operate these particular websites and (2) the “geographic scope” of the companies’ “commercial ambitions” in doing so. *** To establish the requisite “something more” based on these sorts of considerations, we have held that the plaintiff must show that the website operator “both actively appealed to and profited from an audience” in the U.S. forum. ***

To be sure, defendants did not contract to host their websites on physical servicers in the United States. What they did instead was contract with U.S.-based contract delivery network (“CDN”) for the purpose of giving users an “uninterrupted experience.” As defendants acknowledged,

its CDN providers “‘pull’ certain content from [the companies’] servers in Amsterdam onto the CDN providers’ regional facilities based upon local user clicks and videos.” That content “is temporarily cached on, and served from, the CDN facilities and subsequently deleted.” By using U.S.-based CDNs to improve the viewing experience of persons near those CDNs, and by allowing CDN providers to pull content onto the U.S.-based CDNs’ servers to do so, [defendants] have differentially targeted U.S. visitors in a way that, * * * constitutes express aiming at the U.S. market.

Further, defendants’ operations of the websites caused harm that defendants knew was likely to be suffered in the forum state.

Here, the harm on which Plaintiff’s complaint is based is the publication of videos of her childhood sexual abuse on [defendants’] websites. At least one of those
videos attracted more than 160,000 views worldwide before it was taken down in response to a cease-and-desist letter from Plaintiff’s attorney. And given that between 12% and 19% of the relevant websites’ users are in the United States, it is clear that a substantial volume of the widespread publication of the videos of Plaintiff’s abuse occurred in the United States. These facts more than suffice to bring this case squarely within the rule that, where “a Defendant’s actions cause harm in multiple fora, jurisdiction is proper in any forum where a ‘sufficient’ amount of harm occurs, even if that amounts to only a small percentage of the overall harm caused.”

The publication harms clearly arose out of the forum-related contacts, and the Ninth Circuit found that defendants did not carry their burden to show that exercise of power would be unreasonable.

A concurring opinion emphasized that it would have been “prudent” for the district court to have ordered limited jurisdictional discovery:

For example, it would have helped to know the extent of [defendants’] use of content delivery network services (CDNs) in the United States—and elsewhere around the globe—to improve the viewing experience of their users. That, in turn, would have aided us in determining whether [defendants] differentially targeted the United States and thus expressly aimed at our market. * * *

But even without such jurisdictional discovery, other evidence and common sense strongly suggest that WGCZ and NKL expressly aimed at the United States market. And it makes little sense to insist on a remand on that issue and further delay this case involving allegations of underaged sex trafficking. * * *

X Corp. v. Ctr. for Countering Digital Hate Ltd., 2024 WL 1245993 (N.D. Cal. 2024).

The facts of the case are topical and important, and the decision focuses, in part, on the relation between technological contact and the constitutionality of a federal court’s exercise of
jurisdiction under Federal Rule 4(k)(2). The European Climate Foundation (ECF) is organized under Dutch law and headquartered in The Hague. X Corp. sued ECF based on help that ECF allegedly provided to another entity to improperly access X Corp.’s data. ECF moved to dismiss for lack of specific jurisdiction because “it has done nothing tied to [X Corp’s] claims that specifically targeted and created a ‘substantial connection’” with the United States, relying on *Walden v. Fiore*. X argued that it met the Ninth Circuit’s test of “purposeful direction” by showing ECF committed an intentional act expressly aimed at the forum that caused harm to defendant that defendant knew was likely to be suffered in the forum—sharing its login credentials with one of the defendants thereby enabling access to X’s applications and non-public data that otherwise were inaccessible. After a long and careful analysis the district court granted the motion (and then also rejected basing jurisdiction on contacts with California under California’s state long-arm statute). Sharing login credentials with a third party that then accessed a server in the United States was too random a connection and did not involve ECF’s own choice to affiliate with the forum.

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

**The Requirement of Reasonable Notice**

*In re Bailey, 90 F.4th 1158 (11th Cir. 2024).*

This case offers a concise fact pattern about the reasonableness standard for notice, in the context of reviving a bankruptcy judgment in federal court under Federal Rule 69(a). Under governing state law, plaintiff had ten years to collect on the judgment. Within that period plaintiff filed, and the court granted, a motion to revive the judgment, rejecting defendant’s argument that plaintiff failed to strictly comply with the state law. The appeals court affirmed, colorfully explaining:

Baseball Hall of Famer Frank Robinson famously said that “[c]lose only counts in horseshoes and hand grenades.” To that list we add one more thing: close—as long as it’s close enough to qualify as “substantial compliance”—also counts when it comes to following a state’s rules for reviving a judgment in federal court under Federal Rule of Civil Procedure 69(a).
The decision recites that after defendant refused to pay the judgment for almost a decade and was about to become time barred for enforcement, plaintiff requested a status conference with the bankruptcy judge. Notice of the scheduled conference was mailed to defendant and his company’s registered agent. Plaintiff also filed an emergency motion to revive the judgment. Notice of a hearing on the motion was mailed to defendant, his company, the company’s registered agent, and defendant’s counsel at multiple addresses. Plaintiff’s counsel also called defendant’s counsel the day before the hearing on the motion. Nevertheless, defendants failed to appear. On appeal, defendant argued that strict compliance was required with the governing state law, and that due process required personal service via adversarial summons, as mandated by Georgia state law. The Eleventh Circuit held that Rule 69(a) required only substantial and not strict compliance:

[T]he Rule’s plain text does not compel a “procedural straitjacket” in the form of a strict-compliance requirement. We will not impose one here.

What’s more, Georgia scire facias procedures do not squarely fit within the federal court system. Under Georgia state law, the clerk of the state court in which the judgment was obtained must issue scire facias, and that county’s sheriff must serve it. Ga. Code Ann. § 9-12-63. But Georgia federal courts do not control county sheriffs. Requiring strict compliance with scire facias procedures in a federal forum that cannot order the state-mandated relief makes little sense. And insisting on county-specific procedures in federal court, especially in a state with 159 counties, is impractical. Rather, the Federal Rules of Civil Procedure, which apply uniformly in federal court, require one procedure for obtaining relief: filing a motion. See Fed. R. Civ. P. 7(b)(1) (incorporated into bankruptcy adversary proceedings by Fed. R. Bankr. P. 7007).

Overall, efforts were reasonably calculated to apprise defendant of the hearing were shown by evidence of multiple mailings at different addresses: “To be sure, [plaintiff] could have attempted service personally or by publication, but due process did not require him to do so.”
The decision involves notice of forfeiture and provides a useful complement to *Dusenbery* (Casebook, p.247, Note 6). The Drug Enforcement Administration ("DEA") seized $585,610 found in Klimashevsky’s vehicle, provided a receipt, and informed Klimashevsky he would receive a mailing about further proceedings. The agency sent notice by certified mail to Klimashevsky of its intent to initiate civil forfeiture proceedings on April 28, and it said that he had to file a claim by June 2 to contest the forfeiture. Notice was also posted online. However, Klimashevsky did not receive the notice until July 28, long after his claim was due. The DEA never checked the mailing’s status nor tried to confirm if it was delivered before undertaking the forfeiture proceeding. Klimashevsky submitted a claim within 30 days of receiving notice, but the DEA’s Forfeiture Counsel entered a forfeiture order that gave the government ownership of the seized money. Klimashevsky moved in federal court to set aside the forfeiture, and the district court entered judgment for the government while finding that adequate notice had been given.

On appeal, the Seventh Circuit held that the government “minimally” complied with its notice obligation. Actual notice was not required; sending notice via certified mail satisfied due process unless the sender knows or has reason to know that the notice would be ineffective. Although the government did not receive a confirmation of delivery, neither was the notice returned to sender, and neither the forfeiture statute nor precedent required the government to continually check tracking information to ensure notice was delivered. The Seventh Circuit acknowledged “the DEA could have done more,” but only exceptional circumstances required more effort. The court also found it relevant that Klimashevsky did not contact anyone to inquire about the seized money nor did he look online for a notice, which might have made the government aware of the lack of notice.

First Floor Living LLC v. City of Cleveland, 83 F.4th 445 (6th Cir. 2023), petition for cert. docketed (U.S. 2024).

The dispute focused on the timing and quality of notice required before the city can demolish property that it had condemned. Plaintiff bought the property after it had been
condemned and before demolition. It sued the city and the private contractors that carried out the demolition. The district court granted summary judgment for defendants on the federal constitutional claims, declined to exercise supplemental jurisdiction over state law claims, and along the way denied plaintiff’s request for discovery under Federal Rule 56(d). The Sixth Circuit affirmed, with Judge Nalbandian concurring in part and dissenting in part.

The City of Cleveland had condemned two properties for violating city code. Years after condemnation, one property was purchased by Lush Designs, LLC, and the other by First Floor Living, LLC. Regarding the Lush Designs property, the city sent a notice of condemnation and demolition by certified mail to the property and the company’s statutory agent and posted it on the building in a prominent location. Both notices were received, but an individual other than the statutory agent signed for the letter. The city sent a notice by certified mail to the First Floor property and the company’s statutory agent, but neither were received. Notice was also sent to and received by a prior owner of the property before First Floor took ownership. After reviewing city databases to ensure that neither Lush Designs nor First Floor secured permits to improve the buildings or address the code violations, both properties were demolished. The property owners filed suit against the city for deprivation of property without due process, and the district court granted summary judgment in favor of the defendants.

The Sixth Circuit affirmed the district court’s grant of summary judgment in favor of the defendants, holding that notices to the property owners were constitutionally sufficient. Students can be asked how searching a database differed from the challenged notice in Jones v. Flowers (Casebook, p. 248) and in Greene (Casebook, p. 247, Note 5). (The Rule 56(d) issue is discussed later in this memo.)

The Mechanics of Giving Notice


The appeal is from the district court’s denial of a motion to vacate the court’s entry of a default and default judgment under Federal Rule 60(b)(4). The dispositive question was whether
the district court had personal jurisdiction; otherwise the default judgment was void. The case provides an example of a party serving process under Federal Rule 4(e)(1) by using methods authorized by state law. California law provides that if a plaintiff cannot personally serve a defendant using reasonable diligence, service may be effected by leaving a copy of the summons and complaint at the person’s usual mailing address in the presence of a competent member of the household and by thereafter mailing a copy of the summons and complaint to that address See Cal. Code Civ. Proc. § 415.20(b). After attempting to personally serve defendant in California, the process server left a copy of the summons and complaint with an individual who was both defendant’s employee and a tenant at defendant’s mailing address in California. The process server also mailed a copy of the documents to the California address. Zeng argued that service of process was improper under Rule 4(e)(1) because reasonable diligence was not exercised when the process server attempted; moreover, defendant lived in China and the California house was not defendant’s usual mailing address. The Ninth Circuit rejected these arguments. Plaintiff had a reasonable basis for assuming defendant resided in California given her leadership role in a California-incorporated and -headquartered entity and her mortgage agreements indicating the California house as her principal residence. The court also held that the district court did not clearly err in finding that the California house was Zeng’s usual mailing address since her mortgage contract indicated she used the home as her mailing address.


A state prisoner filed a pro se complaint alleging violations of his rights under the Free Exercise Clause and the Religious Land Use and Institutionalized Persons Act (RLUIP). The service of process issue focuses on the district court’s denying of plaintiff’s motion to reimburse service costs incurred by defendants’ refusal to waive service under Federal Rule 4(d)(2). The district court reasoned that because the suit was against prison officials in their official capacity, the claims were against the state, and the state was not obliged to waive service. On appeal, plaintiff argued service was on defendants in their individual capacity under Rule 4(e). The Eleventh Circuit agreed that reimbursement was required. Prior circuit precedent held that claims under RLUIP against a city must be served under Rule 4(j) and against the individual officers under Rule 4(e), thus making the individual defendants subject to the failure-to-waive provision of Rule 4(d)(2), even if sued in an official capacity as well. This is consistent with Rule 4’s
treatment of federal employees, requiring them to be served under Rule 4(e) whether or not they are sued in an official capacity. Nor did defendants show good cause for failure to waive service, so they were required to pay the expenses incurred in making service.

Shah v. Novelis, 2024 WL 1739753 (5th Cir. 2024).

The district court sua sponte dismissed a pro se Title VII action with prejudice because defendants had not been served more than a year after the filing of the complaint, and the appeals court affirmed. The decision illustrates many of the difficulties that a pro se plaintiff faces especially on threshold issues such as service. The decision recites a litany of errors, and classroom discussion can focus on why these actions violated the Federal Rules: plaintiff mailed and emailed the summons to defendants; a summons served by a process server was returned unexecuted; a request for waiver of service did not include information about the consequences of waiving or provide at least 60 days to return the waiver; notice of impending dismissal was not received because plaintiff did not update his address with the court. Moreover, plaintiff’s argument that Rule 4(m)’s time limit does not apply to service of process abroad did not save the day:

By its terms, Rule 4(m)’s time limit does not apply to service of process abroad. * * * But this does not mean that plaintiffs can serve these defendants at their leisure. * * * We have held that Rule 4(f), which governs service of process internationally, “authorizes a without-prejudice dismissal when the court determines in its discretion that the plaintiff has not demonstrated reasonable diligence in attempting service.”* * * “Good faith and reasonable dispatch are the proper yardsticks.” * * *

Here, the record suggests that Shah did not attempt to serve the international defendants until at least six months after he filed his complaint. He did not provide the clerk of court with the necessary information for summons to issue for several months. And he attempted to obtain a waiver of service in November 2022—nine months after commencing suit—but, as discussed, that attempt was
insufficient for several reasons. Shah therefore did not exercise “[g]ood faith and reasonable dispatch” in his attempts to serve the foreign defendants.

(For other examples of pro se plaintiffs’ difficulties with service of process rules, see Harris v. Fort Pierce Police Dep’t, 2023 WL 7153928 (11th Cir. 2023); Davis v. Koch, 2023 WL 5499907 (10th Cir. 2023); Pierce v. Kobach, 2024 WL 1757163 (10th Cir. 2024).

**In re Aputure Imaging Indus. Co., 2024 WL 302404 (Fed Cir. 2024).**

Plaintiff sued defendant in Texas federal court for patent infringement. Defendant was based in China, but plaintiff attempted service at a California address obtained from multiple databases, which was also consistent with a zip code listed on the company’s website. These attempts were unsuccessful, and plaintiff then moved for permission to effect substituted service under Rule 106(b) of the Texas Rules of Civil Procedure, which gives courts the authority to permit service in any manner, including electronically, that will be reasonably effective if service via registered mail, certified mail or delivery was unsuccessful. Defendant opposed the motion, arguing, among other things, that plaintiff was required to comply Federal Rules 4(f)(2) and 4(h)(2). The district court granted the request, and defendant sought mandamus relief, which the Federal Circuit denied.

Federal Rules 4(f) and 4(h)(2) did not govern because the district court concluded that service inside the United States was possible. Moreover, Rule 4(f)(3) stands on equal footing with Rule 4(f)(2) and allows a court to order service of process by any means not prohibited by international agreement, so a court can order alternative means of service even if Rule 4(f)(2) was not strictly complied with. Finally, as a general matter, district courts have broad discretion in deciding whether to allow alternative means of service.

**Moskovits v. Federal Republic of Brazil, 2024 WL 301927 (2d Cir. 2024).**

The case illustrates the requirements of Federal Rule 4(m). The Second Circuit reversed the district court’s sua sponte dismissal of the complaint without having provided advance notice to plaintiff, thus denying him an opportunity to show good cause for failure to timely serve process and effectively denying plaintiff’s leave to amend. Plaintiff, pro se, sued Brazil’s federal
government, various state governments of Brazil, a state-owned utility, and individuals located in Brazil, alleging unjust enrichment and quantum meruit. After a somewhat complicated procedural start—the district court initially dismissed for lack of subject matter jurisdiction, an appeal was taken, the district court granted reconsideration of the dismissal, and plaintiff withdrew his appeal—the case was reinstated following a brief dismissal. Summons were then issued, and the court directed that service be effected. Eighteen months later, plaintiff filed an amended complaint, never having served the first complaint. At that point, without giving notice to the plaintiff, the district court dismissed the case sua sponte under Rule 4(m). The Second Circuit vacated and remanded; “[a]s indicated by the plain language of Rule 4(m), notice to the plaintiff must be given prior to a sua sponte dismissal.” The Second Circuit rejected, however, plaintiff’s request to reassign the case to a different judge on remand.

**Fantozzi v. City of New York, 2024 WL 1597745 (2d Cir. 2024).**

The case involves denial of a Rule 4(m) request to extend the time for service, and illustrates a basic principle: “attorney neglect” does not constitute good cause sufficient for an extension of the period to make service” even if the statute of limitations has run and dismissal with prejudice means plaintiff will forfeit the claim. Counsel’s asserted good cause—financial inability to effect service sooner—fell flat both in the district court and before the Second Circuit, which rhetorically asked why counsel took the case, why he did not move for in forma pauperis status, and why he was able to serve some but not other parties. Nor did the unserved defendants’ actual notice of the case save the day; they would be prejudiced by having to litigate time-barred claims.

**Lucero v. Wheels India, Ltd., 2023 WL 8622293 (5th Cir. 2023).**

The district court dismissed a complaint against a foreign defendant on grounds that plaintiffs’ delay in serving process was “intentional and inexcusable” under Federal Rule 4(m) and denied the request to serve process through electronic means under Rule 4(f)(3). The Fifth Circuit vacated and reversed, explaining why plaintiff’s delay was not intentional and certainly not inexcusable, given plaintiff’s 22-month efforts, albeit unsuccessful, to serve via the Hague Service Convention. As the appeals court emphasized,
The delay was caused by a foreign governmental entity, which neither Plaintiffs nor the court can control. Internal issues at India’s Central Authority, exacerbated by the COVID-19 pandemic, thwarted expedient process service. But these issues and delays were beyond the control of client and counsel.

Plaintiffs have abided by district court deadlines and have requested extensions when needed. Plaintiffs twice attempted to effect service on Wheels India through the Central Authority, followed up with the company that initially submitted the service packet to the Central Authority, hired a second company to again attempt service, and requested—and were granted—ten extensions to serve Wheels India. Although the district court ultimately perceived Plaintiffs’ explanations for requesting extensions as inadequate and substantially similar, this “understandably exasperating” conduct does not rise to the level of contumely.

Moreover, the delay did not unduly prejudice defendant, who knew about the lawsuit. Nor could a finding of intentionality be based on plaintiff’s decision to exhaust service under the treaty before seeking alternative service under Rule 4(f)(3):

[T]he Supreme Court has not provided guidance as to how the requirements of the Convention interact with a court's authority to order alternative service under Rule 4(f)(3). Although the Convention itself contemplates alternative means of service “by postal channels” or “through judicial officers, officials, or other individuals in the State of destination,” India has expressly objected to this Article. Hague Service Convention, art. 10, 20 U.S.T. 361. We have held, however, that the Hague Service Convention does not displace Rule 4(f)(3). Nagravision SA v. Gotech Int’l Tech. Ltd., 882 F.3d 494, 498 (5th Cir. 2018). But this precedent does not mean that the Plaintiffs’ failure to invoke Rule 4(f)(3) earlier constitutes contumacious conduct.

In re Realtek Semiconductor Corporation, 2023 WL 5274627 (Fed. Cir. 2023).

The opinion denying mandamus relief offers a compact problem for a careful reading of Rule 4(f). ParkerVision filed a patent infringement suit against Realtek, which is based in
Taiwan. Realtek contested the sufficiency of process by citing Rule 4(f)(2) of the Federal Rules of Civil Procedure, which says that “if there is no internationally agreed means, or if an international agreement allows but does not specify other means,” process may be served “by a method that is reasonably calculated to give notice” as “prescribed by the foreign country’s law for service . . . .” District court cases have held that under this Rule, service in Taiwan must be administered by a court clerk of Taiwan. Process was not served to Realtek in this manner. ParkerVision filed a motion for leave to effect alternative service of process, and the district court ordered Realtek’s attorney to accept service of process on Realtek’s behalf within 30 days. Realtek petitioned for a writ of mandamus to vacate the order and to require service of process in compliance with Rule 4(f)(2).

The Federal Circuit held that Realtek did not meet the standard for a writ of mandamus. Although service may not have been proper under Rule 4(f)(2), Rule 4(f)(3) stands independently and on equal footing, and it allows courts to direct “other means” of service if such means are not “prohibited by international agreement.” In applying that Rule, some courts consider whether the plaintiff reasonably attempted to effectuate service by conventional means, but that is only one factor that judges may consider in their discretion. Since there is no international agreement prohibiting serving process via someone’s attorney, the method of service ordered by the district court satisfies Rule 4(f)(3). District courts have broad discretion in determining whether to grant relief under Rule 4(f)(3), and it was appropriate for the district court to consider ParkerVision’s initial good faith attempt to serve Realtek with process. Realtek also argued that its attorney was not authorized to receive service of process based on case law applying Rule 4(h)(1), but the requirements of Rule 4(h)(1) do not apply to Rule 4(f)(3), and there is no authority imposing similar restrictions to service of process under Rule 4(f)(3). Finally, serving process to Realtek’s counsel satisfies the *Mullane* standard of “notice reasonably calculated,” since there was no evidence that Realtek was not in communication with its attorney. The Federal Circuit denied Realtek’s petition.
Huzhou Chuangtai Rongyuan Investment Management Partnership v. Qin, 2024 WL 1193065 (2d Cir. 2024).

The case illustrates that service and notice questions can affect the enforcement of arbitral awards in U.S. courts. The Second Circuit affirmed confirmation of a foreign arbitral award, rejecting arguments that because of inadequate notice defendant was not able to participate in the selection of the arbitrators. Under Article V(1)(d) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), it is a defense to enforcement where the party against whom enforcement is sought “was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.” Second Circuit precedent states that Article V(1)(b) “essentially sanctions the application of the forum state’s standards of due process.” Looking to Mullane, the Second Circuit found no due process violation. The arbitration organization made sufficient efforts that were reasonably calculated to provide notice under all the circumstances, sending notice to the address listed as defendant’s address in the parties’ governing agreement, which defendant never changed; the address also was listed as defendant’s registered address on Chinese court judgments; and when the notices were returned undelivered, the organization took additional steps and sent notice to two additional addresses associated with companies that defendant controlled. Moreover, defendant contacted the arbitration organization shortly before arbitration was scheduled to request an adjournment, further evidence that he had an opportunity to participate in the proceedings with counsel.

Opportunity to Be Heard


The Court held that in cases involving civil forfeiture of personal property, due process requires a timely forfeiture hearing, but does not require a separate preliminary hearing. The decision triggered a concurrence by Justice Gorsuch calling for a reevaluation of civil forfeiture statutes and a dissent by Justice Sotomayor opposing the majority’s categorical bar of such a
Two separate actions had been brought by two car owners whose cars were seized during arrests for drug offenses of the persons to whom the owners had loaned their cars. They claimed that the Alabama statute authorizing retention of seized vehicles without holding preliminary hearings violated due process. The state was required to initiate a forfeiture hearing promptly after the seizure, but the owner could regain the vehicle only by posting bond at double the car’s value. Not until the forfeiture hearing could the claimant defend on grounds of innocent ownership—that the owner lacked knowledge of the car’s connection to the drug crime. While the actions were pending, Alabama amended its law to allow an innocent owner of seized property to request an expedited hearing.

The Court declined to apply the Mathews test and relied instead on a pair of cases involving seizure by Customs Service officials. Those cases set out four factors to determine whether the timing of a civil forfeiture proceedings met due process: “the length of the delay, the reason for the delay, whether the property owner asserted his rights, and whether the delay was prejudicial.” The Court further found that even if Mathews did apply, a preliminary hearing would not be required since it would interfere with the government’s law-enforcement activities, and a forfeiture hearing already protects the interests of the claimant and government. Finally, the Court pointed to historical practice to reinforce its holding that preliminary hearings in forfeiture cases are not required. States by statute since the founding have authorized the government to hold seized property pending a forfeiture hearing without a separate preliminary hearing.

9 As noted in the dissenting opinion, the Court granted certiorari on the test to apply in granting a retention hearing, not whether due process required a retention hearing:

See Pet. for Cert. i (“In determining whether the Due Process Clause requires a state or local government to provide a post seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the ‘speedy trial’ test employed in United States v. $8,850, 461 U.S. 555, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983) and Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), as held by the Eleventh Circuit or the three-part due process analysis set forth in Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) as held by at least the Second, Fifth, Seventh, and Ninth Circuits”).

hearing. Moreover, “when the Fourteenth Amendment was ratified in 1868, Congress did not require preliminary hearings.”

Justices Gorsuch, with Thomas joining his opinion, concurred. They agreed that *Mathews* did not apply, explaining the Court does “not afford any particular solicitude to ‘governmental interests’—in cases like this one where the government seeks to deprive an individual of her private property.” Nevertheless, the concurring Justices raised questions about “whether, and to what extent, contemporary civil forfeiture practices can be squared with the Constitution’s promise of due process.” The concurrence noted the recent proliferation of broad state civil forfeiture statutes and the tendencies of states and law enforcement agencies to lean on their authority under these statutes, which have fewer procedural safeguards than criminal arrest, to raise revenue. Although providing due process after seizure of property in the civil context is deeply rooted in history, it is primarily in discrete areas of law such as admiralty, customs, and revenue law where forfeiture was necessary because otherwise the offender would have “escaped the reach of justice.” Justice Gorsuch asked, “How does any of that support the use of civil forfeiture in so many cases today, where the government *can* secure personal jurisdiction over the wrongdoer? And where seizing his property is *not* the only adequate means of addressing his offense?” (Emphasis in original.) Drawing a comparison between current civil forfeiture practices and “the archaic common-law deodand,” which required forfeiture of an object responsible for death, the concurrence concluded that “in future cases, with the benefit of full briefing, I hope we might begin the task of assessing how well the profound changes in civil forfeiture practices we have witnessed in recent decades comport with the Constitution’s enduring guarantee” of due process.

Justice Sotomayor dissented, with Justices Kagan and Jackson joining her opinion. First, the dissent argued that the Court should not have strayed from the cert. questions and should have determined the appropriate test and left it to lower courts for application, noting that all but the Eleventh Circuit rejected *Mathews* in this context. The dissent explained why the rule chosen by the majority is incompatible with the flexibility that due process requires, and further made clear that the decision leaves open other due process challenges to civil forfeitures:
It does not foreclose other potential due process challenges to civil forfeiture proceedings. * * * People who have their property seized by police remain free to challenge other abuses in the civil forfeiture system. For instance, such claimants could challenge notice of a forfeiture posted only in a newspaper, the lack of a neutral adjudicator at an initial hearing, or the standard of proof necessary to seize a car. Lower courts remain free to apply Mathews to those claims. * * * Due process also still “requires a timely post-seizure forfeiture hearing,” * * * so claimants may continue to challenge unreasonable delays.

The dissenting Justices, as did the concurring Justices, emphasized documented abuses of civil forfeiture statutes especially as against low-income communities.

**Todman v. Mayor and City Council of Baltimore, 104 F.4th 479 (4th Cir. 2024).**

The Fourth Circuit declined to extend Culley to the holdover context. Baltimore enacted a city ordinance that permitted landlords to take ownership of evicted tenants’ abandoned property; the justification was to limit dumping of abandoned property on city streets and sidewalks. The ordinance did not include any reclamation period, and the only “notice” required was the landlords having to tell the tenant when the eviction would take place and “prominently warn” them that any property left on the premises would be considered abandoned. Moreover, this notice requirement did not apply to holdover tenants (those who continued to pay rent but remained beyond the lease)—the landlord could do anything it wanted with their property other than dump it on the street. Holdover tenants sued; the district court entered summary judgment in their favor, finding that the city ordinance, as applied to them, violated due process. The Fourth Circuit affirmed. The only notice that the tenants received was the warrant of eviction; information about seizure of their property was written in small print, buried in the text, and written in a confusing manner, and could not be considered reasonably calculated to provide notice. The appellate court also found that under Mathews holdover tenants were denied an opportunity to be heard on their property claims. Students can be asked to identify and weight the relevant interests.
Black v. Decker, 103 F.4th 133 (2d Cir. 2024).

The case involves the due process rights of noncitizen detainees to a bond hearing. The Supreme Court has held Congress may require the detention of noncitizens for brief periods necessary for their removal proceedings because of a concern that noncitizens would not appear for their removal hearings. Furthermore, 8 U.S.C. § 1226’s text did not require a bond hearing after any particular fixed period of detention. However, the Supreme Court has not addressed whether detention without a bond hearing would violate a detainee’s due process rights at some point generally. The Second Circuit held that as a matter of first impression, the government was barred under the Due Process Clause from detaining a noncitizen without a bond hearing for an unreasonably prolonged period under § 1226(c), which required the detention of noncitizens who have committed one of certain listed offenses or whom the government has identified as involved in terrorist activities. Also as a matter of first impression, the appellate court held that the *Mathews* balancing test applied and that the due process challenge should be determined case by case. In this case, the district court properly required the immigration judge in a bond hearing to consider the noncitizen’s ability to pay and alternatives to detention when setting the amount of the bond.

Immigration law is of course complicated; for a 1L class, discussion could focus on application of the *Mathews* test to determine whether an individual’s detention under § 1226(c) is so prolonged that due process rights may be violated. Courts in the Southern District of New York use a multifactor, case-by-case approach when determining if an individual’s detention is unreasonable or unjustified given the fact that the Supreme Court had left open the possibility that detentions under § 1226(c) may violate due process if they are too lengthy. In adopting this test, the Second Circuit rejected a bright-line rule adopted by some other circuits that require a bond hearing after six months of detention, although it noted that detentions surpassing six months without a hearing raise serious due process concerns.


The case provides a straightforward context in which to consider the Mathews balancing factors. Plaintiff was issued a Commercial Driver’s License (“CDL”) after passing a skills test at a local community college. Eight months later, an audit found improprieties at the testing facility. In response, the Pennsylvania Department of Transportation (“PennDOT”) required plaintiff and other affected drivers to retest, and plaintiff refused. He unsuccessfully challenged the decision in a state court proceeding that operated as a supersedeas, so he maintained his CDL while the appeal was pending. He then filed suit in federal court alleging a violation of procedural due process. After discovery, defendant moved for summary judgment, which the district court denied without prejudice due to “deficient” briefing, and the parties were directed to address whether plaintiff could use his CDL while the case was pending. The district court then granted the summary judgment motion. The Third Circuit affirmed applying Mathews. Plaintiff retained use his special license during his initial challenge. Testing improprieties constituted a dangerous situation. Finally, the risk of error and the benefit of additional safeguards were low.

(For another fact pattern illustrating application of the Mathew balancing factors, see Montoya v. Jeffreys, 99 F.4th 394 (7th Cir. 2024), a challenge by convicted sex offenders serving mandatory supervised release to a policy that barred them from having contact with their minor children without prior approval by the parent’s treating therapist. The suit argued that the policy violated procedural due process because the therapist was not a neutral, independent decisionmaker and, further, that the appeal process was deficient because it was carried out on a paper record and not through an in-person hearing. The Seventh Circuit, applying Mathews, held against plaintiffs on both issues. What facts would students consider relevant to the decision?)


1L students applying the due process test sometimes move straight to Mathews balancing without first considering whether the claimant has a property or liberty interest that the federal Constitution protects. Traditionally property was rooted in the common law and limited to land or intangible forms of property. This case illustrates that statutes can create entitlements that are
property for due process purposes. The facts are simple: a career appointee in the Senior Executive Service (the top corps of managers in the civil service) was removed by the Department of the Army from those ranks and demoted to a lower position; she sued, claiming the Army violated due process. The district court dismissed the case, finding that she failed to show a property interest and did not reach the question of whether the process provided was sufficient; the D.C. Circuit reversed.

The statute giving rise to the property interest is not so simple: the Civil Service Reform Act of 1978 (CSRA). CSRA established a system for reviewing personnel action taken against federal employees. The CSRA also created the Senior Executive Service (“SES”), a class of managerial employees. SES appointees are selected based on merit and must serve a one-year probationary period during which they can be removed for any reason. After that, they can only be removed in accordance with five particular CSRA provisions. One such provision says that an SES employee can be removed to a non-SES position for “less than fully successful executive performance” as determined under the particular agency’s appraisal system for assigning performance ratings. In the Army, there are five performance rating levels, and the lowest two are “less than fully successful performance.”

In this case, plaintiff was demoted without being told the basis for the decision or given reports that purported to support the adverse personnel decision.13 The class can walk through

13 The facts can be presented in a straightforward chronology:

- In 2010 plaintiff became an SES employee in the Army.
- In 2017 plaintiff’s supervisor recommended an outstanding performance ranking.
- In 2018 (a few months later) plaintiff was informed by letter that her ranking was being held in abeyance pending an investigation but did not identify the basis for the investigation or who was conducting it. Plaintiff was not given a copy of a report by the Office of Special Counsel recommending disciplinary action for alleged prohibited plaintiff had taken during the 2014-15 hiring process.
- The Army convened a performance review board (“PRB”), which lowered the performance ranking to unsatisfactory based on a review of the executive summary of the OSC report.
- In 2018 the Army demoted plaintiff, stating the decision was based on the PRB recommendation and the OSC report, neither of which had been given to plaintiff. Subsequent to the demotion, the Army provided plaintiff the OSC report.
- Plaintiff asked for reconsideration and the request was denied.
- In 2018 plaintiff requested an informal hearing before the Merits Systems Protection Board, an agency that adjudicates federal employment disputes, and by statute guarantees a hearing “at least 15 days before the removal.”
- In 2019 the MSPB held an informal hearing; it referred the hearing’s record and transcript to the Army and took no further action. O. She was only given the report after being notified of her removal.
the personnel decision’s steps and consider why they amounted to a violation of the plaintiff’s right to be heard. On appeal, the D.C. Circuit first addressed whether a property interest existed, explaining that whether a federal employee has a constitutionally protected property interest in her job “turns on the extent of any substantive limitations on the government’s authority to remove her,” which involves asking whether “the ‘substantive provisions’ governing the position specify ‘particularized standards or criteria [to] guide the … decisionmakers’ seeking to remove the employee.” (Alterations in original.) Thus, an at-will employee has no property interest. Critically, “whether a property interest exists is not ‘defined by the procedures provided for its deprivation.’” It then turned to the process due. Class discussion can focus on why the statute supported a finding of a property interest and why the process provided failed the Mathews balancing test. A dissent by Judge Henderson argued that there is no constitutional property interest in an SES career appointee’s rank, distinguishing a transfer from a termination.

**Cacho-Cambo Trust v. Dan Holding Co., 2024 WL 1119774 (D.P.R. 2024).**

The case presents a compact set of facts on when prejudgment attachment may be entered without notice and a hearing under Connecticut v. Doehr. Due process requires “at least … a showing of some exigent circumstance.” Attachment was granted on these facts:

Plaintiffs state that in January of 2024 Defendants received $100 million dollars in funding that Siriwardana allegedly told Plaintiffs was to go towards paying the settlement price agreed upon in the Revised Settlement Agreement. However, Plaintiffs have received no such payment. Plaintiffs aver that “[t]he Defendants are otherwise undercapitalized entities,” and “Defendants’ international operations and connections create an impending risk of disposal and/or liquidation or obfuscation of the assets of and by the Defendants.” * * *

Plaintiffs further contend that the entrance of pre-judgment attachment would not

- That same year plaintiff appealed the MSPB order to the Federal Circuit, which dismissed for lack of jurisdiction. Plaintiff then filed suit in federal district court and the court dismissed the action.

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be without notice given that Plaintiffs sent Defendants emails notifying them of the motion for prejudgment attachment.

Throughout the proceedings, admittedly at an early stage, defendants failed to appear, and the court expressed a lack of confidence that they would attend a pre-attachment hearing even if scheduled. Moreover, uncontested testimony suggested defendants were trying to remove or transfer assets to unnamed bank accounts. Three months later the district court entered a default judgment against defendants.


The case, described by the Fifth Circuit as “unusual,” involves disciplinary proceedings of a law firm, McClenny Moseley & Associates, P.L.L.C. (“MMA”), that filed hundreds of hurricane-related insurance claims on behalf of clients.

After suspending MMA’s attorneys, the district court sua sponte determined that MMA, its individual attorneys, and related parties are not entitled to attorneys’ fees or costs for any pending claims, and also ruled that MMA and its related parties have no property or ownership interest in any proceeds that MMA would potentially have been entitled to.

The suspensions came after a number of hearings by the district court, and the court indeed conducted individual suspension hearings. Nevertheless, the court of appeals found that the district court failed to give notice or an opportunity to defend against the deprivation of the lawyers’ property interests or ownership, and that “nothing in the hearing transcripts indicate a meaningful opportunity to be heard on the attorney’s fees, costs, or litigation proceeds.” Moreover, imposition of the sanction exceeded the scope of the district court’s discretion to exercise inherent sanctioning authority. On remand, the district court was directed to “clarify the breadth and basis for sanctions,” which must show “a causal link * * * between the litigant’s misbehavior and legal fees” and provide additional procedural protections for sanctions that are punitive in nature.
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


The Department of Defense furloughed the petitioner, Stuart Harrow, for six days, and he unsuccessfully challenged the adverse action before the Merit Systems Protection Board. Under 5 U.S.C. § 7703(b)(1), Harrow had the right to appeal that decision to the Court of Appeals for the Federal Circuit within 60 days of the final order, but he did not know about this deadline and filed his appeal late. Harrow requested the Federal Circuit to toll the filing deadline, but the court, believing that the deadline was an unalterable “jurisdictional requirement,” denied his request. The Supreme Court held that this 60-day statutory time limit for appeals was non-jurisdictional. It therefore could be waived or forfeited by the defendant. The Court left open, however, whether it would be subject to equitable tolling.

The Subject-Matter Jurisdiction of the Federal Courts

Kiviti v. Bhatt, 80 F.4th 520 (4th Cir. 2023), cert. denied, 2024 WL 2116280 (U.S. 2024).

Although bankruptcy jurisdiction is beyond the scope of the 1L Procedure course, it is useful for students at this early stage in their legal education to recognize that a variety of non-Article III decisionmakers participate in the world of federal courts. In this case, the Fourth Circuit held that bankruptcy courts are not subject to the jurisdictional limits of Article III of the federal Constitution and have statutory authority to adjudicate matters that would be considered moot and outside Article III.
The Subject-Matter Jurisdiction of the Federal Courts—Diversity of Citizenship

The Rule of Complete Diversity


The case presents a compact fact pattern for teaching the rule of complete diversity and the special rule that applies under the Class Action Fairness Act (CAFA). The City brought a putative class action in diversity against Netflix and other video streaming platforms, alleging violations of state competition law and other city or state law claims. On appeal from the district court’s grant of defendants’ Rule 12(b)(6) motion, the Seventh Circuit first considered jurisdiction and found that complete diversity was lacking. The City was a citizen of Illinois. However, several of defendants are limited liability companies, and the citizenship of an LLC is the citizenship of each member, “traced through as many levels as necessary until reaching a natural person or a corporation”: “If you trace through the complex ownership structure of WarnerMedia Direct, LLC, on the date this suit began, you eventually reach AT&T Capital Services, Inc., which has its principal place of business in Illinois. Jurisdiction therefore cannot be sustained.” That conclusion was not changed when AT&T sold its stake in WarnerMedia Direct during the pendency of the action “because jurisdiction depends on circumstances at a suit’s outset.”

The circuit court next turned to CAFA. The allegations of the complaint met the requirements of §1332(d)(2), which allowed for jurisdiction on a showing of minimal diversity, and here, only WarnerMedia is a citizen of Illinois (and the claims exceed $5 million). Nor did § 1332(d)(4) require the district court to decline jurisdiction on the ground that more than two-thirds of the plaintiff class’s members and at least one defendant are citizens of the state in which the suit was filed, and in addition the principal injuries occur there. On first glance, those conditions appeared to be met with respect to Illinois. That was not the case, however, because
of § 1332(d)(10)’s specific provision for determining the citizenship of unincorporated associations for purposes of CAFA:\textsuperscript{14}

WarnerMedia Direct is unincorporated; only a corporation (or its equivalent in other legal systems) counts as incorporated, and every other kind of entity is treated as a partnership for jurisdictional purposes. * * * As we observed earlier, normally the citizenship of any entity other than a corporation depends on the citizenship of its partners and members. But § 1332(d)(10) tells us that, for the purpose of § 1332(d), an unincorporated entity is treated like a corporation under § 1332(c)(1): one citizenship for the state of its principal place of business, another for the state of its organization, and the investors' citizenship ignored. WarnerMedia Direct is organized under Delaware law and has its principal place of business in New York. This means that diversity is “complete” under the special definition applicable to § 1332(d), and the condition for dismissal given in § 1332(d)(4)(A)(i)(II)(cc) is not satisfied.

Today is the first time this circuit has considered how § 1332(d)(10) works. As far as we can see, our understanding comports with that of every other circuit that has addressed the subject.

\textsuperscript{14} Section 1332(d)(10) reads: “For purposes of this subsection * * * an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.”


Current and former policyholders sued a mutual insurance company and 46 of its current and former officers and directors for breach of contract and other state law claims alleging the firm accumulated and retained $3.5 billion in profits from premium revenues that exceeded the cost of claims, and failed to supply the policies at cost. Defendants removed on the basis of CAFA, and the district court denied a motion to remand. The Seventh Circuit reversed and
remanded, finding that both CAFA’s internal affairs and home-state controversy exceptions divested the district court of diversity jurisdiction.

This case belongs in state court under CAFA’s internal-affairs exception. See 28 U.S.C. § 1332(d)(9)(B). Each of the plaintiffs’ four claims sounds in allegations of corporate mismanagement that not only reflect transgressions of fiduciary duties owed by current and former directors, but also breaches of contract, unjust enrichment, and a violation of the Illinois Consumer Fraud Act. We see no way to adjudicate any of these claims without immersion into the boundaries of the discretion afforded by Illinois law to officers and directors of a mutual insurance company to set capital levels and make related decisions about surplus distributions to policyholder members.

We likewise see the case as falling within CAFA’s home-state controversy exception, see 28 U.S.C. § 1332(d)(4)(B), as the individual defendant whose citizenship creates minimal diversity is not a “primary defendant” in the overall litigation. Under this exception too, then, we return the case to Illinois state court.

**Determining Citizenship**

**Berkley Nat’l Ins. Co. v. Atl.-Newport Realty LLC, 93 F.4th 543 (1st Cir. 2024).**

An insurer brought a diversity action against insured limited liability companies seeking a declaration of non-liability for indemnification. The district court denied judgment on the pleadings and granted partial summary judgment for the insurer. The First Circuit decision carefully discusses whether complete diversity is present. Plaintiff, as a corporation incorporated in Iowa with its principal place of business in that state, clearly was a citizen of Iowa. But defendants were limited liability companies, and so their citizenship turns on the citizenship of each of their members. Moreover, because some of the members of the LLCs are trusts, and a trust is an unincorporated association, the citizenship of their members likewise is jurisdictionally significant. The complaint did not identify the members’ citizenship, and the circuit court asked for affidavits to show their citizenship on the date the complaint was filed.
In the first set of affidavits, [defendants] contended both that none of the trustees of their member trusts was a citizen of Iowa and that all their members were “traditional trusts.” * * * That assertion would suffice, however, only if the trusts in question “exist[ed] as ... fiduciary relationship[s] and not as ... distinct legal entit[ies].” * * * In that event, those trusts would, as a matter of law, “take the citizenship of [their] trustee[s]” rather than “the citizenship of all [their] members.” * * * We therefore asked [defendants] to show cause why there was jurisdiction by providing us with any additional factual support for their characterization of the members trusts as [supporting diversity jurisdiction]. * * *

The insureds responded by submitting affidavits that identified the specific state statutes under which each of the trusts at issue was organized at the relevant time. Having now reviewed those affidavits, and the statutes that they reference, we conclude that [defendants] have shown that their member trusts * * * can sue and be sued, and * * * that the trustees of each member trust are citizens of states other than Iowa. Thus, we are satisfied that there is complete diversity of citizenship among the parties, such that we have subject-matter jurisdiction under 28 U.S.C. § 1332.

How would new Federal Rule 7.1 affect the process and the result?

**McCleary v. Singh, 2024 WL 2078211 (D. Ariz. 2024).**

The complaint alleged that plaintiffs are residents of Missouri and defendants are residents of California. The court noted, however, that “an allegation about an individual’s residence does not establish citizenship for purposes of establishing diversity jurisdiction,” because a “natural person’s state citizenship is * * * determined by her state of domicile, not her state of residence.” Therefore, “Plaintiffs must amend the Complaint to allege the citizenship of the individual natural persons who are parties to this lawsuit.”

The Problem of Collusive Joinder and the Real Party in Interest

**Pace v. Cirrus Design Corp., 93 F.4th 879 (5th Cir. 2024).**

The decision provides a good teaching vehicle to discuss the relation between pleading rules and fraudulent joinder. Plaintiff alleged negligence and misrepresentation claims against in-state defendants; the appeals court affirmed dismissal of the claims, thus permitting removal, asking whether there was at least one viable cause of action against these defendants and applying the “no possibility” of recovery standard under a “Rule 12(b)(6)-type analysis.” In applying that test, the appeals court looked to the law of the state in which the district court sat, in this case, Mississippi. It then applied Rule 9(b) because the alleged claims sounded in fraud, making clear that under *Erie*, the federal pleading rule applied after removal, and that plaintiffs should be permitted leave to amend their complaint to conform to the federal pleading standard. The court’s extensive discussion of the allegations of the complaint would make for a good classroom discussion.

**Palmquist v. Hain Celestial Group, Inc., 103 F.4th 294 (5th Cir. 2024).**

The case presents another variant of the collusive joinder rule. Parents whose infant child suffered physical and mental decline from heavy metal toxicity brought a consumer suit in state court, alleging the injuries resulted from the child’s eating Hain’s Earth’s Best Organic Products, purchased from Whole Foods. The complaint alleged strict products liability and negligence claims against Hain and breach of warranties and negligence against Whole Foods. Hain removed to federal court, arguing that Whole Foods, a multinational supermarket chain headquartered in Texas, had been improperly joined to defeat diversity jurisdiction. After removal, plaintiffs amended their complaint to conform to federal pleading standards and to add a claim, and then moved to remand based on details in the second amended complaint. The

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15 The decision reports that several years after the child’s diagnosis, the House Oversight and Reform Committee released a report demonstrating that Hain’s food indeed contained elevated levels of toxic heavy metals and that Hain did not test for mercury.
District Court dismissed the claims against the in-state defendant for lack of jurisdiction, and then entered judgment on the merits for the out-of-state defendant.

The appeals court vacated and remanded, finding that the district court committed a number of errors. First, it was error not to consider post-removal allegations that merely clarified the state petition rather than stating new claims. Indeed, it is proper to permit amendment (“a plaintiff should not be penalized for adhering to the pleading standards of the jurisdiction in which the case was originally brought”). Second, it was error to look to federal decisions to determine whether plausible claims were stated against the non-diverse defendant. To be sure, federal pleading standards governed in federal court, but Texas law governed to determine whether the alleged misrepresentations were “too general to be actionable,” and the District Court instead applied federal decisions:

This is a problem, however, because “federal courts sitting in diversity apply state substantive law.” * * * Federal courts look to the decisions of the Texas Supreme Court (and lacking any authoritative decision, decisions from the intermediate appellate courts) to determine matters of Texas law. * * * And “any ambiguities of state law must be resolved in favor of remand.” * * * Neither Hain nor Whole Foods have pointed to any Texas cases to support its argument that Whole Foods’ representations about the quality of its food are too generalized.

Acknowledging that there were “few Texas cases” interpreting the governing law, the appeals found that the few identified by plaintiff “found fairly generalized statements adequate enough to support a claim against a nonmanufacturing seller,” especially where the seller “purports to have specialized knowledge.” Thus, the district court erred in finding Whole Foods was improperly joined and in denying the motion to remand. The court also rejected the argument that the claim was for fraud and required to meet Rule 9(b); that argument was not made before the District Court and so was forfeited.

Finally, the appeals court rejected defendant’s argument that, under Caterpillar (Casebook, p. 389), vacatur of the district court’s “take-nothing” final judgment in favor of Hain was not proper. As the court explained,
This case is not controlled by *Caterpillar*. The improper removal affected the subject-matter jurisdiction in this case. Unlike *Caterpillar*, complete diversity did not exist at the time judgment was entered because the [plaintiffs] alleged non-fraudulent claims against a non-diverse defendant, Whole Foods. [footnote omitted] Where a jurisdictional defect lingers (i.e., lack of subject matter jurisdiction) through judgment in the district court, the case must be remanded because the federal court lacked jurisdiction. * * * The district court should have remanded the case * * *.

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**The Amount-in-Controversy Requirement**

**Ministry of Defence of State of Kuwait v. Naffa, 105 F.4th 154 (4th Cir. 2024).**

The decision illustrates the test for determining the amount in controversy to invoke diversity jurisdiction as an original matter: unless the law requires otherwise, the damages that plaintiff alleges in good faith will be accepted by the court. In this case, the Ministry of Defense of the State of Kuwait entered into three contracts with defendant and his law firm for legal advice and representation in U.S. based real estate deals. Defendant did not disclose that he was not authorized to practice in the United States or that his law firm did not exist. Over the course of the contractual relationships, plaintiff paid defendants $635,000. Nevertheless, the court dismissed the action under Rule 12(b)(1). The Fourth Circuit reversed, vacated, and remanded. Boiled down, it found that the district court erred in doing a merits determination, for example, by excluding claims that it found to be time barred. Relying on *St. Paul* (Casebook, p. 320), the circuit court explained:

Good faith is not negated because events during the litigation reduce the amount recoverable below the statutory threshold or the plaintiff is otherwise unable to recover the amount it initially sought. * * *. Thus, a defense to a claim, even one that appears meritorious from the face of the complaint, does not oust federal court jurisdiction. * * * As the Supreme Court has stated:
“[T]here might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defense, and a good defense, too, would not affect the question as to what was the amount in dispute .... [F]or who can say in advance that that defense will be presented by the defendant, or, if presented, sustained by the court?” * * *

Accordingly, the Supreme Court has advised that unless a law requires a different approach, the damages the plaintiff claims in good faith determine the amount in controversy. * * *

The district court below did not heed the Supreme Court’s advice. Instead, the district court erroneously considered Naffa’s potential defenses and evidentiary issues and concluded that any damages that the Ministry could recover after accounting for those defenses would fall below the statutory minimum. In doing so, the court improperly and prematurely assessed the merits of the Ministry’s breach of contract claim despite explicitly cabining its analysis to the jurisdictional issue. * * * That was legal error.

**Sentry Insurance v. Morgan, 101 F.4th 396 (5th Cir. 2024).**

The case presents a question of first impression: how to assess the amount in controversy in an insurer’s petition for appointment of an umpire. The petition alleged that an umpire was needed because the appraisers appointed by the insurer and the insured could not agree on damages for property damage. The district court dismissed, finding the petition did not allege the requisite amount in controversy for diversity jurisdiction: “the district court concluded that the right to be protected is the parties’ contractual right to have an umpire examine the difference between two appraisers’ estimates and determine the amount of loss. Under this view, the district court held that it could not assess the value of that right because the appraisers had not yet made their estimates.” The Fourth Circuit reversed:

The district court erred by narrowly construing the right to be protected. Umpires are central to the adjudication of insurance disputes, and their appointment, as set
out in the parties’ contract here, is often a necessary step before appraisers can even make their estimates. Without the appointment of an umpire, parties risk not being able to adjudicate their claims at all. Thus, in an action seeking the appointment of an umpire for appraisal, the right to be protected is the right to continue with the appraisal process. The value of this right is the disputed amount set to be resolved through appraisal.

The petition established, and defendant did not contest, that defendant demanded an additional $349,657.22 under the policy, thus making the amount to be resolved through appraisal over $75,000.


The case raises the very timely issue of how to value violation of a non-compete agreement for purposes of removal. The district court held that under the 2011 Federal Courts Jurisdiction and Venue Clarification Act, the party removing the case must establish the amount in controversy to a “preponderance of the evidence,” and not by the “legal certainty” standard set out in St. Paul Mercury. The employer sued the employee in state court; the employee removed; and the employer moved to remand arguing the damages in play did not establish the jurisdictional amount. The district court granted the motion to remand. Defendant did not try to value the injunction, and damages generally are measured by the lost profits to the employer caused by the employee’s breach. The problem, however, was that the employee did not argue lost profits; she only alleged her salary when she worked for plaintiff. Moreover, the notice of removal failed to show that any lost profits were caused by the alleged breach of the non-compete agreement, and not simply by the employee’s quitting.

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

We discuss decisions applying the Grable factors in the Removal section of this memo.
Capitol Broad. Co. v. City of Raleigh, N. Carolina, 104 F.4th 536 (4th Cir. 2024).

Two media companies and a law firm sued various city and state officers to release accident reports pursuant to a North Carolina public records law. Defendants refused, countering that a federal privacy law barred them from disclosing the documents. The requesters then sought a federal declaration that the federal law did not bar the disclosure, asserting jurisdiction under § 1331. The district court granted defendants’ motion to dismiss for lack of subject matter jurisdiction and the Fourth Circuit affirmed. The facts provide an excellent problem for students to apply the Skelly Oil test for jurisdiction in a federal declaratory action when the hypothetical claim arises under state law and the affirmative defense to the action would raise a substantial First Amendment right.

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

Hunter v. Page County, Iowa, 102 F.4th 853 (8th Cir. 2024).

The case presents an excellent fact pattern for discussing when a district court in an action removed to federal court may exercise supplemental jurisdiction over state claims after dismissing federal claims, and when remand of the entire case is otherwise appropriate. Property owners who lived near proposed wind turbine sites sued for declaratory and injunctive relief in state court against the county, its board of supervisors, and county officials, alleging the board’s issuance of commercial wind energy permit to erect wind turbines in the county violated federal due process, the Iowa Constitution, Iowa Code, and county ordinances, and that county officials violated the Iowa Open Meetings Act by holding nonpublic meetings on the permittee’s application. Following removal, the district court exercised federal question jurisdiction over the federal claims and supplemental jurisdiction over the state claims, dismissed the federal and state claims, and along the way denied the owner’s motion to remand.

On appeal, plaintiffs disputed the validity of the removal on the ground that one of the parties was a necessary party but did not join in or consent to the removal; defendants countered that he had not been properly joined and served and in any event was only a nominal party. The Eighth Circuit agreed that the party had not yet been served under Iowa law, and so his consent
was not needed for removal. This portion of the decision highlights the difference between serving a county and a county official.16

The decision then includes a clear discussion of the two-step process for reviewing a district court’s exercise of § 1367 jurisdiction: whether power exists and whether discretion in favor of jurisdiction should be exercised. The federal constitutional claim provided the hook for power. Whether to exercise that power, the Eighth Circuit explained, turned on the conditions set out in § 1367(c). The state claims were neither novel nor complex, an inquiry that looks at whether the state law issue is “one of first impression, state law is unsettled, the case touches upon a fundamental interest of the state government (especially a state constitutional issue), or federal resolution of the case would deprive the state courts of a fair opportunity to develop state law on a significant issue.” Although Iowa courts had not yet considered the specific ordinance at issue, case law interpreting ordinances of other counties “provided sufficiently clear guidance.” As for whether the state claims predominated in the action, the number of state claims certainly “outnumbered” the federal claims, the federal claim was not the “gravamen” of the complaint, and the federal claim was dismissed as implausibly alleged. As for whether the case presented “exceptional circumstances,” the Eighth Circuit construed this provision, citing Executive Software (Casebook, p.374), “to allow the district court to consider the underlying interests the Supreme Court has articulated: comity, fairness, judicial economy, and convenience. * * * This factor “permit[s] courts to extend the doctrine’s underlying values beyond previously recognized applications whenever doing so [is] consistent with those values.” The appellate court found no abuse where the district court “noted the large number of filings, the late date at which

16 The decision recites:

In Iowa, service of process may be accomplished through personal service or an alternate method. Iowa R. Civ. P. 1.305–.306. Iowa’s methods of personal service are familiar. They include service on a defendant’s person, home, or spouse. Id. at 1.305(1). Relevant here, they also include “[u]pon any county by serving its auditor or the chair of its board of supervisors” or “[u]pon a governmental board, commission or agency, by serving its presiding officer, clerk or secretary.” Id. at 1.305(9), (13) (emphasis added).

Plaintiffs did not serve process on Holmes’s person, home, or spouse, nor by any other authorized method. Instead, they served process on the County auditor and Board secretary. Under Iowa law, this action was sufficient for serving the County and the Board, but it was not sufficient for serving Holmes separately.
defendants consented to remand, the ‘significant investment of time and energy by the parties and the Court,’ the unnecessary delay in final resolution that a remand order would produce, and the ‘significant time and money’ * * * already invested in [the challenged] project.”

Rhode Island Truck Ctr., LLC v. Daimler Trucks N. Am., LLC, 92 F.4th 330 (1st Cir. 2024).

The case offers a complex application of City of Chicago in a removal action challenging a state administrative board’s jurisdictional dismissal of a claim that, at bottom, implicated the Dormant Commerce Clause and the extraterritorial effect of a franchise-regulation statute. A franchisee truck dealership filed a protest with the Rhode Island State Motor Vehicle Dealers’ License and Hearing Board alleging that the franchisor violated state law when it granted another franchise in the plaintiff’s geographic area. The Board held it lacked jurisdiction to apply Rhode Island law extraterritorially to truck sales in Massachusetts. The franchisee then sued in Rhode Island state court to challenge that decision, defendant removed on the basis of diversity jurisdiction, and the District Court granted summary judgment to the defendant. On appeal, the First Circuit sua sponte raised whether there was federal jurisdiction to hear the claim. First Circuit precedent held that diversity jurisdiction could not be exercised in a case involving state claims to enforce a state administrative agency’s ruling.

So, the appellate court instead looked to City of Chicago and, applying the Grable factors, held that arising under jurisdiction was present even though the franchisee alleged only that the state Board “made an erroneous determination of federal constitutional law,” and not that the Board “violated federal law, constitutional or otherwise.” Does the class agree that the appeals court faithfully applied the Grable factors, especially in light of Gunn? Along the way the appeals court considered and rejected whether Burford abstention applied, but, in the end, certified the state law questions to the state supreme court, discussed later in the Update Memo.

(For another case involving questions of the extraterritorial application of a state deceptive practices act, see In re Chrysler Pacifica Fire Recall Products Liability Litig., --- F. Supp. 3d ---, 2023 WL 8602971 (E.D. Mich. 2023), discussed in connection with Chapters 5 and 6.)
Henderson v. Harmon, 102 F.4th 242 (4th Cir. 2024).

This case can be discussed in connection with Chapter 3 on due process and an opportunity to be heard and Chapter 4 on the discretionary nature of §1367 supplemental jurisdiction. A state prisoner brought an action against prison officials for injunctive relief under § 1983 and Virginia law, alleging that the nearly six-year period between the guilt-finding phase of his prison disciplinary hearing, at which he was found to have assaulted a fellow inmate, and the reconvened disciplinary hearing addressing the amount of restitution to be deducted from his prison trust account, violated due process under the Fourteenth Amendment and Virginia law. In particular, plaintiff challenged the inclusion of various expenses in the amounts subject to restitution. The district court granted summary judgment for defendants on the federal claim and declined to exercise supplemental jurisdiction over the Virginia-based claim.

On appeal, the Fourth Circuit found that plaintiff had a property interest in his prison account. On the process due, the appeals court applied a harmless error standard: “To determine whether an error that results in evidence being erroneously excluded in prison proceedings is harmless, ‘courts must determine whether the excluded evidence could have aided the inmate’s defense.’” The Fourth Circuit concluded that no additional evidence would have aided plaintiff in contesting the charge, and affirmed.

The Fourth Circuit affirmed that supplemental jurisdiction was not warranted because a district court “may decline to exercise supplemental jurisdiction” when it “has dismissed all claims over which it has original jurisdiction.” 28 U.S.C. § 1367(c). Here, the district court had already dismissed a federal due process claim identical to the state law due process claim, so declining supplemental jurisdiction would not be in violation of judicial economy, fairness, or convenience to the plaintiffs. Admittedly, the district court’s order “was brief,” but the circuit court stated it could “infer that the court concluded that declining to exercise jurisdiction would not be inconvenient, unfair, or wasteful of judicial resources.” The district court’s opinion on this issue reads as follows:

The Court “may decline to exercise supplemental jurisdiction” over such state-law claims when the Court “has dismissed all claims over which it has original
jurisdiction.” 28 U.S.C. § 1367(c)(3). “[T]rial courts enjoy wide latitude in determining whether or not to retain jurisdiction over state claims when all federal claims have been extinguished.” Shanaghan v. Cahill, 58 F.3d 106, 110 (4th Cir. 1995). “Among the factors that inform this discretionary determination are convenience and fairness to the parties, the existence of any underlying issues of federal policy, comity, and considerations of judicial economy.” Id.

Having considered all these factors, the Court declines to exercise supplemental jurisdiction over Plaintiff’s state-law claims, pursuant to 28 U.S.C. § 1367(c)(3). Accordingly, Plaintiff’s state-law claims in Claim One are DISMISSED without prejudice to Plaintiff’s right to pursue them in state court.

Students might consider whether conclusory statements on jurisdiction ought to be sufficient to support a court’s jurisdictional ruling.

**Hamilton v. City of Lott, Texas, 2023 WL 8666040 (5th Cir. 2023).**

Plaintiff-appellant, the police chief of Lott, Texas, blew the whistle on the mayor and city council by reporting various crimes to the county district attorney. On the evening he delivered his report, the council voted to defund and later eliminate the police department – causing Hamilton to lose his job. Hamilton filed suit in state court, asserting claims of First Amendment retaliation under § 1983 and violation of the Texas Whistleblower Act. The City of Lott removed the case to federal court, and both claims were dismissed. On appeal, the Fifth Circuit held that the district court erred in exercising supplemental jurisdiction over the state Whistleblower Act claim because the state law claim predominated over the federal claim based on § 1367(c)(2). Also, because the First Amendment claim was dismissed at an early stage, judicial economy, convenience, fairness, and comity tilted against the exercise of supplemental jurisdiction. The appeals court vacated, finding that the district court abused its discretion by failing to consider any of the statutory factors and explaining its decision other than reciting that it had considered “the relevant law and arguments of the parties.”
Vazquez-Velazquez v. Puerto Rico Highways & Transportation Auth., 73 F.4th 44 (1st Cir. 2023).

This case can be discussed as part of Chapter 3 on due process rights to be heard and Chapter 4 on the discretionary nature of supplemental jurisdiction. Current and former employees of the Puerto Rico Highways and Transportation Authority (PRHTA) sued the PRHTA and its executive director alleging that the failure to enforce a regulation authorizing compensation in addition to regular salaries for work as project administrators or supervisors violated their procedural and substantive due process rights under the Fourteenth Amendment, the Contracts Clause, and Puerto Rico laws. The district court granted summary judgment to defendants on the § 1983 claims and declined to exercise supplemental jurisdiction on the Puerto Rico law claims. On appeal, the First Circuit held that it did not need to decide the threshold question of whether a property interest was present “because the requisite process was provided”: “The suspension of the program was generally applicable and not based on facts specific to any particular employee, so no pretermination hearing was required.” Nor was there abuse of discretion in declining to exercise supplemental jurisdiction over the Puerto Rican based claims, emphasizing that the “federal claims were dismissed before trial so there would not be a significant burden on judicial economy, fairness, or convenience to parties. In the federal court’s not hearing the Puerto Rican-law claims.”


A minor student with a vision condition and her parents sued the public school district in state court, challenging the failure to provide a reasonable accommodation for the disability. Claims were alleged under the Americans with Disabilities Act (ADA), the Rehabilitation Act, the Arkansas Civil Rights Act, and negligence; defendant removed. After granting summary judgment on the federal claims, the district court exercised supplemental jurisdiction over the state negligence claim and dismissed with prejudice. It declined to exercise jurisdiction over a state declaratory relief claim seeking to declare the state immunity statute unconstitutional. On appeal, the Eighth Circuit found no abuse of discretion. As to the negligence claim, power existed because the state claim derived from a common nucleus of operative fact as the federal
discrimination claims; nor did the case present reasons to decline supplemental jurisdiction—the claims were not novel. The declaratory relief claim presented a different balance of factors:

As the district court noted, the Supreme Court of Arkansas has repeatedly held that the statute does not violate article 2, § 13 of the Arkansas Constitution. ** * * 
It was not an abuse of the court’s § 1367(c) discretion to decline to rule on Plaintiffs’ claim for declaratory judgment declaring the statute unconstitutional because that is an “issue[ ] of state law on which there was little basis for dispute.”

De Mian v. City of St. Louis, Missouri, 86 F.4th 1179 (8th Cir. 2023).

De Mian, a reporter, was pepper sprayed by a police officer while filming a protest, and sued the city, the city police commissioner, and the police officer for violating her First Amendment right and rights under state law. The district court granted summary judgment on the federal claims and declined to exercise supplemental jurisdiction over her state law claims. On appeal, the Eighth Circuit with little more than a citation to Carlsbad Technology held there was no abuse of discretion, highlighting that all of the federal claims had been dismissed.

The Subject-Matter Jurisdiction of the Federal Courts—Removal

Link Motion Inc. v. DLA Piper LLP, 103 F.4th 905 (2d Cir. 2024).

The case provides an opportunity to discuss Gunn as an application of the Grable factors. A former client brought a legal malpractice action in state court against the law firm and a lawyer. Defendants removed, and the district court denied plaintiff’s motion to remand and dismissed the complaint as time barred. On appeal, the Second Circuit vacated and remanded, holding that under the Grable factors the federal-state balance tilted against exercising § 1331 jurisdiction and that the district court lacked power under § 1367 to exercise supplemental jurisdiction in the absence of original federal jurisdiction. The malpractice claim implicated the question of whether there was standing to pursue federal securities claims; the Second Circuit characterized that issue as “integral” to the malpractice claim and not as a defense, and as a “central point of dispute.” However, the issue—as in Gunn—was not substantial in the
jurisdictional sense: it was “backward-looking and hypothetical.” Finally, “the established federal-state balance expects for legal malpractice actions to be heard in state court,” and so this factor weighed in favor of remand. It followed that because there was no original jurisdiction in the case, supplemental jurisdiction could not be exercised, and ancillary jurisdiction could not serve that purpose.

State by Tong v. Exxon Mobil Corp., 83 F.4th 122 (2d Cir. 2023).

The state of Connecticut filed suit in state court against Exxon Mobil, asserting eight claims under Connecticut Unfair Trade Practices Act (CUTPA) arising from company’s alleged decades-long campaign of deception to knowingly mislead and deceive Connecticut consumers about negative climate effects of fossil fuels that the company was marketing to those consumers. The company removed to federal district court, invoking a federal question and relying on the artful pleading doctrine, arguing that Connecticut crafted the law to preempt a similar federal law and avoid removal and that therefore the lawsuit still implicitly contains a federal question. However, the district court held that this case was not removable because there was not a federal question on the face of the well-pleaded complaint; the only claims alleged were state law claims, and the artful pleading doctrine did not apply. The Connecticut law did not inherently raise federal issues, and applying the artful pleading doctrine would prevent states from crafting laws in which they share authority with the federal government to regulate conduct. (Cities also are suing fossil fuel companies, see, e.g., City of New York v. Exxon Mobil Corporation, 2024 WL 2091994 (S.D.N.Y. 2024), appeal filed (2d Cir. June 11, 2024), which was stayed for two years pending resolution of Connecticut v. Exxon Mobil Corp.)


The Supreme Court has granted cert in this case to determine whether amendment of a complaint after federal question removal pursuant to 28 U.S.C. §1441(a) to omit the federal question defeats federal question jurisdiction and bars the district court from exercising supplemental jurisdiction over the remaining state law claims. The Eighth Circuit answered yes
to the first question and remanded. The pendency of the case before the Supreme Court makes it an excellent vehicle for class discussion.

Wullschleger, a purchaser of prescription dog food for her dog, Clinton, filed a putative class action in state court against Royal Canin, alleging violation of Missouri Merchandising Practices Act (MMPA) and other antitrust and unjust-enrichment claims. The district court remanded. On appeal under 28 U.S.C. §1453(c)(1), providing for appeal of “an order of a district court granting or denying a motion to remand a class action,” the Eighth Circuit found that the antitrust and unjust enrichment claims “had important federal ingredients that would require ‘explication of federal law.’” When back in the district court, plaintiff amended the complaint and “eliminated every reference to federal law in the complaint, cut the antitrust and unjust enrichment claims, and narrowed her request for injunctive relief,” adding, instead, a civil conspiracy claim. The district court nevertheless exercised removal jurisdiction and granted defendant’s motion to dismiss for failure to state a claim. On the second appeal, the Eighth Circuit focused on the amended and not the original complaint, and found that federal question jurisdiction no longer was present and remand was warranted.


The question on appeal was whether a district court can remand to enforce a forum selection clause. The Third Circuit held that a forum selection clause is not a removal defect and does not deprive a district court of subject matter jurisdiction, so the district court erred in remanding and further erred in awarding attorney fees under 28 U.S.C. § 1447(c).

The facts are simple: a company and an individual entered into an employment contract, but disagreed about the start date, so the company sued the individual in state court, which was the venue selected in the contract for any dispute that might arise. The individual removed, and the district court remanded and eventually awarded costs and fees. The Third Circuit reversed. The complaint established that the district court had diversity jurisdiction and so remand was not warranted due to a lack of subject matter jurisdiction. As to costs, §1447(c) gave the district authority only in situations where there was a defect in removal, but none was present. Moreover, Federal Rule 11 was considered sufficient to deter against abusive removal.

The case illustrates the practice of “snap removal,” an issue that currently divides the circuits and divides district courts within the Ninth Circuit. On April 3, 2024, plaintiffs sued six defendants in state court. The next day, two of the defendants filed a notice of removal, alleging they had not yet been served with the summons or complaint; that none of the defendants had yet been served; and that consent of the four other defendants had not been sought. On May 2, plaintiffs moved to remand. The district court denied the motion:

[T]he plain and unambiguous language of § 1441(b)(2) prohibits removal only when a defendant who has been “properly joined and served” is a citizen of the forum state. Here, it is undisputed that no Defendant had been served at the time of removal. It follows that § 1441(b)(2) has no application. Although some courts have declined to follow this approach based on the view that allowing snap removal would be inconsistent with Congress’s purpose and intent in enacting § 1441(b)(2), the Court chooses instead to follow the principle that “once Congress enacts a statute we do not inquire what the legislature meant; we ask only what the statute means.”

The district court also held that the removal petition was deficient, and students might be asked to identify the problems: the petition alleged that plaintiffs were “residents” of North Carolina; it alleged that one of the entity defendants, a professional association, had its principal place of business in Arizona; it alleged that the Arizona Cardinals, another entity defendant, was a Delaware limited liability company; and it alleged that another entity defendant is “a business form unknown, with its principal place of business in the state of New York.” The district court required each party other than the Cardinals to file a notice that affirmatively alleges its form of organization and its citizenship “under the correct legal standards.”

J.C. Penney Corp., Inc. v. Oxford Mall, LLC, 100 F.4th 1340 (11th Cir. 2024).

In 2019, J.C. Penney sued a shopping mall owner in federal court for refusal to extend the store’s lease, alleging diversity jurisdiction. J.C. Penney is a citizen of Delaware and Texas. Defendant is a limited liability company, and so complete diversity would be defeated “if any
member of Oxford Mall, LLC, is a citizen of Delaware or Texas. And if any of those members were LLCs or LPs, the same rule would apply for the members of those members, and so on.” A year later, defendant in a separate lawsuit learned that its LLC included a Delaware citizen, but did not inform the court and continued actively to litigate without raising the jurisdictional defect. Finally in 2021, defendant moved to dismiss for lack of diversity jurisdiction. The district court granted that motion, but also granted plaintiff’s motion for sanctions under the court’s inherent powers, and the court ordered defendant to pay two-thirds of the store’s attorney fees as a sanction. The Eleventh Circuit affirmed, finding that clear and convincing evidence supported the district court’s determination that the shopping mall acted in subjective bad faith, “meaning intentional and not just reckless behavior.” The court rejected the argument that sanctions would be proper only if bad faith was the only plausible explanation for its behavior; that standard “would be tantamount to requiring proof beyond a reasonable doubt.” The court also affirmed the amount of fees award, looking to the approach outlined in Goodyear (Casebook, p. 976).

Students might consider: the district court made various rulings unfavorable to defendant before it dismissed the case for lack of jurisdiction. Did those rulings survive the dismissal? Why did the district court have power to sanction defendant if it lacked jurisdiction?

_Lutostanski v. Brown, 88 F.4th 582 (5th Cir. 2023)._  

Plaintiffs, Travis County voters, sued election officials in the county, challenging the validity of the results of the November 2020 general election. They argued that defendants used an uncertified electronic voting system to conduct the election and, in so doing, violated state and federal laws. Defendants removed based on the federal questions in the complaint, and successfully moved to dismiss the lawsuit for lack of Article III standing. On appeal, the Fifth Circuit held that the district court should have remanded the case to state court rather than dismissing it with prejudice; lack of standing constitutes a lack of subject matter jurisdiction under § 1447(c).

_Totalenergies Renewables USA, LLC v. Trina Solar (U.S.), Inc., 2023 WL 8821328 (9th Cir. 2023)._
In this case, removal meets arbitration and review of remand motions. The district court denied defendant-appellant Trina Solar’s motion to compel arbitration and remanded the case to state court. Trina Solar argued that the Federal Arbitration Act confers jurisdiction for removal to federal court and for the appeal, and that the district court made an antecedent determination of arbitrability that is separable from the decision on remand. On appeal, the Ninth Circuit held that there was no appellate jurisdiction to review the remand decision based on § 1447(d) because remand based on a § 1447(c) is not reviewable. Relying on Powerex (Casebook p. 388), the appellate court explained:

We consider whether the remand can be “colorably characterized” as a matter of subject matter jurisdiction. * * * If so, “review is unavailable no matter how plain the legal error in ordering the remand.” * * *

The district court’s order is “colorably characterized” as a remand for lack of subject matter jurisdiction under 28 U.S.C. § 1447(c). To determine whether the FAA confers subject matter jurisdiction for removal, a district court must first decide if the parties have formed an underlying agreement to arbitrate. * * * Trina Solar asserted the FAA as its sole basis for subject matter jurisdiction. The district court framed the motion to remand as based on the “same core analysis” as the motion to compel arbitration. In its decision, the district court found that Trina Solar and TotalEnergies had not agreed to arbitrate this particular dispute under their superseding and controlling agreement. The parties had initially agreed to arbitrate in a Framework Agreement, but a subsequent Implementing Agreement superseded the Framework Agreement and provided for judicial dispute resolution. Without an agreement to arbitrate, the district court concluded that Trina Solar could not remove the case under the FAA, and remanded. Because its analysis hinged on whether an arbitration agreement related to the dispute for the purpose of 9 U.S.C. § 205, the district court’s order can be colorably characterized as a remand for lack of subject matter jurisdiction under 28 U.S.C. § 1447(c).

Chapter 5. Venue, Transfer, and Forum Non Conveniens

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Venue

_Wynnewood Refining Co. v. EPA, 86 F.4th 1114 (5th Cir. 2023)._  

The case illustrates application of a specialized venue provision under the Clean Air Act. Wynnewood, a small oil refinery, challenged an action by the Environmental Protection Agency (EPA) creating an alternative-compliance approach for certain small refineries with outstanding obligations under the EPA’s Renewable Fuel standard program. Wynnewood filed its challenge as an original matter in the Fifth Circuit Court of Appeals. The EPA moved to transfer venue to the D.C. Circuit under 42 U.S.C. § 7607(b)(1). Whether venue is proper under that provision turns on whether the challenged agency action is “nationally applicable”; if it is, venue exists only in the D.C. Circuit. If the challenged action is “locally or regionally applicable,” then the reviewing court must proceed to another level of analysis. The Fifth Circuit agreed that the challenged action was based on a determination of nationwide scope or effect that the EPA Administrator had published, so venue could only lie in the D.C. Circuit.

By comparison:

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17 As the Fifth Circuit explained:

The CAA includes a channeling provision delineating the appropriate venue in which a petitioner may seek judicial review:

A petition for review of ... any ... nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator’s action ... under this chapter ... which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.

In Calumet Shreveport Refining, LLC v. EPA, 86 F.4th 1121 (5th Cir. 2023), the Fifth Circuit held that venue was proper in that court in a challenge by a number of small oil refineries to the EPA’s denial of an exemption to an environmental regulation. Finding that the determination applied to specific local refineries and was made or should have been made based on information specific to each refinery, the denial actions were not nationally applicable and did not have nationwide scope or effect.

In Hunt Refining Co. v. EPA, 90 F.4th 1107 (11th Cir. 2024), the Eleventh Circuit granted EPA’s motion to transfer venue in a case that also involved exemptions from Clean Air Act rules, noting that “[t]he Fifth Circuit is the only circuit to have denied the EPA’s motions to transfer petitions for review [of the relevant actions],” and explaining that it found the dissenting opinion in Calumet “more persuasive.”

In Oklahoma ex. rel. Drummond v. EPA, 93 F.4th 1262 (10th Cir. 2024), petition for cert docketed (U.S. 2024), the Tenth Circuit held that an EPA final rule disapproving states’ state implementation plans (SIP) under the Clean Air Act held that venue was proper only in the D.C. Circuit. It noted that the Clean Air Act’s venue provision states that the nature of the agency’s “final action,” not the nature of the underlying petitions, is relevant. Because the EPA’s final rule rejected 21 SIPs, “spanning eight EPA regions and ten federal judicial circuits” at once, the final action was nationally applicable and the petition belonged in the D.C. Circuit.

§ 1404 Transfer of Venue

This year the Fifth Circuit decided a number of highly publicized venue transfer cases that have raised concerns about “judge shopping” when cases are filed in single-judge divisions of district courts. In response, the United States Judicial Conference has recommended the random assignment of cases that have nationwide or statewide impact when filed in single-judge

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divisions. The cases we include can be discussed in connection with venue and transfer, or with the use of mandamus as an extraordinary vehicle for appellate review before a final judgment.

**In re Clarke, 94 F.4th 502 (5th Cir. 2024).**

The Fifth Circuit stated that a party moving to transfer under § 1404(a) must show “[a]t minimum” that “its chosen venue is clearly more convenient” than the current venue. Market operators, traders, and academics who participated in PredictIT—a New Zealand university’s platform used for trading on predicted outcomes of political events—filed an action in the Western District of Texas challenging the rescission by the Commodity Futures Trading Commission (CFTC) of a “no-action” letter that it would not recommend enforcement of the Commodities Exchange Act against PredictIT. The district court granted CFTC’s §1404 motion to the District Court for the District of Columbia, and after the transfer, denied plaintiffs’ motions to stay the transfer order and to request a return of the case to Texas. The Fifth Circuit granted plaintiffs’ petition for mandamus, holding that the CFTC failed to meet its burden to establish good cause for the transfer. Although the district court did not abuse its discretion in finding that court congestion favored transfer, it erred in its weighing of the “local interest” transfer factor; the focus should be on the events that gave rise to the suit and their connection to the forum, not the parties’ connection to the forum. Further, the district court abused its discretion in finding that the private factors were neutral, when at least one tilted against transfer.

**In re TikTok, 85 F.4th 352 (5th 2023).**

A Chinese software company, Meishe, sued TikTok for copyright infringement in the Western District of Texas. Meishe alleged that its former software engineer disclosed source code to TikTok, which TikTok incorporated into its video-editing functionality. TikTok moved to transfer, and the district court denied the motion. TikTok then petitioned for a writ of mandamus directing transfer to the Northern District of California. The development of the video-editing functionality took place in China and was implemented into TikTok by an engineering team based in Mountain View, California. One member of the engineering team lived in Irving, Texas, which is in the Northern District of Texas. TikTok has a large presence in Austin, which is in the Western District of Texas, but the Austin TikTok office is purely a
business office that does not perform engineering work. The Fifth Circuit held that the district court abused its discretion in denying the §1404 transfer motion and granted the mandamus petition, going factor-by-factor and concluding—in brief—that the case “challenges conduct that took place mostly in China and to a lesser extent in California and rises or falls with proof located outside the Western District of Texas.”

The circuit also addressed why mandamus relief, although extraordinary, is appropriate “when the issues also have importance beyond the immediate case.” The Fifth Circuit in 2008 decided In re Volkswagen of America, Inc., 545 F.3d 304 (5th Cir. 2008), addressing mandamus “as a limited means to test the district court’s discretion in issuing transfer orders.” Since then, the circuit “has been called on to apply Volkswagen in over 2,000 cases,” and “issued fewer than ten precedential opinions applying its test.” As the court underscored, “granting mandamus in this case will improve ‘consistency of outcomes’ by further instructing when transfer is—or, for that matter is not—warranted in response to a §1404(a) motion.”

In re Chamber of Commerce, 105 F.4th 297 (5th Cir. 2024).

Business associations challenged the legality of a final rule of the Consumer Financial Protection Bureau (CFPB) regarding credit card late fees. They filed their action in the Northern District of Texas, and the district court granted the CFPB’s § 1404 motion to transfer to the United States District Court for the District of Columbia. The Fifth Circuit granted plaintiffs’ mandamus petition, holding that the district court clearly abused its discretion: it erred in considering the convenience of counsel and localized interest as factors favoring transfer, but did not err in concluding that court congestion favored transfer. Overall, the District of Columbia district was not “clearly more convenient” than the Northern District of Texas, so transfer was an abuse of discretion.
§ 1406 Transfer of Venue

In re Space Exploration Technologies, 96 F.4th 733 (5th Cir. 2024) (Elrod, J., dissenting) and 99 F.4th 233 (5th Cir. 2024) (en banc) (Jones, Smith, Elrod, Duncan, Engelhart & Oldham, JJ., dissenting).

Space Exploration Technologies (“SpaceX”) sued the National Labor Relations Board (NLRB) in the Southern District of Texas, seeking to enjoin the adjudication of unfair labor practices on the ground that the NLRB’s hearing structure violated the federal Constitution. The district transferred the case under 28 U.S.C. § 1406(a) to the Central District of California, finding that activities in the forum “were insubstantial in relation to the totality of events giving rise” to the claims, and that nearly all of the events or omissions giving rise to the claim occurred in the Central District of California. 2024 WL 974568 (S.D. Tex. 2024). SpaceX sought a writ of mandamus to reverse the transfer, which the Fifth Circuit denied in a one-line order without an opinion. Judge Elrod dissented, arguing that the district court erred “by asking where the ‘most significant part of the events’ took place.” Rather, venue was proper in her view in the Southern District of Texas because:

NLRB seeks to regulate SpaceX’s conduct in that district. SpaceX is challenging the constitutionality of NLRB proceedings that seek to regulate SpaceX in the Southern District of Texas where it has a substantial presence through its Starbase and Houston facilities. Although scheduled to take place in California, the administrative proceedings initiated by NLRB would regulate SpaceX’s operations and policies everywhere, including the Southern District of Texas. The administrative action is not limited in geographic scope to California employees and facilities. In fact, the very allegations in the administrative proceeding assert that SpaceX violated the NLRA at all of its facilities, including the ones in the Southern District of Texas.

District courts within our circuit have held that under 28 U.S.C. § 1391(e)(1), venue “is proper where an unlawful rule imposes its burdens.”
Multi-District Litigation


We include this decision to illustrate the size and scope of multi-district litigation. Consumers sued Chrysler as the manufacturer of the Chrysler Pacifica Plug-in Hybrid minivan, “which they assert * * * is defective because it has been known to spontaneously combust.” The JPML panel centralized the cases in the Eastern District of Michigan and consolidated them for all pretrial proceedings. The district court characterized the Consolidated Master Complaint (CMC) filed in the multidistrict litigation as a “massive pleading—1,450 paragraphs spanning more than 430 pages,” and including 83 causes of action based on the laws of 31 states. The CMC aggregates claims by 69 individuals in 11 separately filed civil actions. The district court’s discussion of the various claims could be adapted to form discrete problems about plausible pleading under different state consumer protection statutes.

Forum Selection Clauses

AQuate II, LLC v. Myers, 100 F.4th 1316 (11th Cir. 2024).

The case involves the enforceability of a forum selection clause where the designated forum is that of a tribal court. Procedurally, the appropriate way in federal court to enforce a clause designating a state or foreign forum is through the doctrine of forum non conveniens. In this case, plaintiff and defendant, both tribally owned businesses, bid on various government contracts. Plaintiff alleges defendant and its employee stole its trade secrets, and sued. Defendants moved to dismiss on various grounds. Without holding an evidentiary hearing, the district court dismissed the contract claim on grounds of forum non conveniens, relying on a forum clause in the employee’s employment contracts:

The tribal court of the Alabama-Quassarte Tribal Town shall be the exclusive venue for litigation arising out of Employee's employment. If there is no tribal court in existence, then the CFR Court for the geographic region where Employee works shall be the exclusive venue for litigation arising out of Employee's employment.
The circuit court reversed and remanded. Although forum selection clauses are presumptively valid under *Atlantic Marine*, the district court had an obligation under *The Bremen* to determine first whether the clause “should be ‘invalidated’ as unfair or unreasonable.” Plaintiff had argued before the district court that the tribal court did not exist, and submitted an affidavit from the Chairman of Economic Development for the Tribal Town stating that the tribe’s constitution did not provide for a court system and that the referenced court was “fictitious.” Defendants’ evidence to the contrary, two orders allegedly from the court, appeared to the circuit court to “lack any indicia of authenticity.” Given this record, it was error for the district court to find that the record contained no basis from which to infer the orders were fake. The circuit court remanded for the district court to hold an evidentiary hearing to determine whether the tribal court exists. If it does not, then the forum-selection clause is invalid because it was illusory.

*Usme v. CMI Leisure Mgmt., 2024 WL 3217570 (11th Cir. 2024).*

Crew members ordered to set sale on a cruise ship despite a “No Sail Order” issued by the Centers for Disease Control and Prevention because of COVID-19 sued, alleging they were exposed to foreseeable harms (and six of the seven plaintiffs became sick from the virus). Among other claims, plaintiffs sued under the Jones Act, a law that provides protections to merchant marines. Defendants moved to dismiss for improper venue, arguing plaintiffs were bound by a clause in their employment contracts designating the Bahamas as the selected forum. Although defendants did not employ the crew members and the employer was not a party to the litigation, the district court nevertheless dismissed the action on the basis of forum non conveniens, applying the forum clause as a matter of equitable estoppel. It reasoned that because the plaintiffs relied on the terms of the contract to assert claims under the Jones Act, the non-signatory defendants could enforce terms of the contract against them. The circuit court vacated and remanded. It held that the plaintiffs did not rely on the contract to assert the Jones Act claims. Instead, they relied on principles of general maritime law and the borrowed servant doctrine, both of which exist without a written contractual agreement.

It is likely true that but for the agreements with the non-party signatory entities, the crewmembers here would not have been employed on the *Greg Mortimer* at all. And without
such employment, they would have no Jones Act or general maritime claims against any of the entities (whether signatories or non-signatories). But this is the kind of but-for relationship we have deemed insufficient to warrant equitable estoppel in similar cases that bind us.

Because the forum-selection clause was unenforceable on a theory of equitable estoppel, the circuit court remanded for further proceedings.

Chapter 6. Ascertaining the Applicable Law

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


The case illustrates the range of situations in which an Erie question involving choice of law might arise—in this case, involving the appeal of a decision declining to enjoin an arbitration. In the usual case, such decisions are not appealable. However, the Supreme Court has held that the parties may agree to conduct the arbitration by different rules. In this case, the parties’ arbitration agreement included a choice of law clause applying New York arbitration law, which, according to the appeals court, showed the parties’ intent to agree to the appealability of an order refusing to enjoin an arbitration. Along the way the Second Circuit faced an Erie question: whether the state’s arbitral appealability rule was procedural or substantive, and held it was substantive so that its application did not violate Erie:

Although neither we nor the Supreme Court has answered the specific question before us, a provision within a statute that withholds jurisdiction where it would otherwise have existed, such as Section 16 of the FAA, seems aptly to also “speak[ ] ... to the substantive rights of the parties” by denying them a right to appeal that they otherwise would have. * * * We therefore conclude that the relevant provision in the FAA (withholding appellate jurisdiction) and Article 75 of New York’s Civil Practice and Rules (granting appellate jurisdiction), are both substantive provisions. As a result, * * * application of New York arbitration law bearing on appellate jurisdiction for denials of preliminary injunction, does not
run afoul of *Erie*’s fundamental principle that federal courts are not to apply state procedural law.

**Wells v. Tex. Tech Univ., 2024 WL 2967859 (N.D. Tex. May 7, 2024).**

An appeal has been filed in this multi-claim complaint involving employment discrimination, defamation, and patent invalidation based on events during plaintiff’s time as a student at Texas Tech University and afterwards. One issue concerns the applicability of the Texas election-of-remedies provision, which applies to tort claims against a Texas government entity or its employees. The original complaint in this action named both the university and professors, which was treated as “irrevocable election” to proceed with the claims against the professors in their official capacity. Although plaintiff later amended the complaint to remove Texas Tech as a defendant, the court held she remained bound by that earlier election. The court acknowledged that the Texas rule might seem procedural and in conflict with Federal Rule 15. To the contrary, in the court’s view, the Texas rule does not actually prohibit a plaintiff from amending her complaint nor does it alter the procedures surrounding amendment; it simply prevents an amendment from nullifying an employee’s statutory right to dismissal based on immunity. * * * So this is not a case where the state law automatically does not apply because a valid “Federal Rule of Civil Procedure answers the same question as the state law or rule.”

Moreover, not enforcing it in federal court would undermine the twin aims of *Erie* by encouraging forum shopping and producing inequitable administration of the law:

> [W]ithout this rule, the professors—or other similar government employees—would have to address dueling theories of liability or at least the possibility that a plaintiff would rethink the initial tort theory after dismissal is sought.

The defendants’ inability to obtain the immunity to which they would be entitled in state court is a substantial consequence that would result in inequitable administration of the laws, * * *. Given the sovereign immunity overlay to the
TTCA, permitting such claims to proceed in federal court would be particularly harmful.

**Rodgers-Rouzier v. Am. Queen Steamboat Operating Co., LLC, 104 F.4th 978 (7th Cir. 2024).**

The case involves *Erie*, arbitration, collective actions, and venue, and presents a compact problem for discussing the substantive/procedural divide. Plaintiff, a steamboat worker, filed a proposed collection action under the Fair Labor Standards Act alleging nonpayment of overtime wages. One hundred coworkers filed consent and joined. Defendant moved to dismiss for improper venue alleging plaintiff had consented to arbitration. The operative agreement and the motion relied exclusively on the Federal Arbitration Act (FAA). The district court denied the motion on the ground that the FAA carves out an exception for “seamen.” Defendant then moved again to dismiss based on the arbitration agreement, this time invoking Indiana state law, which contains no such exception. The district court granted the motion, rejecting objections that the argument was waived. The appeals court reversed on the ground that under Indiana law, defendant would be held “to its bargain that its arbitration agreement was governed by the FAA.”

Along the way, the Seventh Circuit explained that the FAA is a substantive, and not a procedural, federal law, and although it preempts conflicting state law “within its sphere,” it does not occupy the field, and coexists with state laws that favor arbitration (as the Indiana law does). Further there was not waiver of the state law argument under Rule 12(h)(1).

Rule 12(h)(1) does not govern the question of waiver because a motion to dismiss under Rule 12(b)(3) is not the proper means of enforcing an arbitration agreement in the first place. * * *

Although we have, on occasion, repeated litigants’ understanding that a motion to enforce an arbitration agreement is brought under Rule 12(b)(3), even after *Atlantic Marine*, we have grown increasingly critical of that assumption. * * * The Supreme Court has clarified that Rule 12(b)(3) is limited to challenges to statutory venue,* * * so it follows that the Rule is no longer a permissible means of enforcing arbitration agreements.


This pair of cases address the identical procedural issue and reach contrary results. The statute in play provides an excellent vehicle for discussion about interpretation, the substantive/procedural divide, and Erie guesses. Both cases involve group enforcement of the Ohio Minimum Fair Wages Standards Act (OMFWSA) for unpaid hours worked and unpaid overtime. OMFWSA has an opt-in provision for group actions. Plaintiffs in each case sought to enforce the Ohio law by filing a putative class action under Federal Rule 23. The district court in the Eastern District of Michigan agreed with that procedural styling, emphasizing that federal rules control in federal court and Rule 23 does not exceed the Rules Enabling Act. Although acknowledging that its reading could encourage forum shopping, the Michigan court found that its reading of the state provision did not “enlarge or shrink the substantive rights or remedies available to plaintiffs.” The district court also declined to certify a question about the opt-in provision to the Ohio Supreme Court.

The district court in the Northern District of Ohio held that the opt-in provision was substantive, not procedural, agreeing with Justice Ginsburg’s dissent in Shady Grove that “there are instances where a state’s prohibition on class actions is part of the substantive law and remedies and must be applied by federal courts,” and applying Justice Stevens’ concurrence that “instructed courts to consider the balance Congress has established where conflicts between federal procedural rules and state laws exists.” The Ohio court relied on a number of factors: (1) “that the opt-in language * * * is contained within the statute itself and only applies to claims” under this statute; (2) the legislative history indicated the statute was designed to ban opt-out suits and discrimination would result if it were read as other than an opt-in suit; (3) the provision affects not only joinder but “how early in the litigation” a plaintiff can participate and a defendant can defend. Finally, the Ohio court, citing comity, emphasized that it was being “mindful about neutralizing a state statute when there exists a reasonable judicial interpretation
which avoids this result when considering the interplay with Federal Rule 23.” The district court thus dismissed because the action was brought as an opt-out suit.


This pair of cases, both from the Eastern District of Michigan, involve state law class action bars, and reach different results in their reading of the relevant state provisions and their application of Shady Grove. In re Chrysler Pacifica was a consolidated class action in multidistrict litigation against a minivan manufacturer on claims under laws of 31 states (as well as “nationwide” common law claims). 19 Chrysler moved to dismiss under Federal Rule 12(b)(6), pertinent here, “that statutory provisions in Colorado, Georgia, Kansas, Kentucky, Ohio, Tennessee, and Virginia law categorically bar plaintiffs from pursuing consumer fraud claims via class proceedings, and that under Iowa law prior approval from the state attorney general is required before a consumer class action may be filed.” The district court acknowledged that the question was “close,” but that on balance “the weight of authority tips in favor” of applying Federal Rule 23, relying on Shady Grove that the bars were procedural because they “govern[] only the manner and the means by which the litigants’ rights are enforced.”

Estate of Pilgrim was a multi-state class action against General Motors, alleging that the installation of a particular engine in Corvettes caused “catastrophic injury” and violated consumer laws in 20 states. The district court declined to certify the case as a class under Rule 23 finding that “variances in the substantive law governing them make this case unsuitable for class treatment.” The case could comfortably be used as a teaching vehicle illustrating the different requirements of certification. For purposes of the Erie doctrine, the district court first decided a threshold issue: whether Rule 23 applied to all of the claims, given class action bars in some of

19 The decision recites that the Consolidated Mater Complaint is a “massive pleading”—1,450 paragraphs spanning more than 430 pages” and that plaintiffs planned to seek certification of state-by-state subclasses” for the counts pleaded under the laws of 31 states.
the state laws at issue. Of the 19 consumer protection claims, five state statutes (Alabama, Georgia, Montana, Tennessee, and Utah) were read to “bar class actions outright”; the district court held that the class action bar was a substantive rule that applied in federal court, purporting to adhere to Justice Stevens’ concurrence in *Shady Grove* that “[a] federal rule ... cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right.” The court distinguished *Shady Grove* on the ground that the class action bar in that case was expressly styled as a rule of civil procedure:

The statutory bars at issue here are qualitatively different than the New York rule in *Shady Grove*, which was expressly styled as a rule of civil procedure. Indeed, the bars exist in the statutes themselves. Most of the consumer protection statutes listed above envision enforcement primarily by the state Attorney General, who is typically empowered to pursue only injunctive relief and penalties. The private causes of action, meanwhile, grant remedies to individual plaintiffs for *actual* damages—and in some instance treble penalties. Courts in this district have previously dismissed putative class claims because of such statutory bars, reasoning that the class-action prohibition is a substantive limitation and not merely a procedural one. *See Cunningham v. Ford Motor Co.*, 641 F. Supp. 3d 400, 416 (E.D. Mich. 2022) (Leitman, J); *Matanky*, 370 F. Supp. 3d at 798. The Court considers these interpretations well-reasoned: the statutes listed above create substantive rights. They do not establish mere rules of procedure. Accordingly, these claims may not be certified.

**Blue Cross & Blue Shield of Vt. v. Teva Pharm. Indus., Ltd., --- F. Supp. 3d ---, 2024 WL 323775 (D. Vt. 2024).**

Blue Cross and a subsidiary brought a putative class action against various pharmaceutical companies for violating the Sherman Act, state antitrust laws, and state consumer protection acts. The decision runs for 150 pages and raises complex questions about *Noerr-Pennington* immunity and the *Illinois Brick* doctrine that are beyond the ken of the 1L course. In terms of *Erie*, the court held that the Illinois Antitrust Act’s bar on indirect purchaser class
actions applies only to Illinois state court, and not to federal court actions, rejecting the application of Justice Stevens’ concurrence in Shady Grove and finding the state rule to be procedural, not substantive. (The decision also addresses the applicability of Federal Rule 9(b) to state consumer protection claims, discussed in connection with Chapter 8, on pleading.)

**KOKO Dev., LLC v. Phillips & Jordan, Inc., 101 F.4th 544 (8th Cir. 2024).**

The decision illustrates how a court sitting in diversity applies federal procedural law and state substantive law, and how procedural rulings can affect the merits determination. A developer filed suit in state court alleging breach of contract and negligence based on cost overruns. Defendants removed. The district court granted summary to defendants. On appeal, the Eighth Circuit held the district court acted within its discretion in excluding the developer’s proffered expert witnesses on the ground that plaintiff listed them as fact and not as expert witnesses in the Rule 26(a) disclosure, and failed to present substantial justification or to show that the nondisclosure was harmless. In refusing to treat the witnesses as fact witnesses, the appeals court emphasized the important of 2000 amendments to Federal Rules of Evidence, which, by adding Rule 701(c) was designed “to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.” Further, “[u]nder the amendment, a witness’ testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”

Finally, the circuit court held that that there was no abuse of discretion in finding that under North Dakota law, expert testimony was required to support elements of the contract and contract claims. The North Dakota Supreme Court has held that although expert testimony is not required in every negligence or contract suit, expert testimony is essential “if the issue is beyond the area of common knowledge or lay comprehension,” and this case turned on questions of “complex infrastructure and engineering analysis.”

Tederick sued LoanCare in federal court for violations of the West Virginia Consumer Credit and Protection Act (WVCCPA), and LoanCare moved to dismiss in part for failure to comply with a notice-of-claim provision in the WVCCPA. Tederick argued in defense that this notice-of-claim provision is procedural and not applicable in federal court. The court conducted a lengthy analysis of *Erie*, *Hanna*, and a Fourth Circuit case holding that a similar West Virginia requirement in another statute was displaced by the Federal Rules. *Pledger v. Lynch*, 5 F. 4th 511 (4th Cir. 2021). The court devoted most of its analysis to whether the notice requirement conflicts with Rule 3, engaging similar cases and the text of the WVCCPA in depth. Finding the conflict, the court summarily found that Rule 3 satisfied the second step of *Hanna* and was valid here.

Hensley v. Bossio, 2024 WL 2799261 (6th Cir. 2024).

The facts of the case are disturbing. A prisoner raped and killed another prisoner while both were incarcerated in a state run prison. Decedent’s father filed a Section 1983 action claiming that prison officials violated the Eighth Amendment by failing to protect his son and were negligent under state law. The magistrate judge granted a directed verdict in favor of all defendants on the constitutional claim and to all but one defendant on the negligence claim. On appeal, the Sixth Circuit affirmed. Although the circuits are divided on whether state or federal law governs the standard for granting motions for directed verdicts and judgments notwithstanding the verdict in a diversity action, the Sixth Circuit follows the minority rule, which looks to state law. “Under Kentucky law, a trial court may enter a directed verdict if ‘there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable minds could differ.’” A directed verdict was proper because plaintiff failed to establish that the prison official’s conduct “substantially caused” the son’s death; it was not sufficient “that the harm would not have occurred had the actor not been negligent.”
The Problem of Ascertaining State Law

*Rhode Island Truck Ctr., LLC v. Daimler Trucks N. Am., LLC, 92 F.4th 330 (1st Cir. 2024).*

The merits question was whether a Rhode Island franchise dealership could enforce a Rhode Island statute based on a dealership established out of state. The Rhode Island Supreme Court had not addressed the question, but Rhode Island law did not contain a presumption against extraterritorial application and also does not recognize a canon of constitutional avoidance when a federal constitutional question is raised. Finding “an implicit ambiguity” in the statute’s “definition of ‘relevant market area,’” the appeals court—citing prudence—certified the question to the state high court. In reaching that decision, the appeals court applied two factors: (1) the certified question “may be determinative of the cause”; and (2) the answer to the certified question was not “sufficiently clear to allow” the federal court to predict the state court’s ruling. Students might consider why the second factor is important to the integrity of a federal court and the constitutional grant of diversity jurisdiction.

*Johnson v. Miller, 98 F.4th 580 (5th Cir. 2024).*

The appeals court certified the question whether a worker’s retaliation claim under the Mississippi Whistleblower Protect Act was subject to procedural provisions of the Mississippi Tort Claims Act, which requires notice to the governmental entity’s chief executive officer at least 90 days before filing suit. In reaching this decision, the court relied on three factors, and held that “[a]n *Erie* guess * * * would be a leap into the dark” given the absence of state law on the question:

1. the closeness of the question and the existence of sufficient sources of state law; 2. the degree to which considerations of comity are relevant in light of the particular issue and case to be decided; and 3. practical limitations of the certification process: significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court.
Green Plains Trade Grp., LLC v. Archer Daniels Midland Co., 90 F.4th 919 (7th Cir. 2024).

Should a district court sitting in diversity reject a reading of a statute favorable to plaintiff that the state supreme court “might adopt” but has not yet done so? The district court dismissed a claim for tortious interference under Nebraska law where the complaint alleged defendant had unlawfully manipulated prices downward, causing plaintiff to receive less money when it sold the product to third parties. The Seventh Circuit vacated and remanded, emphasizing that the district court when making an “Erie guess” is not required to adopt the most “restrictive interpretation of state law, even when the evidence as to the content of state law is not in equipoise and, in fact, points to the less restrictive option”:

A federal court sitting in diversity has a basic constitutional responsibility to ascertain correctly the content of state law. * * * When the highest court of the state has not spoken on the matter, this inquiry can be difficult, but it cannot be avoided. In such situations, our case law, and that of the Supreme Court, instructs us to search elsewhere for a persuasive indication of how the highest court of the state would rule if the present case were before that tribunal today. Over time, we have articulated several “guardrails” to guide and discipline our decision-making process. One such maxim counsels district courts against accepting novel state law claims when the evidence concerning the content of state law is in equipoise. But this maxim has its limits and should not be overused. The district court’s north star, and one constitutionally mandated by Erie, is to discern, as best it can, the content of state law as the highest court of the state would view it today.

The court emphasized another guard rail: “that a federal court, faced with two equally plausible readings of state law, should not choose the alternative that requires us to predict a change or an expansion in extant state legal doctrine. These cases suggest it is not our place to alter state law, but simply to apply it.” And, the appeals court invited the district court to certify the state statutory issue to the Nebraska Supreme Court.
Under *Erie*, can a state make jurisdiction exclusive to its state courts or administrative tribunals, and so oust the federal court of diversity jurisdiction? In a concise opinion the Fourth Circuit answered no, and explained the difference between a state’s definition of substantive rights for *Erie* purposes and state statutes that purport to withhold power from the Article III courts. The facts are simple but tragic: industrial cleaners suffered “severe, disfiguring burns” as a result of what the court called an industrial “inferno” apparently caused by defendant’s decision “not to interrupt production at the plant” during the clean-up. The workers sued in state court alleging negligence. Defendants removed to federal court on the basis of diversity jurisdiction. Defendants then did an about face and moved to dismiss the action alleging that the plaintiffs were “statutory employees” covered by the South Carolina Workers’ Compensation Law, which bars that category of workers from filing tort suits in state courts. The district court treated the question as jurisdictional and dismissed under Rule 12(b)(1). On appeal, the plaintiffs argued that they were not statutory employees. The appeals court agreed that the district court erred, but vacated and remanded on a different ground: state law cannot divest the federal court of jurisdiction. As the appeals court explained:

True, the Law excludes covered employees from enjoying rights or remedies at common law, confers immunity from tort suits on employers, and vests exclusive jurisdiction in the Workers’ Compensation Commission. * * * Those facts reflect the substantive policy of South Carolina, which, under *Erie*, we are required to enforce in diversity jurisdiction. * * * Even so, this limitation only determines whether Plaintiffs have stated a claim upon which relief can be granted; it cannot strip us of subject matter jurisdiction that we otherwise enjoy.

Students might consider why was it appropriate for the appeals court to remand rather than affirming on grounds not relied upon by the District Court?

**Swanson v. Sw. Airlines Co., 2023 WL 5509357 (N.D. Ill. 2023).**

The decision addresses whether the waiver of the right to compel arbitration is substantive for *Erie* purposes, and holds that a Texas waiver rule favoring arbitration governs in
a diversity action. Swanson, a ramp supervisor for the defendant airline, filed a retaliation claim against in federal court, with jurisdiction based on diversity. Eight months later and after the case had already been referred to a magistrate for discovery, the airline moved to compel arbitration. Swanson defended on the basis of waiver: the airline did not include this defense in the answer. Under federal law, Swanson is exempt from arbitration; however, state laws that are favorable to arbitration are not considered preempted, and so state law controlled. Moreover, the Supreme Court held in 2022 that federal courts may not craft a prejudice requirement when determining whether a party waived mandatory arbitration, and the district court held state law governed the question of waiver. The court then engaged in a lengthy explanation of why the waiver of a right to arbitrate is substantive—because no Federal Rule governs, it applied the “relatively unguided” *Erie* analysis, finding that the Texas rule is bound up with rights and so applied in the diversity action. Finding no prejudice to the plaintiff, the court granted the motion to compel arbitration.

**Mundell v. Acadia Hosp. Corp., 92 F.4th 1 (1st Cir. 2024).**

The First Circuit, over a dissent by Judge Barron, affirmed summary judgment in favor of an employee under the Main Equal Pay Law (MEPL), along the way finding that certification of “complex issues” to the state high court was not warranted. Both in the district court and on appeal, defendant requested certification of whether the state law barring, among other things, gender-based pay differentials required a showing of discriminatory intent as an element of the claim and permitted a showing of a viable reasonable factor other than sex as an affirmative defense. Both issues were characterized as “outcome determinative” to the suit, but Maine’s highest court had not decided these questions. The district court granted summary judgment for the employee, denying certification, and relying on the statute’s plain language, legislative history, and comparable statutes, and rejected two policy concerns raised by defendant. The First Circuit agreed that certification was “unnecessary and inappropriate because the factors cited by the district court * * * provide us with ample guidance.” In interpreting the Maine statute, the

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appellate court emphasized that the standard was to “predict” how the state court “likely would decide the issue,” relying on the interpretive methods that the state court would apply.

When interpreting a statute, Maine courts “give effect to the Legislature’s intent by considering the statute’s plain meaning and the entire statutory scheme of which the provision at issue forms a part.” * * * “Only if the plain language of the statute is ambiguous” should courts “look beyond [it] to examine other indicia of legislative intent, such as legislative history.” * * * The [Maine] Law Court also has stressed that “[n]othing in a statute may be treated as surplusage if a reasonable construction applying meaning and force is otherwise possible.”

Further, the appeals court relied on Maine’s interpretive approach in determining whether the statute was ambiguous—the state court has stated the tests as whether the statute could have only “one reasonable interpretation,” even if it is “amenable to another interpretation” or “discerning the only possible interpretation requires a taxing inquiry”—but also supported that approach with citations to Supreme Court decisions interpreting federal statutes and regulations. Moreover, the mere fact that a state statute is “complex” does not make it “ambiguous.”

Judge Barron’s dissent looked to a different state interpretive presumption—the presumption “that the state’s statutes use the same words to mean the same thing”—and argued that the majority’s holding violated that rule, and gave the statute a more expansive interpretation than warranted. In his view, certification was warranted:

Maine is, of course, free to enact a pay-equity measure as sweeping as the majority holds that Maine has. Maine is even free to do so by using the same words to mean irreconcilable things. But before we may decide that the state has done so, we must be confident that its highest court would agree with that decision. And, in my view, neither the text of the MEPL nor any other interpretive sources can give us that confidence. I thus would certify to the Maine Law Court the question about how to construe the MEPL that is before us in this appeal, as that court, unlike ours, need not guess about the construction of the MEPL that it would adopt.
The class can consider the costs and benefits of certification, which Judge Barron identifies in his dissent.

**House v. Player’s Dugout, Inc., 2024 WL 495998 (6th Cir. 2024).**

The appeals court reversed and remanded a jury’s Lanham Act award as excessive. The parties did not dispute that the jury instructions used the incorrect “preponderance of the evidence standard” and not the correct “clear and convincing” standard as required under the governing state law. But there remained the question of whether federal or state law applied to review incorrect jury instructions where, as in this case, “the party appealing the instructions did not object at trial.” The court concluded that federal law applied, and that state cases on the issue were not relevant:

In 2003, the Federal Rules of Civil Procedure were amended to add Rule 51(d)(2), which states that where “a plain error” in jury instructions “has not been preserved as required” through an objection, the error may be reviewed only if it “affects substantial rights.” Fed. R. Civ. P. 51(d)(2). Where a federal rule of procedure consistent with the Rules Enabling Act is applicable, “the Federal Rule applies regardless of contrary state law.”

Applying federal law, we have said—both before and after Rule 51(d)(2)’s adoption—that where a plain error in jury instructions is so “obvious and prejudicial” that we are required to act “in the interests of justice,” we may reverse even where the complaining party fails to object at trial.

**Firexo, Inc. v. Firexo Grp. Ltd., 99 F.4th 304 (6th Cir. 2024).**

The case provides a solid fact pattern for discussing how the *Erie* doctrine affects the interpretation of a forum-selection clause in a commercial contract and its application to a non-signatory. In 2019, Smith, a U.S. businessman entered a joint venture agreement with Firexo

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22 Certification is permitted under Maine law, Me. Rev. Stat. tit. 4, § 57; Me. R. App. P. 25(a).
Group Limited (FGL), a manufacturer of fire extinguishers based in England. The agreement included a clause selecting England or Wales as the “exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this agreement or its subject matter or formation” and choosing “the laws of England and Wales” to govern such dispute. Smith then purchased from FGL 70 percent of Firexo Corp., FGL’s wholly owned subsidiary which was incorporated in Florida. In 2021 Firexo sued FGL in Ohio state court for breach of an oral distributorship agreement. Defendant removed based on diversity and then moved to dismiss based on the joint venture agreement’s forum clause. The district court granted the motion, relying on the “closely related” doctrine (Casebook, p. 438, Note 2), and the Sixth Circuit over a dissent reversed, holding that the clause did not bind the non-signatory. After taking a deep dive into the development of the “closely related” doctrine, the appellate court characterized it as a federal common law rule of equitable contract interpretation, which, under Erie, had to give way to the law that under the Ohio conflicts rule would apply—namely, that of England and Wales.

A concurring opinion agreed with the majority’s Erie/Klaxon analysis, and likewise rejected applying federal common law to determine whether a non-signatory is bound by or can invoke a forum clause, but made clear that where a state has adopted the “closely related” test, a district court in the Sixth Circuit sitting in diversity would have to apply that test as a matter of state law. A dissenting opinion argued that the circuit had previously adopted the closely related and foreseeable test and that the panel was bound by that precedent.

Chapter 8. Modern Pleading

The Complaint

Nat’l Rifle Ass’n v. Vullo, 602 U.S. 175, 144 S.Ct. 1316, 218 L.Ed.2d 642 (2024).

A summary of this case is included the Rules Supplement (see above).

The Supreme Court has granted cert, in two cases each involving pleading standards under federal statutes.
E. Ohman J:or Fonder AB v. NVIDIA Corp., 81 F.4th 918 (9th Cir. 2023), cert. granted, 2024 WL 3014476 (U.S. 2024).

Shareholders brought a putative class action under the Private Securities Reform Act against Nvidia, a chip manufacturer (that incidentally garnered a lot of headlines this year because of AI) and several executives, alleging they knowingly made materially false or misleading statements that minimized how volatile cryptocurrency-related sales would affect the company’s revenues. To allege falsity with particularity, plaintiffs relied on an expert report to allege an estimated amount of cryptocurrency-related sales that was substantially different from what various executives publicly reported. Plaintiffs also relied on two former NVIDIA employees who testified as to the CEO’s management and NVIDIA’s data-collection practices to allege with particularity that the CEO was aware of documents showing the alleged amounts of crypto-related sales. Defendants countered that the PSLRA requires that plaintiffs must plead with particularity the contents of internal company documents to plausibly allege scienter, and that an expert opinion cannot substitute for particularized allegations of fact. The Supreme Court has granted cert. on:

1) Whether plaintiffs seeking to allege scienter under the PSLRA based on allegations about internal company documents must plead with particularity the contents of those documents;

2) Whether plaintiffs can satisfy the PSLRA’s falsity requirement by relying on an expert opinion to substitute for particularized allegations of fact.23


Jewish survivors of the Holocaust sued the Republic of Hungary under the Foreign Sovereign Immunities Act seeking compensation for property allegedly seized. The FSIA waives foreign sovereign immunity when “rights in property taken in violation of the international law

are in issue” and there are certain commercial ties to the United States. To fall into this exception, plaintiffs cannot be of Hungarian nationality, otherwise international law would not be at issue per the “domestic takings rule.” The D.C. Circuit found that certain plaintiffs had plausibly alleged Czechoslovakian nationality at the time of the takings and directed the district court to allow other plaintiffs to replead to establish Czechoslovakian nationality. The appellate court rejected Hungary’s argument that the Supreme Court had established a higher “legally valid claim” pleading standard for FSIA jurisdiction, finding that the Supreme Court had merely rejected the lower “legally nonfrivolous” standard and did not abandon the Twombly plausibility standard. The Supreme Court has granted cert:

1) Whether historical commingling of assets suffices to establish that proceeds of seized property have a commercial nexus with the United States under the expropriation exception to the Foreign Sovereign Immunities Act.
2) Whether a plaintiff must make out a valid claim that an exception to the Foreign Sovereign Immunities Act applies at the pleading stage, rather than merely raising a plausible inference.
3) Whether a sovereign defendant bears the burden of producing evidence to affirmatively disprove that the proceeds of property taken in violation of international law have a commercial nexus with the United States under the expropriation exception to the Foreign Sovereign Immunities Act.\(^{24}\)

**Cline v. Clinical Perfusion Systems, 92 F.4th 926 (10th Cir. 2024).**

The Tenth Circuit’s decision illustrates the consequences of allowing parties to plead in the alternative. A former worker sued claiming his employer fired him either because of age or disability discrimination. The employer moved to dismiss, and the district court dismissed all claims. In particular, the district court held that age discrimination was not plausible as a but-for factor for age discrimination because the complaint alleged termination based on disability discrimination. The Tenth Circuit reversed dismissal of the age discrimination claim, finding that

plaintiffs are entitled to plead alternative theories of recovery and Cline had plausibly alleged the elements of age discrimination:

The district court erred by concluding that the [first amended complaint] failed to allege sufficiently that age was a but-for cause of Cline’s termination. [Plaintiff] Cline was entitled * * * to plead inconsistent legal theories and inconsistent facts. * * * Therefore, the allegations in the [first amended complaint that plaintiff] was terminated because of his disability do not prevent [plaintiff] from alternatively alleging that he was terminated because of his age.

We conclude that [the first amended complaint] plausibly alleged that “age was the factor that made a difference” in his termination. * * * [The first amended complaint] alleged that “the sole factor, the primary factor, the determinative or determining factor, or a significant motivating factor in making [appellee’s] decision to terminate [plaintiff] and its decision not to reinstate or rehire him was ... (5) the fact that [plaintiff] was sixty-one (61) years old at the time the decisions were made.”* * * While this is a conclusory statement, [plaintiff] supported his causation argument with sufficient factual allegations.

**Liu v. Uber Tech., Inc., 2024 WL 3102801 (9th Cir. 2024).**

The decision presents a compact fact pattern for applying the *Iqbal* pleading standard to a claim that Uber’s use of the star rating system to make driver termination decisions discriminates against non-white drivers. The Ninth Circuit affirmed dismissal for failure to state a claim. In particular, the appellate court found that social science and survey evidence did not support a plausible inference of significant racially disparate impact in driver termination rates causally linked to use of customer ratings.

**Caraway v. Corecivic of Tennessee, L.L.C., 98 F.4th 679 (6th Cir. 2024).**

The facts are troubling. A state prisoner’s mother, on behalf of the estate, filed a § 1983 action against a private prison and prison officials alleging they violated the Eighth Amendment by failing to prevent decedent’s drug overdose. The Sixth Circuit affirmed the dismissal and held
that the district court did not abuse its discretion in failing to convert the defendants’ motion to dismiss into a Rule 56 motion notwithstanding statements outside the complaint about drug trafficking into the prison and the district court’s refusal to allow discovery. The complaint largely relied on state audits showing understaffing at the facility to support the failure to protect claim, but in the circuit’s view the complaint failed to allege that decedent “faced an excessive risk of harm from unfettered access to drugs.” Moreover, the complaint by merely alleging death failed to meet the objective component of the Eighth Amendment claim, which requires a showing of “the risk to the injured party before the alleged injury occurred.” Class discussion might focus on the problem of asymmetric information. The subjective component of the Eighth Amendment claim requires allegations that defendants had notice of the risk and failed reasonably to respond. Could the complaint meet the Iqbal standard without some limited discovery?

For another case involving Rule 12/Rule 56 conversion, see Cotterman v. City of Cincinnati, Ohio, No. 21-3659, 2023 WL 7132017 (6th Cir. Oct. 30, 2023). The Sixth Circuit affirmed dismissal of a § 1983 suit where the district court, after discovery, refused plaintiff’s request to convert defendant’s motion to dismiss to a motion for summary judgment. The appellate court stated that plaintiff’s counsel, to rely on newly discovered facts, ought to have amended the complaint under Rule 15. Plaintiff “must bear the consequences for his lawyer’s inexplicable failure to do so.”

Jones v. L.A. Cent. Plaza, L.L.C., 74 F.4th 1053 (9th Cir. 2023)

Federal Rule 12(d) allows a court to convert a motion to dismiss into a motion for summary judgment subject to specified conditions. The district court in this case erred in thinking the rule allowed it to convert a motion for summary judgment into a motion to dismiss subject to Iqbal pleading standards. The facts are simple: A customer sued a liquor shop alleging barriers to access in violation of the Americans with Disabilities Act. The customer moved for summary judgment. Defendants did not file a formal cross-motion for summary judgment, but they opposed the motion by arguing the customer did not show Article III standing. The district court sua sponte dismissed the case on the ground that the amended complaint did not adequately plead standing. Moreover, the district court then
considered, and denied, a hypothetical request by Jones for “leave to amend his complaint.” Because the deadline to amend the complaint under the court’s Rule 16 pretrial scheduling order had long passed, the district court held that the stricter standards of Rule 16, rather than the more permissive standards of Rule 15 governed any amendment of the complaint. * * * Concluding that those stricter standards could not be met, the district court denied leave to amend the complaint and dismissed the action without prejudice.

The Ninth Circuit vacated and remanded. The district court violated the norm of adversarial presentation: the parties presented the standing issue to the court under Rule 56, and they based their arguments on the evidentiary material in the summary judgment record. Nothing in the Federal Rules allowed the district court to convert the summary judgment motion into one to dismiss. Nor would such a conversion serve the goals of Federal Rule 1.

By disregarding the more robust procedural device the parties have invoked to frame the issue, such a reverse conversion unjustifiably ignores the fuller evidentiary record assembled by the parties after they have already incurred the expense of discovery. For similar reasons, one of the chief objectives of the Iqbal pleading standards—which is to avoid “unlock[ing] the doors of discovery for a plaintiff armed with nothing more than conclusions,” * * * —is largely inapposite by the time of summary judgment.

Moreover, had defendant challenged pleading deficiencies at the Rule 12 stage, plaintiff could have had an opportunity to cure through amendment; insisting instead “on raising sua sponte an unobjected-to-but potentially-curable deficiency only after the time to amend has expired, seems hardly to promote the just determination of the action.” (Emphasis in original.) Also problematic was the district court’s failure to provide notice to the parties of the conversion.


The facts and procedural posture of this case make it a good teaching companion to Swierkiewicz. The district court dismissed race discrimination claims with prejudice on the ground that the amended complaint failed to establish two elements of the prima facie case for
intentional race discrimination under the *McDonnell Douglas* standard—“that he suffered an adverse employment action” and that defendant “treated similarly situated employees of a different race more favorably.” The Eleventh Circuit reversed the dismissal of that claim: “Even if the factual allegations in [the] amended complaint do not allege ‘a classic *McDonnell Douglas* prima facie case’ of race discrimination, they are adequate to ‘plausibly suggest that [plaintiff] suffered an adverse employment action due to intentional racial discrimination”—all that is required at the pleading stage.

**Farrell v. U.S. Dep’t of Def., 2024 WL 3090854 (N.D. Cal. 2024).**

LGBTQ+ veterans who were discharged under Don’t Ask, Don’t Tell, some dishonorably, filed a putative class action challenging defendants’ failure to correct the discharge status on paperwork used for official purposes (such as accessing benefits). The complaint alleged equal protection and due process violations. The Department of Defense moved to dismiss in part for failure to state a claim, arguing that the military correction board policies were facially neutral and cannot be discriminatory, and that the complaint did not allege the procedures meet the “shock-the-conscience” standard for substantive due process or plausibly allege that they were not fair. The district court denied the motion. Among other things, the decision illustrates the “incorporation by reference doctrine,” under which documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.”

* * *

“Unlike rule-established judicial notice, incorporation-by-reference is a judicially created doctrine that treats certain documents as though they are part of the complaint itself.”

* * *

“The doctrine prevents plaintiffs from selecting only portions of documents that support their claims, while omitting portions of those very documents that weaken—or doom—their claims.”

This 150-page decision addresses a complicated class action brought by Blue Cross against pharmaceutical companies under federal antitrust and state statutes. The district court held that claims arising under various state consumer protection laws were not subject to dismissal for failure to comply with the heightened pleading standard for fraud under Federal Rule 9(b). To be sure, some of the claims “are expressed in terms evocative of fraud,” and Second Circuit precedent holds that Rule 9(b) “is not limited to allegations styled or denominated as fraud or expressed in terms of the constituent elements of a fraud cause of action.” Nevertheless, the district court found that the claims were not “intertwined with any explicit claims of fraud,” but rather sounded in unfair or anticompetitive conduct.

**Motions to Dismiss and Local Rules**

**Thurman-Carr v. Murillo, 2024 WL 385652 (9th Cir. 2024).**

The district court granted defendant’s motion of dismiss a civil rights case despite the movant’s failure to comply with a local rule of the Central District of California requiring the parties to meet-and-confer at least seven days before making a motion, where a separate rule states the court “may decline to consider a motion unless it meets the requirements” of the local rules. C.D. Cal. L.R. 7–7–4. The circuit court found no abuse of discretion:

Although the defendants filed their motion to dismiss only one day after the meet-and-confer conference, the district court exercised its discretion to consider the motion. “Only in rare cases will we question the exercise of discretion in connection with the application of local rules.” * * * This is not one of those rare cases. A meet-and-confer conference does not grant a right to any party, nor does it protect a party from unfair prejudice. Requiring parties to meet and confer before filing is simply meant to help parties resolve their dispute without a hearing, which promotes the efficient administration of justice. But by repeatedly refusing to cooperate with the defendants’ efforts to meet and confer, Carr’s counsel made it unnecessarily difficult for the parties to reach a resolution. So, the
district court was well within its discretion when it chose, based on Local Rule 7-3’s underlying goals, to consider the motion.

**Local Rules and Notice**

**Jones v. Providence Public Schools, 2024 WL 1128034 (1st Cir. 2024).**

Jones filed a pro se action against her employer, the Providence Public School District. She used “a pre-printed form complaint” to alleged violations of various federal laws, including the Americans with Disabilities Act. Defendant moved to dismiss under Rule 12(b)(6) for failure to state a claim. Jones did not file a response within the 14-day period provided in the court’s Local Rule Cv 7(a)(3), and sometime later the district court granted the motion “without prejudice as unopposed” and dismissed the action. On appeal, Jones filed a one-page motion asserting, “she was waiting for some word or guidance from the district court before filing a response.” The First Circuit vacated and remanded. The First Circuit has previously held that dismissal for failure to respond to a Rule 12(b)(6) motion may be proper if based on “the application of a specific district court local rule expressly allowing for such a disposition,” an approach that the Seventh Circuit has specifically rejected because it fails to hold the movant to its burden. However, under the First Circuit approach, the relevant local rule must “impose a mandatory requirement to file an opposition and/or warn that a plaintiff will be deemed to have waived arguments in opposition to dismiss” if opposition papers are not filed. The local rule at play in this dispute provided notice of the filing deadline (which also is set out in the court’s rule, and available on the court’s website), and the risk of forfeiture, but did not state that failure to reply would automatically be deemed a waiver of arguments on the merits. The circuit court thus vacated and remanded for further proceedings to give plaintiff an opportunity to reply.

25 USDC R.I. LR Cv 7(b) states: “Any party may file a response to a motion, the contents of which are governed by LR Cv 7(a)(2). The response must be filed within 14 days after service of the motion unless the Court shortens or extends the time.” (Emphasis added by the court.)
Local Rules and Motion Practice

Rembert v. Estates, 2024 WL 449354 (11th Cir. 2024).

The district court sua sponte dismissed a civil rights complaint for failure to comply with a local rule requiring filing of a certificate of interested persons and corporate disclosure statement. On appeal, plaintiff’s opening brief argued that the district court abused its discretion by applying the local rule in an unfair and unequal way that blocked an African American woman from seeking judicial redress for violations to her right to purchase property. 2023 WL 5954711 (C.A. 11) (Appellate Brief). The Eleventh Circuit affirmed.

Rembert’s brief concedes that her counsel knew of Local Rule 1.07(c) and does not allege any lack of knowledge of the docket entry explaining the consequences of violating Local Rule 1.07(c). But she argues that her “notice of compliance,” filed after the initial case management order, showed a “good faith” belief of compliance and an “apparent lack of awareness” that she had not met the requirements of Local Rule 1.07(c). Rembert also argues that because “most of the local judges ... do not enforce Local Rule[ ] 1.07(c) in the same, stringent manner” as the judge did here, the district court had no justification for dismissing the case. There was, according to Rembert, “no evidence of a failure to prosecute or of a repeated refusal to follow the court’s orders.”

None of these arguments persuades us. “It was not an abuse of discretion to dismiss ... due to plaintiff’s ‘personal inattention to this case.’ ”

Provisions to Deter Frivolous Pleadings


Plaintiff filed a pro se complaint in the Court of Federal Claims alleging that the Clerk’s Office in the District Court for the Middle District of North Carolina failed to send him documents relating to cases he filed in that district. The district court sua sponte dismissed the complaint for lack of subject matter jurisdiction and imposed an injunction limiting his ability to
file future suits, based on plaintiff’s “extensive history of ‘frivolous litigiousness.’” On appeal, the government moved for summary affirmance, and the Federal Circuit ordered the government to address whether the sanction violated due process, finding it appropriate to raise this issue sua sponte in the context of a pro se action where “‘injustice might otherwise result.’” The circuit affirmed the jurisdictional dismissal but vacated the sanction, making clear that the sanction could be reimposed after providing plaintiff notice and an opportunity to be heard.

Relying on *Chambers v. NASCO*, the court acknowledged the inherent power of federal courts to sanction bad faith conduct, including vexatious litigation. Nevertheless, “access to federal courts is a fundamental right, which cannot be infringed without compliance with due process,” and the Federal Circuit had not squarely “determined whether imposition of an anti-filing injunction must be preceded by notice and an opportunity to be heard.” Although the district court’s injunction permitted plaintiff to file a case if filed by counsel or if he sought leave, the restrictions on his access to the court were still meaningful. Prior warnings from other courts not to file frivolous cases or else face possible restrictions were not sufficient notice because they were not issued by the same court issuing the injunction. Finding due process violated, the circuit vacated the injunction and remanded for further proceedings.

**Amendment**

*Coleman v. United States, 79 F.4th 822 (7th Cir. 2023).*

The case illustrates the role of civil procedural rules in habeas proceedings (civil actions that challenge wrongful detention). The Seventh Circuit clarified that the standard of appellate review for Rule 15(c) decisions is abuse of discretion and reversed the district court’s denial of a motion to relate back an amended pleading. A prisoner (Coleman) pro se moved under 28 U.S.C. § 2255 to vacate his life sentence for conspiring to traffic crack cocaine on the ground that counsel provided ineffective assistance by failing to inform him of the government’s pretrial 21 U.S.C. § 851 Notice of Enhancement. Before the district court ruled on the motion, Coleman moved to amend his pleading under Rule 15(c), seeking to add allegations and specifically arguing counsel was ineffective by failing to object to treating his state cocaine-related convictions as “felony drug offenses” that could serve as a basis for enhancement under federal
law. The district court denied the initial motion and denied leave to amend on the ground that the amendment did not relate back to the initial pleading because they rested on “distinct types of attorney misfeasance” and were “supported by different facts.”

The Seventh Circuit clarified that the standard of review on a relation-back motion is abuse of discretion.

It is well-settled that review of a district court’s disposition of a motion to amend under Rule 15(a) is for an abuse of discretion. * * * But we have been less clear on the appropriate standard of review when a district court decides whether a proposed amendment “relates back” to a pleading under Rule 15(c). Indeed, over six years ago, we made a mental note to “clarify the correct standard in a future case when the matter is properly before the court.” * * * With this issue squarely before us, we make clear that a district court’s disposition of a motion to amend a pleading that turns on the “relation-back” provision of Rule 15(c) is reviewed for an abuse of discretion.

* * * [T]he fact that this issue comes to us via a § 2255 proceeding is of no consequence. Habeas corpus cases under § 2255 are civil cases generally governed by the Federal Rules of Civil Procedure.

Moreover, the critical question is whether the non-movant “would have been on notice of the moving party’s amended claims based on all the relevant circumstance of a particular case,” a decision usually subject to abuse-of-discretion deferential review. The Seventh Circuit then found that even under this deferential standard, the district court abused its discretion. Both the original and the proposed amended complaint alleged ineffective assistance of counsel, and the claims in both were “substantively similar in time and type.” The claims were tied via a “common core of operative facts”; the government could not reasonably have been surprised by the amended claim.
Moore v. Walton, 96 F.4th 616 (3d Cir. 2024).

The case again illustrates the importance of civil procedural rules in challenging prison conditions. The facts further show the difficulties that pro se litigants face. As a matter of first impression, the Third Circuit held that the notice period in Rule 15(c)(1)(C) requiring that a newly named party received notice of an action for relation back is not limited to 90 days but rather includes any extensions granted for good cause under Rule 4(m). Applying that reading, the Third Circuit vacated and remanded the district court’s granting of summary judgment for defendant and denial of plaintiff’s cross motion.

Here are the facts:

After the toilet in plaintiff Troy Moore, Sr.’s prison cell exploded, covering him and the entire cell in human sewage, defendant Correctional Officer Saajida Walton refused to let Moore out of his cell to clean up for over eight hours. Initially proceeding pro se, Moore sued under 42 U.S.C. § 1983, arguing Walton violated his Eighth Amendment rights. However, through no fault of his own, Moore’s original complaint misspelled Walton’s name as “Walden,” and despite the District Court finding “good cause for the delay in service in this case,” Moore was unable to correct the error until well after the statute of limitations on his claim expired.

In granting the summary judgment motion, the district court found “[t]here is no evidence in the record that Walton knew or should have known of this action before the statute of limitations had run,” without considering “whether that notice period incorporates the service extension it previously granted to Moore for good cause under Rule 4(m).” The Third Circuit, holding that “Rule 15(c)(1)(C)’s reference to ‘the period provided by Rule 4(m)’ includes any extensions for service granted under that rule for good cause,” vacated the district court’s order and remanded. Students can consider what issues the district court should address before making its relation-back determination.
Jack v. Evonik Corp., 79 F.4th 547 (5th Cir. 2023).

A homeowner and other residents living near a petrochemical manufacturing facility sued the facility and others to recover damages for injuries allegedly caused by emission of ethylene oxide. Following removal on the basis of diversity jurisdiction, the denial of a motion to remand, the dismissal of the claims against the individual defendants, and the severance of plaintiffs, homeowner filed an amended complaint asserting state-law claims for negligence, battery, and nuisance, seeking survival and wrongful death damages arising from his wife’s pain and suffering and eventual death from breast cancer, as well as damages for his own fear and increased likelihood of development of cancer and other fatal and debilitating diseases. The district court dismissed the negligence claim with prejudice and refused leave to amend without giving reasons. Louisiana law governed the statute of limitations. On appeal, the Fifth Circuit held it was an abuse of discretion to dismiss with prejudice without allowing leave to amend.

The decision shows, first, how the plausible pleading of a claim can affect whether the court has jurisdiction in a diversity action. The district court held that plaintiff improperly joined in-state defendant; under Louisiana law no negligence claim could plausibly be alleged against them. Therefore, their dismissal was correct and the in-state bar on removal did not come into play.

As to the amendments, the district court held that the claims based on the wife’s death were time-barred and that leave to amend should be denied on the emotional harm claim. The timeliness of the claim turned in part of when plaintiff knew or should have known of the cause of his wife’s fatal breast cancer.

[W]e hold that Jack did not act unreasonably when he failed to inquire further into the cause of his wife’s breast cancer * * *. The question is whether a reasonable man with Jack’s education and experience should have suspected —without any indication to the contrary—that the cause was something out of the ordinary. Under the specific facts of this case, the answer is no.

The doctrine of contra non valentem does not allow us to put ourselves, with the benefit of all our information and hindsight, into Jack’s shoes. Nor does it permit
us to opine as to whether a fictional and infallible “reasonable person” would have asked follow-up questions. Jack, who had no connections to the plant, had lived in the same small town all his life, was computer illiterate, and had no medical training, cannot be expected to hunt down answers to a problem when there was absolutely no suggestion, at the time of the diagnosis, that any out-of-the-ordinary problem existed.

Furthermore, breast cancer is an exceedingly common diagnosis. Unlike asbestosis or multiple myeloma, it generally has a mundane cause and is not the kind of diagnosis that puts one on notice of problems in and of itself. And a man who does not work for an allegedly tortious employer cannot be held, with nothing more, to be suspicious of invisible and unknown emissions of surrounding companies or to embark independently on an investigation of the inner workings of an otherwise ordinary plant. We reverse and remand this claim to the district court for further factual development as to when Jack reasonably could have discovered the allegedly tortious cause of his wife's diagnosis and death.

Finally, the Fifth Circuit held it was an abuse of discretion to deny leave to amend the complaint. The record did not show whether plaintiff could show the kind of distress required under Louisiana law for his claim; “[t]herefore, it cannot have been a reason to deny leave to amend.” Nor did the record show undue delay, bad faith or dilatory motive, or undue prejudice to the opposing party. In particular, the district court never gave plaintiff notice of the deficiencies in the original complaint.


The district court dismissed a complaint alleging breach of an insurance contract with prejudice and denied leave to amend. The Tenth Circuit affirmed the dismissal and the denial, but held it was an abuse of discretion to dismiss with prejudice. The decision provides a compact fact pattern for assessing the sufficiency of contract and bad faith claims. It also provides an excellent overview of the steps a party must take when seeking leave to amend—here, all
plaintiff did was include a short paragraph at the end of his response to the motion to dismiss. And the discussion of the prejudice issue highlights the duty of the trial court to give reasons for its decisions. It was not sufficient for the district court to dismiss with prejudice simply by referring to plaintiff’s failure to amend in compliance with the local rules. Remand was needed to determine whether a sanction was justified. A dissenting judge argued that the dismissal with prejudice ought to have been affirmed because the record did not support treating it as a sanction; it was the consequence of plaintiff’s failure “to amend and follow the rules to do so.”

**Rule 15 Amendments and Local Rules**

**Association of American Physicians and Surgeons Educational Foundation v. American Board of Internal Medicine, 103 F.4th 383 (5th Cir. 2024).**

A professional association of physicians sued national medical specialty certifiers and the Secretary of Homeland Security alleging violations of the First Amendment rights of physicians who criticized the pandemic-related mask mandate. The district court found that the association lacked standing and dismissed all claims. Along the way, the district court also denied with prejudice but without explanation the plaintiff’s ability to amend its complaint under Galveston Division Local Rule 6. On appeal, the Fifth Circuit reversed. First, it found that the local rule was not valid for it “impermissibly forecloses repleading via amendment, a routine practice sanctioned under FRCP 15(a).”

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26 That rule provides in pertinent part:

The court will provide parties an opportunity to amend their pleadings once before entertaining a Rule 12(b) motion to dismiss. To advance the case efficiently and minimize the costs of litigation, the court requires a party intending to file a motion to dismiss under Rule 12(b) to confer with opposing counsel concerning the expected motion’s basis. The party seeking dismissal shall further inform the respondent, by letter, of the right to amend the pleadings under these rules and Fed. R. Civ. P. 15(a)(1)(B), specifying that the amended pleading must be filed within 21 days of the date of the letter. This letter functions as “service of a motion under Rule 12(b)” within the meaning of Fed. R. Civ. P. 15(a)(1)(B). Once the motion to dismiss is filed, the non-movant shall not be allowed to amend its pleading until disposition of the motion to dismiss and upon leave from the court.

Galveston Division Local Rule 6 inverts how FRCP 15 operates in practice, demanding amendment “before entertaining a Rule 12(b) motion to dismiss.” Gal Div. Loc. R. 6 (emphasis added). Normally, plaintiffs facing a motion to dismiss go through a process of receiving briefing from the movant, conducting research and submitting opposing briefing to the district court, and finally receiving a ruling identifying potential flaws in their original complaint. Galveston Division Local Rule 6 short circuits that process.

It instead requires plaintiffs to amend their complaint after “conferring with” opposing counsel via letter (a letter which most likely will fail to lay out the full grounds for dismissal), or risk dismissal after the first motion to dismiss battle without being given a chance to amend. Galveston Division Local Rule 6 contradicts FRCP 15(a) and this Circuit’s caselaw which require that leave “be liberally granted,” especially in cases where, like here, the plaintiff seems able to replead to satisfy the 12(b) standard on at least some of its claims.

The Fifth Circuit also found that the district court abused its discretion court by failing to provide meaningful explanation for the denial of the motion, instead merely providing a reference to Local Rule 6 and general statements about “futility, undue delay, and unfair prejudice.”

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

Real Party in Interest under Rule 17


The Argentine branch of the U.S. bank Citibank sued the bank’s former employee who held a judgment against the bank from an Argentine court. The district court granted the branch’s motion for a preliminary injunction compelling arbitration and preventing the employee’s enforcement of the Argentinian judgment, and the Second Circuit reversed and remanded. The circuit court held that the branch did not constitute an independent entity under Argentinian law, and therefore could not be the real party in interest under Federal Rule 17(a)(1). Instead, Citibank itself was the proper party in interest because it was at risk of an injury that was fairly
traceable to the defendant’s conduct and redressable by the requested relief. Citibank, however, did not seek to join the action, so the court reversed and remanded with instructions to dismiss the case for lack of subject matter jurisdiction.

**Joinder of Required Parties under Rule 19**

**PHH Mortg. Corp. v. Old Republic Nat’l Title Ins. Co., 80 F.4th 555 (5th Cir. 2023).**

Plaintiff, the successor in interest to the loan servicer that held a mortgage note secured by a lien on real property, sued a title insurance company for denying a claim under the title insurance policy. Faced with dueling Rule 56 motions, the district court *sua sponte* determined that all parties with an interest in the underlying property were necessary parties under Federal Rule 19(a) and dismissed the case. The Fifth Circuit held that the district court wrongly construed the action as regarding ownership of the underlying property rather than simply an alleged breach of the insurance policy. Thus, third parties with an interest in the property did not satisfy any of the Rule 19(a)(1) factors that require a party to be joined. The Fifth Circuit also noted that the district court erred by ignoring the Rule 19(b) factors that must be considered before dismissing claims due to the absence of a required party, and vacated and remanded for reconsideration.

**Epsilon Energy USA, Inc. v. Chesapeake Appalachia, LLC, 80 F.4th 223 (3d Cir. 2023).**

A natural gas developer that proposed new projects under a joint operating agreement sued the operator of joint natural gas projects for breach of the agreement. The operator moved to dismiss the developer’s claims for a failure under Federal Rule 19 to join the other co-signatories of the agreements establishing the joint projects. The district court denied the motion on the ground that the interests of the absent parties would be advanced by the present parties, and dismissed for a failure to state a claim. The Third Circuit vacated and remanded in part. After a deep dive into Rule 19’s text, history, context, and purpose, the court concluded that
the best reading of Rule 19 settles into three steps: 1) Considering the qualifications under Rule 19(a)(1)(A) and (a)(1)(B), should the absent party be joined?; 2) If so, is joinder feasible—that is, can the party be joined without depriving the court of the ability to hear the case?; 3) If joining the party is not feasible, should the action continue in the party’s absence or be dismissed?

Applying this framework, the court found that the co-signatories were required parties under Rule 19(a)(1) because they had a legally protected interest in the dispute, but joining them was not feasible because it would destroy complete diversity and therefore jurisdiction. The court then held that the district court did not adequately address the third prong, and remanded to the lower court to assess “whether, in equity and good conscience, the action should proceed” as Rule 19(b) requires.

**Continental Indemnity Co. v. BII, Inc., 104 F.4th 630 (7th Cir. 2024).**

A contractor’s insurer won a default judgment against a subcontractor arising from a worker’s injury at a construction site. Wanting to collect, the party added the subcontractor’s insurer as a garnishee. On appeal, among a number of issues, the Seventh Circuit agreed that the district court correctly dismissed for lack of ancillary jurisdiction because the garnishment proceeding was not sufficiently related to the original action. The circuit court also noted that the lower court was within its discretion to decline to exercise diversity jurisdiction over the additional claim because (1) subcontractor’s insurer was not a required party under Rule 19(a), and (2) Rule 20 granted the district court discretion “[to tell the insurer] to bring its (post-judgment) claim in a separate civil action.”

**Permissive Joinder Under Rule 20**

**Ellis v. Werfel, 86 F.4th 1032 (4th Cir. 2023).**

The case marks the interaction between Rule 20 and the Prison Litigation Reform Act (“PLRA”). 28 U.S.C. § 1915(b)(1). Four inmates attempted to bring a joint *pro se* action against the Internal Revenue Service for infringing their due process and equal protection rights by denying COVID-19 stimulus payments because they were incarcerated. The district court acted
sua sponte to sever the prisoners’ claims for misjoinder under Rule 21 because it determined the PLRA, as well as practical considerations, required the claimants to file separately and each pay the filing fee. The Fourth Circuit held that the implicated portion of the PLRA did not apply to the plaintiffs because they were not proceeding in forma pauperis.

The Fourth Circuit also held that the record did not support the district court’s determinations that the named plaintiff was improperly representing the other plaintiffs or that practical considerations supported severing the claims. In fact, the court noted, the record indicated the plaintiffs “lived close to each other; . . . were with each other 24 hours a day; and that they were able to cooperate in their joint efforts.” Accordingly, the court remanded for reconsideration of whether the plaintiffs were properly joined under Rule 20.

Cannon v. Armstrong Containers, Inc., 92 F.4th 688 (7th Cir. 2024).

The decision illustrates the interaction of Rule 20 joinder, case management orders, and preclusion (Chapter 17). Over 160 persons who had ingested white lead carbonate as children were joined under Rule 20(a)(1) in a products liability suit in state court against the paint manufacturers. The action was removed on the basis of diversity jurisdiction. The procedural history is long and complicated. The parties and the district court devised a case management order under which groups of plaintiffs “would try their claims in a series of waves” that would effectively operate as bellwether trials.

Plaintiffs in Wave 1 lost on their negligent failure-to-warn claim and won on a theory of strict liability. Wave 1 plaintiffs appealed. While that appeal was pending, defendants moved for summary judgment against Wave 2 plaintiffs who “concede[d] they do not have surviving claims for negligent failure to warn;” the district court entered summary judgment on that claim. The Seventh Circuit then decided the Wave 1 appeal in favor of defendants; it concluded that the district court correctly dismissed the negligence claim, but erred in not dismissing the strict liability claim, because the duty to warn on both claims was identical. Defendants then renewed their motion for summary judgment against the Wave 2 plaintiffs and also moved against later-enumerated Waves of plaintiffs. The trial court granted summary judgment against all remaining plaintiffs, but on different grounds, and the case returned to the Seventh Circuit.
Wave 2 plaintiffs argued that the district court erred in denying their motion to reconsider introducing evidence about lead dust that arguably affected the duty to warn. The circuit court disagreed. The proffered evidence was not new, but rather was available at the time plaintiffs conceded their negligence claim. Moreover, the intervening appellate decision on strict liability did not mark a “controlling or significant change in the law” with respect to the negligence claim. Rather, counsel made a bad strategic choice:

We recognize that the Wave 2 plaintiffs may have conceded summary judgment to the defendants and elected not to appeal the district court’s ruling on their negligent failure-to-warn claims because they thought they would succeed on their strict liability claims. While that may have seemed a sound strategic decision at the time, the fact that our ruling * * * proved that decision costly does not provide grounds for reconsideration.

Wave 3 plaintiffs argued that the district court erred in granting summary judgment against them on law of the case grounds or issue preclusion. The Seventh Circuit addressed only the former, and found no error.

“The doctrine of law of the case establishes a presumption that a ruling made at one stage of a lawsuit will be adhered to throughout the suit.” * * * The doctrine is discretionary, “not an inflexible dictate.” * * * Generally, however, a party must point to a “good reason” to abandon the court’s earlier ruling. * * * Such “unusual circumstances” justifying departure from the doctrine include (1) substantial new evidence introduced after the first review, (2) an intervening change in the law, and (3) a clearly erroneous decision. * * *

Here, the law of the case doctrine properly applies to the Group 3 plaintiffs because they were part of the same “case” as the Wave 2 plaintiffs and have consistently litigated that way. * * * [They] intentionally decided to join together under Rule 20 and proceed within those two complaints. Thus, when the Wave 2 plaintiffs conceded their negligence claims at summary judgment, that concession on a common issue bound the Group 3 plaintiffs. As the district court correctly
noted: the Group 3 plaintiffs may have their own claims, but they chose to bring those claims within the cases of [the Rule 20 complaint]. *** The district court’s ruling on the common duty question therefore became law of the case that appropriately applied to the Group 3 plaintiffs.

Parties who were not members of these Waves and had filed their own actions—which pursuant to the case management order were stayed pending the earlier trials—argued that it was error to grant summary judgment on the basis of issue preclusion. The Seventh Circuit agreed, and reversed.

Students should consider first: in a diversity action does federal or state law apply to determine the issue preclusive effect of a judgment? Following Semtek, the circuit acknowledged that federal common law governs the preclusive effect of a judgment, but—in diversity cases—“incorporates the rules of preclusion applied by the State in which the rendering court sits.” Wisconsin law applied a two-step analysis to determine whether a nonparty can be issue precluded: whether the nonparty “was in privity or had sufficient identity of interests [with the precluded party] to comport with due process”; whether applying issue preclusion “would be fundamentally fair.” But the Wisconsin court had not addressed the precise issue presented—how its rule of privity would apply in a coordinated personal-injury action, and the district court based its decision on a single case from a Wisconsin intermediate court. Instead, the circuit court looked to Taylor v. Sturgell, finding “close parallels” between the federal common law approach to issue preclusion and Wisconsin state law, and concluding that Wisconsin would indeed follow the federal approach. Finding that the nonparties did not fit into any of the recognized exceptions to nonparty preclusion—they did not agree to be bound, they did not control the litigation, and adequate representation was not shown in the absence of a class—the Seventh Circuit further rejected the argument that the nonparties could be bound on a theory of notice, and reversed. The court further mentioned devices that could be used to promote efficiency while safeguarding nonparty rights, including “treating prior decisions as persuasive absent a showing of cause why the issue should be revisited, or requiring consolidated complaints.”
Improper Joinder under Rule 21 and Statutes of Limitations

Holt v. Cnty. of Orange, 91 F.4th 1013 (9th Cir. 2024).

A mother and her children brought a timely action under 42 U.S.C. § 1983 and state law against Orange County, CA, and several deputy county sheriffs. These parties, together with the grandmother, were then added to an amended complaint in a separate action, and voluntarily dismissed their first action. The district court then dismissed each family member’s claims in the second action with prejudice under Rule 21 for improper joinder. The family then refiled their claims in a separate action; by that time the statute of limitations had run and the district court dismissed the claims as time barred. On appeal, the family argued that the statute of limitations should have been tolled. The Ninth Circuit disagreed; and affirmed the court’s judgment:

Section 1367(d) generally tolls the statute of limitations for federal-law claims filed in the same action as supplemental state-law claims and voluntarily dismissed at the same time as or after the district court acts affirmatively to dismiss the supplemental claims. But the statute of limitations is not tolled when the supplemental claims are voluntarily dismissed, or when the supplemental claims are dismissed for improper joinder.

Nor did equitable tolling save the claims; the circuit held that the district court did not abuse its discretion in finding the mother and grandmother “did not pursue their claims in good faith.”

Impleader


This decision is discussed in connection with Chapter 2. The Second Circuit affirmed that the district court lacked personal jurisdiction over an airline, sued as a third-party defendant, in an action against UPS for breaching duties as a common carrier when a shipment
of vitamins arrived damage at the destination. For purposes of the third-party impleader action, the location of the injury is the location of the original event that caused the injury, which in this case had nothing to do with the forum state. Moreover, the third-party did not consent to jurisdiction. And, finally, the Montreal Convention addressed subject matter and not personal jurisdiction.

**Intervention under Rule 24**

*Bost v. Illinois State Bd. of Elections, 75 F.4th 682 (7th Cir. 2023).*

Voters sued the Illinois Board of Elections alleging that a state policy allowing the counting of mail-in ballots received up to two weeks after Election Day violated federal law. The Democratic Party of Illinois (“DPI”) moved to intervene as of right to defend the policy, the district court denied the motion, and the Seventh Circuit affirmed. In discussing whether DPI’s interests were adequately represented by the Board of Elections, the Seventh Circuit wrote that “when there is no notable relationship between the existing party and the applicant for intervention,” the court typically applies a “lenient” standard—the applicant must show only that representation may be inadequate. However, an “intermediate” standard applies if the applicant and the named party share “the same goal.” And the “strictest” test applies when the existing party is a governmental body with an obligation to represent the interests of the applicant.

In this case, the Seventh Circuit held, first, that the applicant and the existing party did not share the same goal, although their interests did overlap. Thus, the default rule, with its lenient standard, applied. Nevertheless, the DPI failed to show that its interests were not already adequately represented as is needed to justify intervention of right under Rule 24(a). The Seventh Circuit also held that the lower court did not abuse its discretion by denying permissive intervention under Rule 24(b), because it reasonably invoked judicial efficiency, the need to move quickly in an election case, and “DPI’s addition as a party would add little substance.”

*United States ex rel Hernandez v. Team Fin., L.L.C., 80 F.4th 571 (5th Cir. 2023).*

A health care economist sought to intervene under Rule 24(b) in a closed case for the
limited purpose of unsealing readings that he wanted to use in his research. The underlying action was a qui tam action under the False Claims Act involving a group of private equity-owned healthcare entities. In that action, the parties had agreed to protective orders, although they disputed its boundaries, and eventually the case settled, with the district court retaining jurisdiction to enforce the settlement. The district court denied the motion to intervene but the Fifth Circuit reversed and remanded. First, the circuit court found that the district court erred in finding the putative intervenor lacked standing; to the contrary, he asserted an Article III injury from “violations of the public right to access judicial records and to gather news,” and the “individualized harm from ‘being deprived of information that he is uniquely well-qualified to study.’” Second, the district court abused its discretion in holding the putative intervenor lacked a claim or defense under Rule 24(b)(1)(B). Circuit precedent provided that the claim-or-defense portion of the rule is to be interpreted “liberally,” and the challenge fell within the “legal definition of ‘claim’—an ‘interest or remedy recognized at law.’” The claim further shared common questions of law with the district court’s decision to seal the records. Finally, the court held that the lower court abused its discretion by determining that the economist’s motion was not timely, as it wrongly viewed the relevant time period as starting when the economist learned of the case instead of when he learned that the documents would remain sealed when the case concluded. The court remanded for the district court to reconsider the motion to intervene in accordance with these corrections.

**Entergy Arkansas, LLC v. Thomas, 76 F.4th 1069 (8th Cir. 2023).**

An electric utility sued the Arkansas Public Service Commission alleging that the commission violated federal and state law in denying the utility’s request to raise its retail rates. A consumer group moved to intervene as of right under Rule 24(a), and the district court denied the motion. On appeal, the Eighth Circuit affirmed, relying on the presumption that the Commission’s representation of the organization’s interest would be adequate and finding that the putative intervenor did not overcome that presumption by showing that it “stands to gain or lose from the litigation in a way different from the public at large.” Significantly, the Commission conceded that its representation of the public was not adequate, and acknowledged that at prior hearings the absence of the consumer group resulted in a “slanted” presentation in favor of the electric utility. Nevertheless, the Eighth Circuit declined to accept this concession.
“at face value,” emphasizing that the court had a duty to determine whether the requirements of Rule 24(a)(2) were met:

In our view, the Commission’s trial presentation does not evince the sort of “misfeasance or nonfeasance in protecting the public” necessary to overcome the presumption of adequacy. ***. The Commission has maintained throughout this litigation that the lawfulness of its denial must be evaluated solely on the basis of the evidence presented in the administrative proceeding (in which [the consumer group] participated) and that additional evidence before the district court is therefore unnecessary. Whether that legal position ultimately prevails is not our concern at present. What matters now is whether the Commission's principled decision not to call witnesses at trial amounts to “a clear dereliction of duty.”

**Kane Cnty., Utah v. United States, 94 F.4th 1017 (10th Cir. 2024).**

Kane County, Utah sued the United States to quiet title to alleged rights-of-way crossing federal land within the county. A wilderness preservation group sought to intervene as of right in support of the United States. The district court denied the request finding the United States adequately represented its interests, and that even if the requirements of Rule 24(a)(2) were met, Rule 1 provided additional grounds to deny the motion. The Tenth Circuit affirmed in part, reversed in part, and remanded. In particular, the group’s interests in the scope of rights of way sought by the county diverged enough from those of the United State as to establish inadequacy of representation. Further, Rule 1 did not provide a basis for denying intervention; although it recognized that an additional party would cause burdens to the court, “those burdens fall well within the bounds of everyday case management.” The court then remanded the case for reconsideration in light of this correction.
Interpleader

Caballero v. Fuerzas Armadas Revolucionarias de Colom, 2024 WL 2976712 (D. Conn. 2024).

The decision brings together interpleader with a turnover action. Plaintiff sued defendant FARC in Florida district court for its alleged torture and murder of his father, a former United Nations ambassador and critic of narco-trafficking in Colombia, alleging a violation of the Anti-Terrorism Act (the same statute at issue in Waldman and Fuld, discussed above).

The Florida court entered a default judgment for more than $45 million in compensatory damages. To collect, plaintiff registered the Florida judgment in Connecticut district court and then moved for a turnover order against a financial account maintained by a Connecticut-based brokerage firm that belongs to an El Salvadoran oil company. The action was brought under the Terrorism Risk Insurance Act of 2002. Later the brokerage firm sought interpleader relief on the ground that the account was subject to competing claims from other FARC victims, and the district court denied a motion to dismiss that action. The fact that the oil company objected to personal jurisdiction did not make the interpleader action improper. Moreover, although a statutory interpleader claimant ordinarily must deposit the contested funds with the court, the court instead permitted the posting of an unsecured bond of $1,000 because the federal government had blocked the contested account.

The district court then considered and rejected a request from the oil company for relief from the Florida default judgment on the ground that the judgment is void for lack of personal jurisdiction. Such relief is available only when the court "plainly usurped jurisdiction, or, put somewhat differently, when there is a total want of jurisdiction and no arguable basis on which it could have rested a finding that it had jurisdiction." The court first found that the oil company

27 The statute provides in part that any person who “has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, ... the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.” TRIA, § 201(a), Pub. L. 107-297, 116 Stat. 2322 (codified as a note following 28 U.S.C. § 1610).
lacked standing to challenge the exercise of jurisdiction over FARC; personal jurisdiction is a personal right that cannot be challenged by a third-party claimant. But on the merits the court also rejected the challenge: there was “enough evidence to arguably establish FARC’s minimum contacts with the United States in the Florida court” given evidence that the torture and killing of plaintiff’s father “was a necessary component” of FARC’s “overall criminal activity and schema to traffic illicit drugs into South Florida.” As to whether personal jurisdiction could be exercised over the oil company, the court rejected any analogy to Fuld (discussed above). The oil company chose to invest with a Connecticut-based brokerage company, thus purposefully availing itself of the benefits of conducting business in Connecticut and the United States. Nor did Shaffer v. Heitner (Casebook, p. 210) compel a different result: courts have not read that decision to foreclose jurisdiction over a foreign defendant “where the underlying dispute involves a claim of right to property located in the judicial forum,” and, in any event, here jurisdiction was not based on the fortuitous presence of in-state property but rather the oil company’s having “chosen to invest” in the United States.

Chapter 10. Class Actions

Operation of the Class Action Device

DeFries v. Union Pacific Railroad Company, 104 F.4th 1091 (9th Cir. 2024).

The case has a complicated procedural history affecting the key issue: tolling of the statute of limitations under American Pipe when the class definition as certified is narrower than the definition alleged in the original complaint, “especially when the scope of the class definition is disputed and ambiguous as applied” to putative class members. Railroad employees filed a putative class action alleging that the railroad operator administered its fitness-for-duty programs in ways that violated the Americans with Disabilities Act. The motion for class certification narrowed the definition of the class as alleged in the original complaint. On interlocutory appeal, the Eighth Circuit reversed class certification for lack of commonality. A worker who was not a member of the class as certified but would have been a member of the class as defined in the original complaint then filed an individual action alleging disability discrimination. The district court granted summary judgment for the railroad. On appeal, as a matter of first impression, the
Ninth Circuit held “that ambiguity about the scope of a putative or certified class should be resolved in favor of tolling so that bystander members of the class need not rush to file separate actions to protect their rights.” In the absence of Supreme Court guidance, and few cases from other circuits, the decision provides a comprehensive account of the “origins and equities” of American Pipe tolling.

Ending American Pipe tolling with anything short of unambiguous narrowing would undermine the balance contemplated by the Supreme Court. It would encourage putative or certified class members to rush to intervene as individuals or to file individual actions. To preserve their right to pursue their individual claims after a potential narrowing, bystander plaintiffs would have to follow the class action closely, looking for any change in the class definition and carefully parsing what it might mean.

That approach would, of course, often require individual plaintiffs to consult attorneys to ensure that they understand their rights as the class action litigation proceeds. In the many class actions that offer only a small recovery to each class member, such a requirement would quickly become financially unreasonable. If individual claims are large enough to justify counsel for individual suits (as perhaps with many ADA claims over lost jobs), the converse problem might arise: “excluded potential class members may choose to litigate separately, thereby leading to duplicative litigation.” If bystander plaintiffs’ inclusion in the class were even potentially ambiguous, they would need to intervene or file their own individual suits to assert timely claims. Such duplicative filings would “frustrate the principal function” of a class action by encouraging the “unnecessary filing of repetitious papers and motions,” the very “multiplicity of activity which Rule 23 was designed to avoid.” That is why Rule 23 “both permits and encourages class members to rely on the named plaintiffs to press their claims.” Class members have no “duty to take note of” a potential class suit, “or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case” before class notice has been sent.
approach to the end of *American Pipe* tolling thus should allow putative class members to rely passively on class counsel when confronted with ambiguous class definitions so that a class action may continue to function as a “truly representative suit.”

In sum, we conclude that to end *American Pipe* tolling for a particular bystander plaintiff based on a revised class definition, a court must adopt a new definition that “unambiguously” excludes that bystander plaintiff.

In this case, plaintiff “was entitled to tolling as a member of the * * * class until the Eighth Circuit issued the mandate for its decision reversing class certification,” and so his case was timely.


The case discusses the standard for striking class allegations under Federal Rule 12(f). The class suit is by a consumer whose garbage and recycling weren’t picked up. The district court carefully explained the difference between a motion to strike and a motion in opposition to Rule 23 certification. On a motion to strike, plaintiff bears the burden “of advancing a prima facie showing that the class action requirements of [Rule 23] are satisfied or that discovery is likely to product substantiation of the class allegations.” Although “for practical purposes” a motion to strike is the same as a motion in opposition to class certification, there is a critical difference: “the parties have not completed class discovery yet,” and the district court emphasized that “only in ‘rare cases where the complaint itself demonstrates that the requirements for maintain a class action cannot be met’ should a court strike the class allegations at this early stage in the case * * * .” In this case, the district court held that a prima facie showing of commonality was made.

**Settlement**

**Drazen v. Pinto, ___ F.4th ___, 2024 WL 3422404 (11th Cir. July 16, 2024).**

The decision, which runs for more than 100 pages, involves the appeal of a proposed settlement of consolidated class actions against GoDaddy.com, a web-hosting company, for
allegedly violating the Telephone Consumer Protection Act by using an automatic telephone
dialing system. The Eleventh Circuit reversed and vacated the district court’s approval of the
settlement and attorney’s fees. For a 1L class, the important issues are why class notice violated
Rule 23(e) and due process, the court’s fiduciary duty in ensuring the fairness of class action
settlements, and counsel’s duty as officers of the court. There also is an interesting discussion of
why the Class Action Fairness Act applied to the case.

In recounting the facts, the circuit court emphasized counsel’s race against the clock to
get the settlement approved once the Supreme Court granted certiorari in Facebook Inc. v.
Dugid28 to resolve a circuit conflict on whether an autodialer must have capacity to generate
random or sequential phone numbers, essentially the same issue in the GoDaddy challenge. The
Supreme Court granted cert in the Facebook case the same day the Settlement Administrator
emailed court-ordered Rule 23(c)(2) notice to the class. If the GoDaddy proceedings were stayed
pending the Supreme Court merits decision in Facebook, the Facebook decision could affect the
value of GoDaddy class members’ claims, which would affect counsel’s fees. What were
defendants’ incentives in joining plaintiffs’ counsel to have the settlement approved? In any
event, after argument in Facebook, but before the Supreme Court’s decision, the district court
certified the GoDaddy class, approved the settlement, and approved attorney fees, all over the
objection of Pinto, the appellant. The Eleventh Circuit held that the district court abused its
discretion and vacated the judgment. The appellate court also emphasized counsel’s abuse: “As
officers of the court, they should have reminded the District Court that Rule 23(c)(2)(B)(iii)
required that the notice of settlement sent to the class members inform them about Facebook.”

The decision includes a lengthy discussion of the district court’s role as fiduciary to
ensure a settlement is not collusion. The Eleventh Circuit discussed the notice required by both
Rule 23(e) and due process, emphasizing the role of such notice in providing information to the
class needed to assess the proposed settlement and to the court, to enable it “to find that it ‘will
likely be able to approve the proposal.’”

The word “likely” when used in this context means that the information the parties provide the court creates the probability that, by the time the court convenes the Rule 23(e)(2) hearing, it will approve the proposal. In doing so, the court will consider the class members’ responses to the Rule 23(c)(2) notice and any other evidence bearing on whether the proposal is fair, reasonable, and adequate that may not have been before the court when it considered the issue the first time around. Included in such other evidence is the information the court uncovers in its fiduciary role in focusing on the negotiation process that led to the settlement proposal, to preclude the possibility of collusion.

The Eleventh Circuit also read the text of Rule 23(c)(2) referring to the right to be informed of “the claims, issues, or defenses” involved in the action to impose a conjunctive, and not a disjunctive, duty. Here, the notice failed to inform the class about the Facebook issue, which essentially was dispositive of the GoDaddy claims. Turning to the due process question, the court asked:

Can there be any doubt that the District Court’s failure to inform the Class Members denied them due process of law?

The Class Members were entitled to know that if the District Court waited until the Supreme Court decided Facebook before considering whether to approve the Settlement Agreement, the deal would probably have collapsed. That is because if the Supreme Court ruled that a system materially similar to the one GoDaddy used was not an ATDS, the Class Members’ claims would have vanished along with Class Counsel’s anticipated attorney’s fees. On the other hand, if the Supreme Court ruled to the contrary, their claims would have a value well in excess of $35 in cash or a $150 voucher, and so too Class Counsel’s right to attorney’s fees.

As to the court’s role as a fiduciary, the Eleventh Circuit emphasized that when settlement is reached prior to formal class certification, the court’s review is at “an even higher level of scrutiny for evidence of collusion or other conflicts of interest.” In this case, the district
court failed to apply 2018 amendments to Rule 23(e), which were interpreted as not displacing prior factors previously identified by courts, but “rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision.” The court’s treatment of what the appellate court called an overbroad release provision was of particular concern.

The Eleventh Circuit held that the district court abused its discretion in granting attorney’s fees and, in particular, mischaracterized the settlement as creating a common fund rather than a claims-made settlement. Moreover, again rejecting the district court’s analysis, the appeals court held that the Class Action Fairness Act (CAFA) applied, addressing “the novel questions” of what constitutes a coupon settlement and how CAFA’s attorney fee provisions apply. A concurrence would have addressed “only the district courts erroneous determination that this was not a coupon settlement and the related attorney’s fees calculation issue.”

For another appellate decision reviewing the fairness of a class action settlement, including the adequacy of notice, and affirming the settlement, see Employees Retirement System of City of St. Louis v. Jones, No. 23-3512, 2024 WL 659984 (6th Cir. Feb. 16, 2024).

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

Relevance and Proportionality


The unreported decision illustrates the types of analysis a district court is expected to undertake to determine whether discovery is proportional. Plaintiffs are two groups of families in separate product liability actions against manufacturers and retailers of compressed air, which is alleged to impair neurological functioning when huffed and to have led to fatal car accidents involving plaintiffs’ family members. To meet defendants’ argument that they took adequate steps to discourage huffing by including a bitterant in their product, plaintiffs issued subpoenas under Federal Rule 45 to a non-defendant that also manufactured a compressed air product and had discontinued use of bitterant. The district court quashed the subpoenas, and on appeal plaintiffs argued that the district court “based its decision solely on a statement from the firm’s website requesting that persons affected by [the relevant injuries or deaths] contact the attorneys.
Because the potential risk of future litigation is a speculative burden to CRC, Appellants argue that it is an insufficient basis to quash the subpoenas.” Third Circuit vacated and remanded:

In finding that the subpoenas imposed an undue burden on [the nonparty], the District Court relied solely on the future possibility that Appellants’ counsel would successfully solicit more plaintiffs, file additional lawsuits, and subpoena [the nonparty] for depositions “indefinitely.” * * * It did not analyze or balance factors such as the need for the information sought, the costs of compliance, * * * non-party status, whether less burdensome ways to obtain the relevant information are available [footnote omitted], and what impact that may have on relevance and Appellants’ need for the information sought. The District Court’s opinion also cites no case law—and we have found none—demonstrating that the hypothetical risk of responding to future subpoenas alone constitutes an undue burden [footnote omitted]. It may be the case here that the District Court will ultimately conclude that the benefits of the subpoenas do not outweigh the burdens imposed on CRC as a non-party. Given the record before us, however, we find that a more fulsome undue burden analysis is required and that reliance on the website alone was an abuse of discretion.

**Ruiz v. Fiesta Mart, L.L.C., 2023 WL 5031489 (5th Cir. 2023).**

The Fifth Circuit vacated and remanded the district court’s grant of summary judgment for defendant in a slip-and-fall case, finding summary judgment was “premature because the district court’s discovery restrictions stunted [the] ability to adduce a complete record—either substantiating a material fact dispute, or, quite possibly, showing there is not one.” The opening paragraph of this unreported decision refers to the circuit’s prior admonishment in prior cases of this district court for undue discovery restrictions.

This slip-and-fall litigation never got off the ground. The district court refused to allow the plaintiff to conduct sufficient discovery and then granted summary judgment to the defendant. This follows a pattern from this particular
district court. E.g., Bailey v. KS Mgmt. Serv., L.L.C., 35 F.4th 397 (5th Cir. 2022) (per curiam) (district court abused its discretion in denying discovery); Miller v. Sam Houston State Univ., 986 F.3d 880 (5th Cir. 2021) (same); McCoy v. Energy XXI GOM, L.L.C., 695 F. App’x 750 (5th Cir. 2017) (per curiam) (same). Again, we direct the district court to allow the litigants to conduct adequate discovery before entering summary judgment. We vacate the court’s summary judgment and remand.

The action was filed in state court and removed to federal court. Removal set the following court process in motion:

Immediately following removal, the district court entered a “Notice in a Removed or Transferred Case.” The notice directed the parties that “[n]o interrogatories, requests for admission, or depositions may be set without court approval.” The notice further warned that “[f]ailure to comply with [the] order may result in sanctions, including dismissal of the action, assessment of expenses, and prolonged tirades of this court.” The district court then entered an “Order Setting Conference,” during which the district court would “decide motions, narrow issues, inquire about and resolve expected motions, and schedule discovery.”

Prior to the conference, the parties submitted a “Joint Discovery/Case Management Plan,” and Ruiz represented that she intended to propound interrogatories and take depositions. But at the conference, the district court stated that Ruiz would only be allowed to discover a diagram of the store, the user’s manual for the freezer, and bills related to the freezer's maintenance.

“At the end of the day,” the appellate court explained, plaintiff “was never allowed to propound any written discovery, never allowed to subpoena third-party documents, and only granted permission to take two depositions”; further her testimony was regarded as “self-serving” and not sufficient to create a genuine dispute of fact on summary judgment.
Planning for Discovery

For a case involving strict enforcement of the timeliness requirement of the Rule 26(f) conference and disclosure, see Thomas v. Atlanta Public Schools, No. 23-11101, 2024 WL 2992938 (11th Cir. June 14, 2024).

Automatic Disclosure

Santa Clarita Valley Water Agency v. Whittaker Corp., 99 F.4th 458 (9th Cir. 2024).

A regional water supply agency sued a munitions-and-explosives manufacturer for violating federal environmental statutes by contaminating water supplies. After a bench trial, the district court entered a $68 million judgment in favor of the agency. On appeal, the manufacturer argued that the district court erred in permitting the agency to assert restoration costs as the measure of damages after the close of discovery. The manufacturer did not argue that plaintiff had failed to disclose the computation of damages, but that it had failed to disclose the legal theory that entitled it to damages. The argument boiled down to whether the requirement under Rule 26(a)(1)(A)(iii) that a party disclose “a computation of each category of damages claimed by the disclosing party” requires disclosure of legal theories—an issue of first impression for the Ninth Circuit. District courts within the circuit have held that the rule does not require disclosure of legal theories, and the Ninth Circuit agreed:

* * * Rule 26 is a discovery rule intended to ensure that the parties have access to the information that will be used to support a claim or defense. In the operative complaint, [the agency] explicitly requested “payment of all necessary costs of response, removal and remedial action costs, [and] costs of abatement and liability incurred by [the agency] as a result of any release or threatened release of hazardous substances at the [defendant’s] Site ....” [Defendant] Whittaker had access to the computation of damages sought * * * [and] equally had access to the applicable law and facts and could have mounted a defense based upon the damages sought and the evidence that supported the computation of damages. As the district court aptly stated: [defendant] “has not shown that [the agency] is
responsible for failing to alert the defense to a possible defense theory arising under California law.” We agree, and find the district court did not abuse its discretion by permitting [the agency] to assert a legal theory at trial that it did not include in its Rule 26 disclosures.

Students might consider what discovery requests the manufacturer could have propounded for additional information about the agency’s theory of damages.

**Special Problems Regarding the Scope of Discovery**

**Privileges and Work Product—the Extent of Protection**

**Blue Mountains Biodiversity Project v. Jeffries, 99 F.4th 438 (9th Cir. 2024).**

An environmental group sued the United States Forest Service and forest supervisor challenging approval of a project to replace trees infested with rot and beetles with disease-resistant trees. An issue on appeal was whether the district court abused its discretion in declining to order production of a privilege log of documents withheld on the basis of deliberative privilege. For present purposes,29 the case illustrates the role of a privilege log and the scope of judicial review. Whether materials are in fact deliberative is subject to judicial review, and the privilege does not shield from disclosure “any factual information upon which the agency has relied.” A showing of an agency’s bad faith or improper behavior might justify the district court’s production of a privilege log to facilitate review. In this case, however, plaintiff did not assert agency misconduct or contend that “specific documents were improperly classified as deliberative.” The Ninth Circuit affirmed: “Although we leave for another day a detailed exploration of the precise circumstances under which a district court can order the production of a privilege log, the court here did not abuse its discretion by declining to do so in this case.”

29 A significant issue on appeal was the scope of the administrative record.
Expert Information

Cantrell v. Coloplast Corp., 76 F.4th 1113 (8th Cir. 2023).

A patient who suffered injury from the implantation of a surgical mesh device sued the manufacturer for negligent design; California law applied to the dispute and required expert testimony on the issue of causation. The district court found plaintiff’s expert report on causation to be deficient under Federal Rule 26(a)(2)(B)(i) because it failed to set forth reasons for the opinion, and then refused to accept a supplemental report as untimely. In the absence of admissible specific testimony on causation, the district court then granted summary judgment against the patient. The issue on appeal was whether the district court abused its discretion in making these discovery rulings rather than imposing a lesser sanction.

The facts of the case highlight the role of a judge’s scheduling order and the deference that an appellate court gives to a district court’s exercise of managerial authority. Plaintiff timely disclosed; the report included a “three-sentence specific causation analysis”; defendant moved to exclude; plaintiff responded with a supplemental report almost four months after the close of discovery as set out in the court’s discovery schedule. Plaintiff’s reliance on Rule 26(a)(3)(B) that pretrial disclosures “be made at least 30 days before trial” was beside the point; “Rule 26’s default timing provision applies only if the court does not order otherwise. Here, the court set deadlines in its scheduling order, those deadlines superseded the default rules, and [plaintiff] failed to meet those deadlines.” Nor was exclusion of the supplemental report without considering lesser sanctions an abuse of discretion: the supplemental report “was not based on previously unknown or unavailable information,” and the untimeliness caused prejudice “as allowing it would have required reopening discovery. Moreover, under Rule 37(c)(1) exclusion occurred automatically; lesser sanctions may be considered “on a party’s motion,” and plaintiff did not move for an alternative sanction.

Serendipity at Sea, LLC v. Underwriters at Lloyd’s of London, 2024 WL 2830627 (11th Cir. 2024).

In this unreported decision, the Eleventh Circuit affirmed the district court’s denial of plaintiff’s motion to permit disclosure of an expert witness out of time and to reopen discovery
for the limited purpose of deposing that expert. When the court has not set its own timetable for expert disclosure, Rule 26(a)(2)(D)(i) sets a default deadline of at least 90 days before the trial date. “[I]n evaluating whether the exclusion of a late witness was an abuse of discretion, an appellate court should consider the explanation for the failure to disclose the witness, the importance of the testimony, and the prejudice to the opposing party if the witness had been allowed to testify.” Romero v. Drummond Co., 552 F.3d 1303, 1321 (11th Cir. 2008) (cleaned up). We have held that the first and third factors can together outweigh the second.” The appellate court agreed that the failure was neither substantially justified nor harmless. Plaintiff sought to disclose the expert three years late and after defendant’s motion for summary judgment and a month before trial was scheduled. The only excuse given was that plaintiff’s former counsel overlooked the significance of the issue and the next for expert testimony.

Judicial Supervision of Discovery and Sanctions

Asante-Chioke v. Dowdle, 103 F.4th 1126 (5th Cir. 2024).

The decision addresses the scope of discovery in a civil rights action in anticipation of a ruling on qualified immunity at the summary judgment stage. The facts of the case are grim. Police shot and killed Asante-Chioke following a report that a “visibly distressed” person was at an intersection in Jefferson County, Louisiana. “An autopsy revealed thirty-six rounds were fired by the officers. Twenty-four of those rounds hit Asante-Chioke—six gunshot wounds on his right and left arms, eight gunshot wounds on his right and left legs, and ten gunshot wounds on his torso.” The complaint alleged that officers continued “firing their weapons” even after the decedent was “incapacitated, motionless on the ground.” The district court denied a request to limit discovery to the issue of qualified immunity. The Fifth Circuit vacated and remanded, finding that the refusal to limit discovery was tantamount to “the denial of qualified immunity.” As the circuit court explained:

[T]he defense of qualified immunity turns on whether [the police officer] continued using deadly force by firing shots at Asante-Chioke after he became incapacitated. The district court was correct in recognizing that to have continued shooting is a clear violation under this circuit precedent. **But there were
multiple alleged shooters from at least two different law enforcement agencies, thirty-six rounds fired, and a dispute as to whether a single defendant * * * used deadly force after Asante-Chioke became incapacitated. On the present record, it is not known whether [the officer] fired any shots; how many if so; and when, in relation to Asante-Chioke’s actions and death. Through limited discovery, this information may well be discernable. Yet the district court denied Defendants’ request for limited discovery in light of Plaintiff’s issued discovery requests—which include requests for information and documents not limited to the defense of qualified immunity—staying only discovery as to claims against [the officer] and issues regarding his qualified immunity on appeal. * * * [O]ur jurisprudence strongly favors limited discovery in a case like this where a plaintiff alleges facts to overcome the defense of qualified immunity.

Students might consider how they would design the limited discovery to elicit the information needed show the officer’s liability

    Skanska USA Civil Southeast Inc. v. Bagelheads, Inc., 75 F.4th 1290 (11th Cir. 2023).

Hurricane Sally hit Pensacola Bay in 2020. Barges in the bay became unmoored and caused damage. Skanska, the corporate owner of the barges, filed petitions under the Limitation of Liability Act, a federal statute that allows the owner of a maritime vessel to limit its damages in situations in which the owner does not have knowledge of the negligent acts at issue. Among other issues on appeal, the Eleventh Circuit focused on whether the district court abused its discretion in imposing spoliation sanctions against the owner for destruction of cell phone data and awarding fees and costs to the claimants. As a matter of first impression, it held that Rule 37(e)(2)’s reference to “intent to deprive another party of the information’s use in the litigation” is the equivalent of bad faith in other spoliation contexts, and “generally means destruction [of evidence] for the purpose of hiding adverse evidence.” (Alternation and emphasis in original.). The opinion contains a clear explication of the rule:
Rule 37(e) creates a two-tiered sanctions regime—with lesser sanctions under Rule 37(e)(1) and more severe sanctions under Rule 37(e)(2). Both parts of the rule share two preconditions: (1) “electronically stored information that should have been preserved in the anticipation or conduct of litigation” was “lost because a party failed to take reasonable steps to preserve it” and (2) that information “cannot be restored or replaced through additional discovery.” The requirements diverge after that. Rule 37(e)(1) sanctions are centered on the effect of a violation; they apply only where lost electronic evidence causes “prejudice to another party,” which then justifies sanctions “no greater than necessary to cure the prejudice.” Rule 37(e)(2) sanctions, on the other hand, look more to the cause of the violation. They require a finding that “the party acted with the intent to deprive another party of the information’s use in the litigation.” If so, the court is justified in imposing more severe sanctions: adverse jury instructions, and even dismissal or default judgment. Fed. R. Civ. P. 37(e)(2). What’s more, Rule 37(e)(2) sanctions do not require “any further finding of prejudice.” 2015 Committee Notes on Rule 37(e)(2). “This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position.” *Id.*

As to Skanska’s acts, it failed to preserve destroyed cell phones, failed to educate data custodians about preservation, and it represented to the court that no data had been destroyed without checking. The circuit acknowledged that the conduct could plausibly suggest “just” gross negligence and not bad faith, but that “an inference of bad faith ... was not clear error.” Moreover, the advisory committee notes to Rule 37(d) state that the reasonableness of preservation efforts depends in part on the party’s sophistication, and Skanska’s website “boasts … that it is ‘one of the largest, most financially sound construction and development companies in the U.S.’” Further, the circuit rejected Skanska’s argument “that—as a per se rule—a finding of bad faith premised on circumstantial evidence requires an ‘affirmative act’ by the spoliating party,” maintaining that “failures to act can be just as harmful as affirmative acts of destruction.”
In an unreported decision, the Fifth Circuit held it was not an abuse of discretion under Federal Rule 37(c) for the district court to disregard a statement disclosed by plaintiff to defendant more than two years after the parties’ Rule 26(f) conference, well after the expiration of the 14-day window provided under Rule 26(a)(1)(C). The underlying action was a personal injury and negligence suit against United Airlines. At his deposition, plaintiff testified he did not remember details of the accident or even the name of the airline. The same day defendants moved for summary judgment, plaintiff disclosed a statement from another passenger that she saw defendant’s employee push plaintiff’s wheelchair into a wall. The circuit court affirmed the grant of summary judgment and held that the exclusion of the untimely disclosure was not an abuse of discretion.

Calsep A/S v. Dabral, 84 F.4th 304 (5th Cir. 2023).

The district court imposed litigation-ending discovery sanctions and the Fifth Circuit affirmed. The dispute was between a software company and a former employee, now a competitor, alleging that the employee’s company stole the code for plaintiff’s software product. During discovery, defendant—referred to by the circuit court as “the alleged thief”—destroyed electronic evidence, thereby violating several court orders as well as its obligations under the Federal Rules. Plaintiff moved for sanctions at an evidentiary hearing before a magistrate judge; defendant did not contest the deletions, but insisted they caused no prejudice to plaintiff and were not intentional. The district court adopted the magistrate judge’s report finding that defendant “(1) filed false affidavits with the court, (2) purposefully delayed discovery, (3) manipulated data, and (4) deleted electronic evidence from the source code control system,” and recommending entry of a default judgment against defendant and the award of damages and fees to plaintiff. The district court based its sanction decision on Federal Rule 37(b), Federal Rule 37(e), and the court’s inherent powers. Defendant did not object to the magistrate judge’s report. Seven months after the district court entered the default sanction, he moved under Rule 60(b) for relief from the final judgment. The district court denied that motion.
The Fifth Circuit affirmed, recognizing that litigation-ending sanctions “are reserved for the most heinous of scenarios,” and are to be entered only after considering “whether some lesser sanctions would’ve ‘substantially achieve[d] the desired deterrent effect’ without ending the case.” (Alteration in original.) The court emphasized, however, that a detailed consideration of lesser sanctions isn’t required where, as here, a court appropriately concludes that a party’s act was particularly egregious, part of a pattern of repeated violations, and—as evidenced by the wrongdoer’s conduct—there’s some indication that lesser sanctions would be futile or ignored. Here, prior to its ruling, the district court warned [defendant] that this was his last chance to “come clean,” and instructed him to comply with the court’s discovery orders. In the sanctions ruling itself, issued after a hearing, the court emphasized that—given [defendant]’s flagrant violations and the destruction of evidence—this was an “egregious case,” and any lesser of a sanction “would not achieve the desired deterrent effect.” We agree and see no error in the court's analysis.

The district court also did not abuse its discretion in denying the belated motion to reconsider in which defendant claimed that the deleted materials had been located and could be made available to plaintiff. The reviewing court agreed with the district court that defendant did not act with diligence in locating the material, that he knew about the material, and that the material would not have changed the outcome because material was still missing and the sanction order rested “on far more than the portion of destroyed evidence” now proffered. (Emphasis in original.)

Leslie v. Starbucks Corp., 2024 WL 2186232 (2d Cir. 2024).

Unionization efforts at Starbucks have generated a number of high-profile discovery disputes. In this decision, the Second Circuit vacated and remanded the district court’s dismissal as a discovery sanction of a “Section 10(j) petition” by the National Labor Relations Board seeking temporary relief, as authorized by the statutory provision, “when the agency has filed a complaint over alleged unfair labor practice charges but has not obtained a final judgment in the ensuing agency proceedings.” Although the district court did not abuse its discretion in permitting expedited discovery, the subpoenas that it permitted were overbroad, compelling
disclosure of “all emails from the email account sbworkersunited@gmail.com sent since August 2021 [by] any Starbucks employee ... at any Starbucks store [or support for the Union.”

(Alterations in original.) The appeals court vacated rather than reversed:

We note * * * that neither Starbucks nor the agency ably presented its case on these discovery issues—as to Starbucks, the specific need for each category of discovery and the reasons why such discovery was proportional to these needs, and as to the agency, the burdens of producing specific categories, including precisely the reasons why particular requests were unduly burdensome. In sum, we conclude that the district court was not well-situated to conduct the relevant weighing analysis on the record before it. We therefore vacate rather than reverse the district court’s judgments as to the permitted subpoenas, allowing it an opportunity for closer inspection on remand. * * *

Given our conclusion that the permitted subpoenas were overbroad, it follows that the district court’s dismissal of the Section 10(j) petition as a sanction for noncompliance with these subpoenas was in error.

(For other cases involving severe discovery sanctions, see, e.g., Jones v. Riot Hosp. Grp. LLC, 95 F.4th 730 (9th Cir. 2024) (affirming dismissal as a discovery sanction for intentional spoliation of electronically stored information, without a showing of prejudice other than a general inference, as stated in the Advisory Committee Notes to Federal Rule 37(e)(2) “that the opposing party was prejudiced by the loss of information that would have favorited its position,” where plaintiff violated court orders even after monetary sanctions had been imposed); Transamerica Life Ins. Co. v. Arutyunyan, 93 F.4th 1136 (9th Cir. 2024) (affirming default judgment as sanction against insured for discovery violations); Ba v. US Dep’t of Homeland Sec. Off. of Equal Emp. Opportunity & Inclusion, 2024 WL 2103280 (9th Cir. 2024) (affirming dismissal of pro se action as discovery sanction where plaintiff “willfully engaged in evasive conduct at two depositions and refused to comply with the court’s order that he answer questions,” “despite warning that his action could be dismissed”).)
Chapter 12. Case Management

The Operation of Rule 16

Stanley v. Phelon, 2024 WL 1453872 (2d Cir. 2024).

The decision illustrates the interaction of a judge’s individual rules, Federal Rule 16, and Federal Rule 15 with respect to denial of two motions for leave to file a third amended complaint in a case involving claims of employment discrimination on the basis of disability, and later, retaliation and termination. Defendants moved to dismiss the second amended complaint, and while that motion was pending, plaintiff sought leave to file a third amended complaint proposing to add retaliation claims for acts that occurred after the filing of the second amended complaint and then for termination. The district court granted defendants’ motion and denied leave to amend. (On the merits the decision provides an excellent fact pattern for assessing the allegations of a complaint.)

The standard for amending a complaint of course differs on when the amendment is sought. In this case, the judge’s individual rules provide:

If a motion to dismiss is filed, the plaintiff has a right to amend its pleading, pursuant to Federal Rule of Civil Procedure 15(a)(1)(B), within 21 days. If the non-moving party elects not to amend its pleading, no further opportunity to amend will ordinarily be granted, and the motion to dismiss will proceed in the normal course.


The district court denied plaintiff’s first motion to file a third amended complaint alleging retaliation on grounds of delay. The Second Circuit found that the judge’s rule, although it did not state “no amendment will be permitted” after a certain date, nevertheless triggered the good cause requirement of Rule 16(b) rather than the more permissive standard of Rule 15(a)(2). The district court was within its discretion in denying the request: plaintiff “made the request two months after the deadline for amended pleadings, failed to offer any reasons for the delay, and
knew of the additional allegations before the deadline for amended pleadings.” The judge’s rule put plaintiff on notice that amendments would ordinarily not be approved after the deadline to respond to a motion to dismiss. The circuit court further found that denial of the second motion to file a third amended complaint was harmless; the district court relied on the permissive Rule 15 standard, even though the tougher Rule 16 standard applied.

Even though Stanley moved within a month after finding out that Defendants intended to discharge him, Stanley nevertheless failed to demonstrate “good cause” because, as the district court explained, permitting another amended complaint would prejudice Defendants by delaying an already-delayed litigation. [Footnote omitted.] The district court noted that its ruling would not preclude Stanley from filing a future lawsuit based on his termination.

**Building Trade United Pension Trust Fund v. Peter Schwabe, Inc., 2024 WL 808895 (E.D. Wis. 2024).**

A union trust fund alleged that an employer failed to make required contributions in violation of the Employee Retirement Income Security Act of 1974. The fund moved for leave to file a third amended complaint to recover contributions for work that defendant allegedly improperly subcontracted to nonunion subcontractors. The district court denied the request and then denied reconsideration under Federal Rule 54(b), discussing the relation between Rule 15 and Rule 16.

[T]he controlling precedent of the Seventh Circuit provides that district courts are “entitled to apply” the heightened good cause standard of Rule 16(b)(4) when the deadline stated in the scheduling order for amendments has passed. * * * [T]here is no requirement that a separate “good cause amendment” deadline be set or that the parties be specifically warned that amendments after the date set in the scheduling order are subject to the Rule 16(b)(4) standard—that is the clear state of the law. However, if the scheduling order specifically does away with holding parties to the Rule 16(b)(4) standard, then * * * the parties are entitled to rely on the plain language of the scheduling order. Thus, the Pension Fund has failed to
show that a manifest error of law was made by applying Rule 16(b)(4) to its motion for leave to amend.

Moreover, the court explained, in denying the petition it also considered the more permissive standard of Rule 15, and found that amendment at this point in the proceedings would cause prejudicial delay to defendant. The parties at this point had settled portions of their dispute, and although that agreement did not bar plaintiff from filing new claims, the fact of settlement was relevant to whether further amendment should be allowed.

**Medline Industries, Inc. v. York Building Products Co., 2023 WL 9900962 (D. Md. 2023).**

The case involves a construction dispute regarding the failure of an earth retaining wall. The third-party defendant moved for leave to file an amended answer to add a contribution claim against two parties as joint tort-feasors, and the third-party plaintiff opposed. Although leave was sought a year after the close of discovery, three years after the scheduling deadline for amending pleadings, and a few months before the start of trial, the district court granted the motion under both Rule 16(b) and Rule 15(a)(2), finding that good cause was shown—the deadlines could not “reasonably be met despite the party’s diligence” and the party acted with diligence. Here, the contribution claim could not be made until the parties were adjudicated as tort-feasors; once the movant learned of that adjudication, it acted diligently to amend. Nor would more than “little prejudice” accrue to the defendant, for the contribution claims did “not change the nature of the trial,” and no new expert testimony would be needed.

**In re Parish, 81 F.4th 403 (5th Cir. 2023).**

Petitioner was a landfill facing two separate suits: a mass tort claim involving over 500 plaintiffs, and a putative class action arising out of the same course of conduct. The appeal concerned defendant’s mandamus petition challenging the district court’s case management order allowing bellwether trial in the mass action to proceed prior to conclusion of class certification in the separate but related action. As a matter of first impression, the Fifth Circuit rejected the argument that the filing of an action under Rule 23 operates to universally estop all separate but related actions from proceeding to the merits while the certification motion is
pending. The circuit court emphasized that under Louisiana law, which governed the dispute, the judgment in the bellwether trial could not have nonmutual collateral estoppel effect in the class action.

In re Bard IVC Filters Product Liability Litigation, 81 F.4th 897 (9th Cir. 2023).

Consumers filed thousands of products liability actions against a medical device manufacturer, and the cases were consolidated and transferred to multidistrict litigation. Now the lawyers wanted to be paid. The district court ordered establishment of a common fund that assessed recoveries by clients of law firms participating in the MDL. The question on appeal was whether the district court had authority to order assessments against recoveries by clients of law firms in non-MDL cases—“that is, those with claims that were not filed in any court, or were filed in state court, or were filed in federal court after the MDL closed.” The Ninth Circuit affirmed:

We hold that a district court properly exercises its authority to order common benefit fund holdback assessments from claimants’ recoveries in non-MDL cases when (1) counsel for claimants voluntarily consents to the district court's authority by signing, or otherwise entering into, a participation agreement requiring contributions in exchange for access to common benefit work product, (2) that participation agreement is incorporated into a court order, and (3) as a result of entering the participation agreement, counsel receives access to common benefit work product. Because these requirements were met here, we affirm the district court's order denying [the] motion to exempt * * * non-MDL cases from the assessment of common benefit attorney's fees and costs.

James v. Templeton, 2024 WL 1045229 (3d Cir. 2024).

The district court denied defendant’s motion for summary judgment on the basis of “deficient” briefing. Defendant then moved again for summary judgment. On appeal, plaintiff argued that the district court erred when it extended the dispositive motion deadline sua sponte. The Third Circuit rejected this argument, explaining that matters of docket control are within the district court’s discretion and will not be overturned absent a showing of “actual and substantial
prejudice to the complaining party.” Federal Rule 16(b)(4) permits modification of a scheduling order “for good cause and with the judge’s consent,” and case law established that the district court has authority to permit a second summary judgment motion “if good reasons exist.”

We find that good reasons existed here, as the District Court dismissed the first motion for summary judgment without prejudice after finding the initial briefings “deficient” in addressing the main question of due process. * * *

Further, there is no requirement of a formal motion to modify a scheduling order. The Court’s decision to permit a second summary judgment motion and extend the dispositive motions deadline sua sponte was well within its discretion. As James has not clearly demonstrated “actual and substantial” prejudice from the second summary judgment motion—he had and took the second opportunity to oppose summary judgment—we will not interfere with the District Court’s ruling.

**Non-Article III Judicial Personnel**

**I.F.G. Port Holdings, LLC v. Lake Charles Harbor & Terminal District, 82 F.4th 402 (5th Cir. 2023)**

The Fifth Circuit considered the type of consent that is constitutionally necessary for a magistrate judge to pass final judgment on a case. In this case, the magistrate judge failed to disclose a longstanding friendship with the lead opposing counsel. Emphasizing that the issue of consent turned on the factual context, the court remanded for an evidentiary hearing. The court emphasized that consent is the “touchstone” of the constitutionality of magistrate judge jurisdiction.

**Prater v. Department of Corrections, 76 F.4th 184 (3d Cir. 2023).**

The consolidated appeal concerned whether the magistrate judge had jurisdiction to deny in forma pauperis motions or enter final orders in actions brought by state prisoners under 42 U.S.C. § 1983.
The Third Circuit held that the magistrate judge has authority to deny an IFP motion, but the circuits are divided. The governing statute, 28 U.S.C. § 636(b)(1)(A), does not list IFP motions as outside the magistrate judge’s authority, but the statute’s list is treated as illustrative not exclusive. Most courts, however, agree that such a motion is non-dispositive, and the circuit court declined to treat denying an IFP motion without prejudice as the “functional equivalent” of an involuntary dismissal; rather, it is merely a determination of how the case is to proceed.” Nor would this treatment of the motion make its denial immediately appealable under 28 U.S.C. § 1291 for review would first be channeled through the district court.

The Third Circuit also held that consent from later-added defendants could be inferred from their litigation conduct, consistent with Roell v. Withrow, 538 U.S. 580, 582 (2003):

Counsel common to all defendants in each case filed a consent form on behalf of some or all of the initially named defendants. In doing so, counsel was “made aware of the need for consent and the right to refuse it.” * * *. And by signing the form, counsel “voluntarily consent[ed] to have a United States Magistrate Judge conduct any and all further proceedings in the case” pursuant to “the provisions of [§] 636(c)(1),” and forewent the “option” of having the case “assigned to a United States District Judge.” * * * And because in both cases, later-named or later-served defendants were represented by the same counsel * * * we can infer their voluntary consent to magistrate judge jurisdiction.

The court declined to decide whether consent from counsel, rather than the party, would be sufficient in all cases.

Washington v. Kijakazi, 72 F.4th 1029 (9th Cir. 2023).

A pro se claimant challenged the Social Security Administration’s denial of a claim for disability benefits. The question on appeal was whether the claimant had impliedly consented to magistrate judge jurisdiction in a district court that had a specially designated magistrate judge with authority to enter a final order. General Order 05-17 of the District Court for the Western District of Washington, in effect as of 2017, requires certain cases to be automatically referred to
magistrate judges and imposes an opt-out requirement on any party who does not consent to have their case decided by a magistrate judge.\(^3\) Page one of the form in part provided:

Consent to a Magistrate Judge is voluntary. A party may decline consent by signing and emailing this form [to the court]. The form must be received by the court no later than October 1, 2021. Please do not file the form. Each party will be deemed to have knowingly and voluntarily consented to proceed before Magistrate Judge Tsuchida if this form is not returned by October 1, 2021. The identity of the parties consenting or declining consent will not be communicated to any judge.

The claimant did not return that form, and the Ninth Circuit held that the claimant thus “knowingly and voluntarily consented to magistrate judge jurisdiction by failing to return the form that notified him of his rights and by thereafter proceeding with the litigation before the magistrate judge.” In reaching this conclusion, the circuit court relied on Roell and the standard of implied consent deemed sufficient in the bankruptcy context.\(^3\)

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\(^3\) As the court recognized:

Two other general orders for the district court are relevant here: Amended G.O. 01-15\(^3\) and Amended G.O. 02-19. These orders state that the clerk of the court assigns social security cases to a magistrate judge if the “plaintiff timely consents, and if the United States does not timely withdraw consent[.]” See Am. G.O. 01-15 at 2; Am. G.O. 02-19 at 1. As the orders note, the United States had already given its “general” consent to magistrate judge jurisdiction in social security cases. See Am. G.O. 01-15 at 2; Am. G.O. 02-19 at 1. If either party timely declines consent, the case is then reassigned to a district judge. See Am. G.O. 01-15 at 2; Am. G.O. 02-19 at 1–2.

The district court reiterates the same procedure for magistrate judge jurisdiction in Local Magistrate Judge Rule (“MJR”) 13. The rule states that 28 U.S.C. § 636(c), G.O. 05-17, and Amended G.O. 01-15 “shall constitute general notice to all parties in civil cases in [the Western District of Washington]” concerning magistrate judge jurisdiction. See Local Rule MJR 13(b). It notes that “[w]hen a case is direct assigned to a magistrate judge, the clerk of court will provide the parties with a form to decline [c]onsent via the Court's CM/ECF System.” Local Rule MJR 13(c). Like G.O. 05-17, Amended G.O. 1-15, and Amended G.O. 02-19, the rule specifies that if a party declines consent, “the clerk will immediately reassign the case to a district judge by random selection.” \(\text{Id}\).

On the one hand, the form’s language is similar to consent forms in other cases in which pro se plaintiffs have been held to have impliedly consented to magistrate judge jurisdiction. On the other hand, the form differed from the form used in the Eastern District of California, which contains “two boxes, one for consent and one for declination of consent, and instructed each party to select one of the boxes.” The Washington form only provides “that (1) consenting to magistrate judge jurisdiction authorizes the magistrate judge to enter a final entry of judgment; (2) appearing in front of a magistrate judge is voluntary and declination is permitted; and (3) declining consent is concomitant with a request to a district judge to hear the case.” The opt-out approach of General Order 05-17 also seems to deviate from the text of Fed. R. Civ. P. 73 itself, which requires the parties to “file a statement consenting to the referral” before consent becomes effective. The Ninth Circuit has relied on Kijakazi twice in the past year to uphold decisions by magistrate judges whose jurisdiction was based solely on a failure to return the declination-of-consent form.32

For comparison, see Nelson v. Allison, 2023 WL 5183695 (E.D. Cal. 2023), a pro se state prisoner proceeding. Under the local rules, prisoner civil rights suits are randomly assigned only to magistrate judges. If the standard notice form is not returned within thirty days, “the parties may be ordered to show cause why the forms have not been returned to the Clerk.” In this case, defendant did not return the form and was not ordered to show cause, but did file a notice of appearance and filed a reply in support of a motion for judgment on the pleadings. The court declined to find implied consent “[b]ecause defendant was not ordered to show cause or advised that failure to return the completed form would be construed as implied consent.”

Case Management Orders, Pro Se Prisoner Actions, Local Rules

Boyd v. Sheffler, 2024 WL 1342572 (7th Cir. 2024).

In this pro se prisoner action, the parties cross-moved for summary judgment, and the district court denied plaintiff’s motion for partial summary judgment and entered judgment for defendant. On appeal, plaintiff argued the district court erred in denying partial summary

32 Stanfield v. Kijakazi, 2023 WL 4311616 (9th Cir. 2023) and Leigh v. Sacks, 2024 WL 2794612 (9th Cir. 2024).
judgment because defendants admitted allegations in the amended complaint that demonstrated their liability. The Seventh Circuit rejected that argument and affirmed.

[Defendants] adequately denied the allegations in Boyd’s amended complaint. In its local rules, the Central District of Illinois specifies the requirements for an answer to a prisoner's pro se complaint. See Fed. R. Civ. P. 83(a)(1) (empowering district courts to enact local rules that are consistent with federal law and rules of practice). In civil rights cases filed by prisoners, the local rules provide that “defendant[s] need not parse the complaint and respond to it” and must answer only “the issues stated in the Case Management Order accompanying the process and complaint, if such an order is entered.” C.D. Ill. R. 16.3(E)(2). Although Boyd asserts that Sheffler and Smith failed to deny, and thus admitted, the additional facts in his amended complaint, see Fed. R. Civ. P. 8(b)(6), they complied with the local rule by answering only issues the district court identified. Moreover, federal pleading rules allow a general denial, see Fed. R. Civ. P. 8(b)(3), so the form of their answer was proper.

Chapter 13. Adjudication Without Trial or by Special Proceeding

Summary Judgment

First Floor Living LLC v. City of Cleveland, 83 F.4th 445 (6th Cir. 2023), petition for cert. docketed (U.S. 2024).

The dispute involved a constitutional and state law challenge to the notice provided prior to the city’s demolition of plaintiff’s property. The district court denied plaintiff’s Rule 56(d) request for discovery and granted defendant’s motion for summary judgment, and on appeal the Sixth Circuit affirmed. The appellate court typically applies a five-factor test to determine whether the district court abused its discretion in denying discovery, but it acknowledged that

33 The factors are: “(1) when the appellant learned of the issue that is the subject of the desired discovery; (2) whether the desired discovery would have changed the ruling below; (3) how long the discovery period has lasted;
“this is an ill-fitting test ‘when the parties have no opportunity for discovery.’” At the least, discovery would be “prudent” at an early stage in the litigation. Nevertheless, there is no abuse when the discovery is request is supported “by mere ‘general and conclusory statements’ or … fails to include ‘any details or specificity.’” In this case, the court found that the requests were not relevant to the claim challenging whether the city made reasonable efforts to provide notice. The requested documents pertained to such matters as the city’s routine practices in issuing notices; the identities of persons involved in the demolition; and internal communications relating to the demolition. Can the students explain why these documents were not considered relevant to the question of whether notice to plaintiff was constitutionally adequate? An opinion styled as a concurrence/dissent argued that the court lacked sufficient information on summary judgment to decide whether the city’s notice efforts amounted to reasonable efforts to “apprise” the party of “what was going on.”

(For short, mostly unreported, decisions involving appellate review of the district court’s discretion in granting or denial of discovery under Federal Rule 56(d), see Hunt v. Smith, 2024 WL 747238 (3d Cir. Feb. 23, 2024) (denial affirmed where requestor sought discovery after the time period had expired and failed to present evidence through an affidavit or declaration that he “could not present essential facts to oppose the motion” for summary judgment); Alicea v. Cnty. of Cook, 88 F.4th 1209 (7th Cir. 2023) (denial of request affirmed where request failed to explain how additional discovery was necessary to respond to summary judgment motion); First Floor Living LLC v. City of Cleveland, 83 F.4th 445 (6th Cir. 2023), petition for cert. docketed (U.S. 2024) (denial of request affirmed where request failed to explain why information sought was relevant). McKenna v. Dillon Transportation, LLC, 97 F.4th 471 (6th Cir. 2024) (denial of request affirmed because Rule 56(d) not to be used to uncover new claims); McKenna v. Dillon Transportation, LLC, 97 F.4th 471 (6th Cir. 2024) (employee’s request for discovery about new claim was not a proper basis to delay Rule 56 motion); Mattingly v. R.J. Corman R.R. Grp., LLC, 90 F.4th 478 (6th Cir. 2024), petition for cert. docketed (U.S. 26, 2024) (affirmed denial of (4) whether the appellant was dilatory in its discovery efforts; and (5) whether the appellee was responsive to discovery requests.”

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plaintiff’s Rule 56(d) request where motion lacked affidavit and failed to set forth reasons or facts essential to justify request and did not preserve issue).

**Ford v. Anderson Cnty., Texas, 102 F.4th 292 (5th Cir. 2024)**

The case involves the death of a pretrial detainee while in custody of a county jail from complications from Addison’s disease. The estate brought a § 1983 civil rights action for violation of due process and the district court dismissed on summary judgment except for the county, finding that individual defendants were entitled to qualified immunity. The Fifth Circuit reversed as to certain of the defendants finding genuine issues of material fact and vacated the order denying leave to file a third amended complaint. The Fifth Circuit’s decision runs to 62 pages and considers the facts party by party. For example, as to the jail’s treating physician, the court concluded, after reviewing the summary judgment record, that “Plaintiffs have presented facts indicating that Dr. Corley: (1) subjectively knew that Newsome had Addison’s disease—a potentially fatal but eminently treatable condition; and (2) did nothing to treat this chronic illness. A jury considering these facts could find that Dr. Corley violated Newsome’s Fourteenth Amendment rights.”

The facts pertinent to any of the defendants could be adapted in ways suitable for class discussion or a writing exercise, notwithstanding the fact that many 1L students will not yet have studied Constitutional Law.

**Local Rules and Dismissal for Failure to Prosecute**

**Jones v. Meridian Security Insurance Company, 2023 WL 6518145 (5th Cir. 2023).**

This unreported decision illustrates some of the hazards that even represented parties face when defendants remove their actions to federal court. Texas has a local rule that requires local counsel in all cases. In this case, the inability of plaintiffs to timely obtain local counsel resulted

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34 Local Rule 83.10(a) of the Northern District of Texas provides that absent leave of court or an applicable exemption, “local counsel is required in all cases where an attorney appearing in a case does not reside or maintain the attorney's principal office in this district.”
in dismissal of their suit, under Federal Rule 41(b), and because the limitations period had run, operated as a dismissal with prejudice.\textsuperscript{35}

The Fifth Circuit affirmed finding no abuse of discretion, treating the dismissal for noncompliance with a local rule as a dismissal under Rule 41(b), rather than as a failure to prosecute, because the district court had first issued an order directing compliance with the local rule and plaintiffs failed to comply with that order. Moreover, because plaintiffs failed before the district court to specify which claim would be time barred and why, they forfeited arguing that a higher standard of review applied to the dismissal with prejudice. Moreover, even if the argument were preserved, plaintiffs failed to cite authority on appeal for their position.

\textbf{Local Rules and Summary Judgment}

\textit{Rongere v. City of Rockford, 99 F.4th 1095 (7th Cir. 2024).}

Plaintiff sued her municipal employer and the district court granted defendant’s Rule 56 motion, finding, among other things, that although courts ordinarily take the facts in the light most favorable to the nonmovant, in this case plaintiff’s response violated Local Rule 56.1 and so the court deemed admitted several of defendant’s factual statements.\textsuperscript{36} The Seventh Circuit affirmed,

\begin{itemize}
  \item July 15, 2022 – Petition filed in state court
  \item August 19, 2022 – Defendants removed
  \item August 19, 2022 – Electronic Case Filing System notice issued with 14-day warning
  \item Late December 2022 – Plaintiff’s Texas counsel unexpectedly resigned
  \item January 3, 2023 – Plaintiffs filed Notice of Appearance of Louisiana-based counsel
  \item January 4, 2023 – Court ordered plaintiffs no later than January 6, 2023 to file notice of entry of local counsel and that noncompliance will result in sanctions of 250 per day or dismissal of action without prejudice; plaintiffs move for extension of time (the decision does not state the date)
  \item January 9, 2023 – Court denied extension and dismissed action under Rule 41(b) without prejudice, stating should dismissal operate as dismissal with prejudice because, for example of a time bar, “Plaintiff must notify the Court in a timely, appropriately argued, and supported motion for leave to proceed without local counsel”
  \item January 12, 2023 – Plaintiffs filed Designation of Local Counsel and Motion to Vacate
  \item January 19, 2023 – Court denied motion to vacate
  \item February 2, 2023 – Plaintiffs appealed
\end{itemize}

\textsuperscript{36} The rule states, “A response may not set forth any new facts, meaning facts that are not fairly responsive to the asserted fact to which the response is made” N.D. Ill. Loc. R. 56.1(e)(2).
finding no abuse of discretion and emphasizing that district courts may require strict compliance
with their local rules. In the circuit court’s view, plaintiff’s response either included new facts that
were not responsive to defendant’s assertions, or failed to explain how factual disputes that she
did identify would have changed the summary judgment ruling, and so any error by the district
court was harmless.

(To similar effect, see Gordon v. Bibb Cnty. School District, 2023 WL 8253881 (11th Cir.
2023) (no abuse of discretion in deeming facts undisputed because of deficient reply); Malarczyk
v. Lovgren, 2023 WL 8073099 (2d Cir. 2023) (no abuse of discretion granting summary judgment
for defendant in civil rights action where plaintiff, represented by counsel, “did not comply with
Local Rule 56.1 because his Local Rule 56.1 statement failed to admit or deny the Troopers’
proffered facts in ‘matching numbered paragraphs’ and, with respect to the essential material facts,
did not provide citations showing that there was a disputed material fact”). For a decision in which
the circuit court affirmed the district court’s decision not to treat facts as admitted notwithstanding
defendant’s failure to comply with the local rule, see Neuman v. Global Security Solutions, Inc.,
2023 WL 6205966 (2d Cir. 2023).)

Chapter 14. Trial

The Right to a Jury Trial

Richards v. Perttu, 96 F.4th 911 (6th Cir. 2024), petition for cert. docketed by Perttu
v. Richards (U.S. 2024).

A state prisoner brought a civil rights claim against the residential unit manager, alleging
sexual harassment, retaliation, and destruction of property. In the retaliation claim, plaintiff
alleged that defendant blocked him from filing grievances relating to the sexual abuse by ripping
up the documents and destroying them and also threatened to kill him if he persisted with the
grievance. Defendant moved for summary judgment, on the ground that plaintiff failed to
exhaust his administrative remedies as required under the Prison Litigation Reform Act (PLRA).
Plaintiff cross-moved on his First Amendment and Eighth Amendment claims. The motions were
denied because factual issues barred judgment on the exhaustion issue, and a magistrate judge
then held an evidentiary hearing to determine whether plaintiff had exhausted. The magistrate
judge’s report recommended that the district court find by a preponderance of the evidence that plaintiff had failed to exhaust, finding that plaintiff’s witnesses were not credible, and the court adopted the report and dismissed.

On appeal, plaintiff argued, inter alia, that the district court erred by ordering an evidentiary hearing on disputed questions related to exhaustion that are intertwined with the merits; those fact questions should have been heard by a jury. This was a case of first impression for the Sixth Circuit. Ordinarily, a judge can decide disputed facts regarding exhaustion. Although exhaustion is not jurisdictional, the circuit court drew an analogy to disputed questions of fact that establish the court’s diversity jurisdiction. The Sixth Circuit earlier held that the district court may dismiss for an insufficient amount in controversy only “if, from the face of the pleadings, is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed.” But, where the jurisdictional issue “is inextricably bound to the merits of the case,” then the “case should be heard and determined on its merits through regular trial procedure.

We therefore conclude that the Seventh Amendment requires a jury trial when the resolution of the exhaustion issue under the PLRA would also resolve a genuine dispute of material fact regarding the merits of the plaintiff’s substantive case. In doing so, we emphasize that a jury trial is appropriate in these circumstances only if the district court finds that genuine disputes of material fact concerning PLRA exhaustion are “decisive of the merits of the plaintiff’s claim.”

* * * Accordingly, we agree with [plaintiff] that the district court erred when it ordered an evidentiary hearing to settle the disputed facts in question.


A former employee sued his employer under the Americans with Disabilities Act and state law for discrimination and retaliation. The district court entered summary judgment for defendant on some of the claims, struck plaintiff’s jury demand, and after a bench trial, entered judgment for the employer on the retaliation claim. On appeal, the Fourth Circuit held the employee did not have a Seventh Amendment right to a jury trial on his ADA-retaliation claim. The ADA by its terms provides no such right. The circuit court thus turned to the constitutional
test: a two-part inquiry that first compares “the nature of the issues involved and the statutory action” with “18th–century actions prior to the merger of the courts of law and equity,” and then, “more importantly,” whether “the remedy available” is “legal or equitable in nature.” The first inquiry was “inconclusive,” for the Fourth Circuit has held that “similar statutory actions are of the ‘nature’ that ‘could be brought in either courts of law or courts of equity.” As to the remedy, every circuit to have addressed the question has determined that legal damages are not available: “There’s simply no way around it: § 1981a(a)(2) provides legal damages only for specific ADA claims. And ‘ADA retaliation is not on the list.’”

**Rossbach v. Montefiore Med. Ctr., 81 F.4th 124 (2nd Cir. 2023).**

A former employee sued her employer and two employees for sexual harassment and retaliatory discharge. After the district court granted partial summary judgment in favor of defendants, defendants moved to dismiss the remaining claims and for sanctions. Following submission of forensic evidence, the district court determined that the main evidence of harassment were forged text messages. The district court dismissed the remaining claims with prejudice citing its inherent power, Federal Rule 37(e), and 28 U.S.C. § 1927, and imposed a monetary sanction of attorney fees, costs, and expenses incurred by defendant. On appeal, the Second Circuit held that the district court applied the wrong standard in sanctioning counsel and vacated that portion of the judgment; the district court erred by imputing sanctions without an explicit finding of bad faith. The Second Circuit further held that a motion for sanctions, when premised on a party’s fraud on the court or discovery misconduct under Rule 37, does not implicated he Seventh Amendment’s jury trial guarantee, so that resolving the motion “is solely within the purview of the district court as trier of fact,” even where, the “issues raised * * * go to the merits of the case.”

**The Implementation of the Right to Jury Trial in the Federal Courts**

**Kairyz v. S. Pines Trucking, Inc., 75 F.4th 153 (3d Cir. 2023).**

Kairyz sued his former employer for disability discrimination alleging he was wrongfully terminated following a hip surgery. The case went to trial, and the jury found for the employer on claims under the Americans with Disabilities Act, the Age Discrimination in Employment Act,
and the Pennsylvania Human Relations Act, and returned an advisory verdict for the employer on an Employee Retirement Income Security Act (ERISA) claim (plaintiff was not entitled to a jury on the ERISA claim). The district court granted judgment to the employee on the ERISA claim, and the employer appealed, arguing that the court’s decision conflicted with the jury’s factual finding on the other jury-claims. The Third Circuit emphasized that generally a district court must accept the jury’s fact finding when facts are common to both the legal and equitable claims. Thus, in this case, the district court had to accept the jury’s facts common to the ERISA and disability claims. In this case the jury was given only a general verdict form and did not make explicit findings on the ERISA claim; nevertheless, for the court, to diverge from the advisory jury verdict, it was required to determine that the factual findings underlying its contrary conclusion were consistent with facts explicitly or implicitly found by the jury on the common claims. In the end the Third Circuit affirmed the district court’s decision on the ERISA claim, determining that it was not inconsistent with the jury’s binding verdicts on the disability claims.

Waiver of the Jury Right

**Pizza Hut L.L.C. v. Pandya, 79 F.4th 535 (5th Cir. 2023).**

Pizza Hut, as franchisor, sued the franchisee and related entities for breach of contract after terminating franchise agreements and entering into a franchise-transfer agreement. Defendants counterclaimed including for fraud or fraudulent inducement, and demanded a jury trial. The district court granted Pizza Hut’s motion to strike the defendants’ jury demand based on a waiver of its jury trial right in the franchise-transfer agreement. On appeal, the Fifth Circuit, in an issue of first impression, held that for a contractual waiver of the Seventh Amendment right to be invalidated on fraud, the allegations of fraud must be directed specifically at the waiver provision. In this case, the allegations were directed at the transfer agreement as a whole, and, moreover, the record supported the district court’s findings that the waiver was knowing and voluntary.
Selection and Composition of the Jury

Artis v. Santos, 95 F.4th 518 (7th Cir. 2024).

A former city employee brought a § 1983 action against his employer and others alleging retaliation for his refusing to support the campaigns of two political candidates. Plaintiff was a Black man. The jury returned a verdict in the employer’s favor, and plaintiff moved for a new trial and for judgment as a matter of law, which the district court denied. On appeal, plaintiff argued that the district court erroneously denied his for-cause challenge to a prospective juror who wrote on the juror questionnaire: “I don’t agree with the thinking that too many black males are targeted or treated unjustly [sic] because of their color, particularly if the geographical area is primarily black.” The record on appeal did not include the questionnaire, apparently because plaintiff never asked to supplement the record. But the parties agreed that the district court’s opinion accurately reflected this portion of the juror’s statement, and so the circuit court addressed the claim and found no abuse of discretion under a two factor test:

[First,] the court must assess whether a prospective juror manifests a prior belief that is both “material and ‘contestable,’ meaning a rational person could question its accuracy.” * * *

Second, the court must determine “whether the juror is capable of suspending” her material and contestable belief “for the duration of the trial.”

The circuit court concluded that the court through voir dire adequately probed the potential bias and made a credibility determination that credited the juror’s affirmation “that any preconceptions would not affect her judgment.

Fylling v Royal Caribbean Cruises, 91 F.4th 1371 (11th Cir. 2024).

A passenger sued a cruise line for negligence following a trip-and-fall accident during a cruise. The jury found both the cruise line and the passenger to be negligent, that the passenger’s negligence accounted for 90 percent of her damage, and that she suffered $750,000 in non-economic damages; given the passenger’s comparative negligence, it awarded the passenger
$75,000. On appeal, the Eleventh Circuit reversed and remanded for a new trial, finding that the district court abused its discretion when, after learning a prospective juror’s niece worked for defendant, did not adequately investigate whether the juror could impartially discharge her responsibilities. The Eleventh Circuit found that the court’s broad question, “Can you think of any reason why you cannot sit on this jury and render a fair and impartial verdict based on the evidence and the law as I instruct you?” was not sufficient and the failure could not be presumed to be harmless.

Instructions and Verdicts

Sidibe v Sutter Health, 103 F.4th 675(9th Cir. 2024).

Participants in a health plan brought a class action challenge to the plan’s premium rates as a violation of the California Cartwright Act. The Magistrate Judge issued jury instructions, and after a four-week trial the jury entered a verdict in defendant’s favor. On appeal, plaintiffs argued, inter alia, that the district court failed to instruct the jury to consider defendant’s anticompetitive purpose. The Ninth Circuit found that this omission, reading the jury instructions as a whole, misstated the law, gave rise to a presumption of prejudice, and was not harmless error. Defendant failed to show that the jury would have reached the same result if properly instructed. Moreover, even though erroneous instructions would not alone warrant a new trial, the circuit court insisted that the error could not be viewed “in isolation”:

The Ninth Circuit and many of our sister circuits have consistently held that errors in a civil trial must be considered “cumulatively” and that the combined effect of multiple errors “may suffice to warrant a new trial even if each error standing alone may not be prejudicial.” **. Thus, even if the jury understood that it could consider evidence of [defendant’s] anticompetitive purpose, then it was all the more important that Plaintiffs be able to introduce evidence of such purpose. Here, however, Plaintiffs also contend that the district court improperly excluded evidence from before 2006, much of which was offered to show that Sutter’s conduct was motivated by anticompetitive purpose. That is, Plaintiffs argue that the district court not only failed to instruct the jury to consider
[defendant’s] anticompetitive purpose, as required by [law], but it also prevented
the jury from hearing evidence that was highly probative of [defendant’s] purpose
in the first place.

**Challenging Errors: New Trial**

**Marlow v. City of Clarendon, 78 F.4th 410 (8th Cir. 2023)**

The Eighth Circuit affirmed the district court’s denial of plaintiff’s motion for a new trial
on a state whistleblower claim, and affirmed the grant of summary judgment against plaintiff on
his First Amendment claim, finding no abuse of discretion in the district court’s discovery rulings.
In order to win on the state whistleblowing claim, plaintiff had to show “that he suffered an adverse
action because he engaged or intended to engage in an activity protected under the Act and that
such action was unrelated to his own misconduct or poor job performance.” The class might focus
on the standard for ordering a new trial. In this case, plaintiff alleged no juror misconduct; rather
the motion went to the jury’s assessment of the evidence put forward at trial. As the court
explained:

The jury heard [plaintiff] say that he gave the dashcam video to [a Deputy]
to provide [the Deputy] with a “trophy.” See Ark. Code Ann. § 21-1-603(b)(2)
(defining “[g]ood faith” reports under the AWBA to exclude “frivolous”
communications made by a public employee). [Plaintiff] testified otherwise at trial,
but it was up to the jury to determine whether [plaintiff] made a “good faith” report
of a “violation or suspected violation of a law, rule, or regulation.” Id. § 21-1-
603(a)(1). And while [plaintiff] claims that his “intent” is irrelevant under the
AWBA, his argument is contrary to the plain text of the statute. See id. § 21-1-
603(b)(2); id. § 21-1-604(c). Based on the evidence presented at trial, a reasonable
jury could find that Marlow failed to satisfy his burden of proof on his
whistleblower claim.

The circuit court also agreed that the district court’s exclusion of testimony concerning the
misconduct of the officer featured in the video in another matter did not warrant a new trial,
finding that this evidence was not relevant to whether plaintiff was entitled to whistleblower protection.

**Wallace v. Pharma Medica Research, Inc., 78 F.4th 402 (8th Cir. 2023)**

The Eighth Circuit affirmed the district court’s denial of plaintiff’s motion for a new trial. The suit was brought by a drug trial participant who developed hepatitis C and sued the pharmaceutical company under state law for negligence. Among the issues on appeal, plaintiff argued he was prejudiced by discovery violations that should have resulted in striking testimony of defendant’s experts. In particular, plaintiff alleged defendants violated Rule 26(e) in failing to disclose that they sent additional documents to their experts. The problem for plaintiff, according to the circuit court, was his failure to explain how the nondisclosures were prejudicial. After all, one of the experts did not change his testimony after reviewing the nondisclosed documents and so there was no surprise. Although the other expert had one inconsistency, plaintiff did not “show how this difference substantially influenced the jury’s verdict.”

**Younger v. Crowder, 79 F.4th 373 (4th Cir. 2023).**

The decision provides an early application of *Dupree v. Younger*, 598 U.S. 729 (2023), which held that “purely legal issues” resolved at summary judgement are preserved for appeal despite a litigant’s failure to re-raise the issue in a Rule 50 motion. Younger was beaten by three corrections officers, sued various parties involved, and was awarded $700,000 after a jury trial. The defendants appealed, arguing that Younger should not have been able to go to trial in the first place because he had not exhausted his administrative remedies before suing. Crowder, however, did not raise this argument in a Rule 50 motion, which would have barred him from raising it on appeal pre-*Dupree v. Younger*. The Fourth Circuit found that, in this case, the exhaustion issue was a purely legal issue, because the determinative factor (whether the Intelligence and Investigative Division was investigating the attack or not) was not in dispute. Thus, the issue was preserved for appeal even though Crowder had failed to bring the issue up again in a Rule 50 motion.
This decision involved the scope of the *Dupree* rule appeals an award of summary judgment. A motorist sued two police officers for Fourth Amendment violations. Some of the claims proceeded to a jury trial, and the jury’s verdict was largely in favor of the policemen. The motorist appealed the award of partial summary judgment to the police officers and from the jury verdict—not the denial of his summary judgment motion. As such, the Fourth Circuit held, his appellate challenge fell outside *Dupree* and he was not required to make a post-trial motion under Rule 50. The circuit court emphasized:

In *Dupree*, the Court highlighted that some trial court orders can become “unreviewable after final judgment because they are overcome by later developments in the litigation.”

Included in that group of orders are those denying summary judgment on sufficiency-of-the-evidence grounds. If a case that fits into such a circumstance proceeds to trial, the party that seeks to preserve a factual challenge to a summary judgment order must make a post-trial motion under Federal Rule of Civil Procedure 50.

Contending that [plaintiff] did not properly raise his appellate issues concerning the summary judgment order in a post-trial Rule 50 motion, the Policemen maintain here that [plaintiff] is barred from appealing that order, insofar as he raises factual contentions. The Policemen, however, misunderstand *Dupree*. As discussed above, the reviewability and preservation rules at play in *Dupree* (and similar decisions) are applicable only when the appellant is challenging the denial of a summary judgment motion after a trial has been conducted. *Dupree*’s principles do not apply to a party appealing an award of summary judgment.
Chapter 15. Securing and Enforcing Judgments

Preliminary Injunctions and Temporary Restraining Orders

Starbucks Corp. v. McKinney, 144 S.Ct. 1570, 2024 WL 2964141 (2024).

The dispute concerns the ongoing unionization effort at Starbucks. The question before the Court focused on the standard that governs injunctive relief when the National Labor Relations Board (NLRB) seeks to enjoin alleged unfair labor practices. The Court vacated the injunction entered by the district court and affirmed by the Sixth Circuit, holding that although the NLRB is authorized by statute to seek preliminary injunction relief, absent a clear statement from Congress, the traditional four-factor Winter test applies to when relief should issue. The lower courts erred in applying the two-part test of McKinney v. Ozburn-Hessey Logistics, LLC, 875 F.3d 333 (2017), asking whether “there is ‘reasonable cause’ to believe that unfair labor practices have occurred,” and, if reasonable cause is established, “whether injunctive relief is ‘just and proper.’” Students can be asked to consider how the reasonable cause/just and proper standard differs from Winter’s four factor approach.

Baird v. Bonta, 81 F.4th 1036 (9th Cir. 2023).

Gun owners challenged a California law that imposes criminal penalties for unlicensed open carry of guns. The district court denied their motion for a preliminary injunction, and the Ninth Circuit reversed and remanded, finding the district court abused its discretion by failing to consider whether the owners were likely to succeed on the merits or their claim or suffer irreparable injury two of the four Winter factors. The circuit court emphasized that the district court “must consider” all four Winter factors; however, the first factor—likelihood of success on the merits”—is “a threshold inquiry” and “the most important factor,” so that “a ”court need not consider the other factors” if a movant fails to show a likelihood of success on the merits. Moreover, when the government is the nonmovant, the last two factors—balance of equities and the public interest—“merge.”
(For a similar fact pattern, this time challenging a near-ban on assault weapons and large-capacity magazines, see Bevis v. City of Naperville, Illinois, 85 F.4th 1175 (7th Cir. 2023), cert. denied sub nom. Harrel v. Raoul, 144 S.Ct. 2491 (2024). The Seventh Circuit held preliminary injunctive relief was not warranted because plaintiffs failed to show a likelihood of success on the merits because “military weapons lie outside the class of Arms to which the individual right applies.” Circuit Judge Brennan dissented, arguing that the banned firearms and magazines “warrant constitutional protection.”)

**Flathead-Lolo-Bitterroot Citizen Task Force v. Montana, 98 F.4th 1180 (9th Cir. 2024).**

Montana laws authorize recreational wolf and coyote trapping. Environmental groups sued alleging these laws violate the Endangered Species Act by allowing the unlawful “taking” of grizzly bears. The district court granted the groups motion for a preliminary injunction, and on appeal, the Ninth Circuit found no abuse of discretion under the *Winter* factors. Nevertheless, emphasizing that an injunction must be carefully tailored and no broader and no narrower than necessary to redress the injury shown, the circuit court remanded because the injunction was overbroad in two ways: (1) the geographic scope was sweeping, and (2) the injunction prevented Montana from trapping wolves for research, which occurs during the summer and thus does not endanger grizzly bears.

**Frazier v. Prince George’s County, Maryland, 86 F.4th 537 (4th Cir. 2023).**

The case illustrates the duty of the district court under Federal Rule 52(a)(2) to explain its decision denying or granting a preliminary injunction by stating its factual findings and legal conclusions. The suit was brought by pretrial detainees as a proposed class action alleging that a pretrial-release program violated their constitutional rights. (Discussion of the details of the program could be a part of Chapter 3’s study of notice and opportunity to be heard. At the final stage of the program, Pretrial Services decides without the participation of a county judge whether the detainee can be released; the process can take months and updated information is not provided to the detainee.) Eight months after plaintiffs moved for preliminary injunctive relief, the court “took up” the motion in a telephonic hearing, explaining that the delay was “due to the
lack of a factual record,” but he said he would not order discovery because it would be “duplicative” of discovery on the merits. He gave the parties ten days to stipulate to the requisite facts; the parties could not reach agreement. The court then denied the motion without prejudice. “The order stated that the motion was denied ‘for the reasons stated on the record during the [] telephone conference.” Plaintiff then filed an interlocutory appeal. The Court of Appeals held that Federal Rule 52(a) required the district court to explain its reasons for denying the preliminary injunction; moreover, the circuit court held it would decline to exercise its discretion to disregard the district court’s failure to reach the merits because the record was not sufficient to resolve the questions presented.


Twenty states—Tennessee, Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and West Virginia (“States”)—sued the U.S. Department of Education (“DOE”) and various federal officials in the Eastern District of Tennessee, challenging guidance documents indicating the Department would enforce Title IX of the Civil Rights Act to prohibit sexual orientation and gender identity discrimination in educational programs that receive federal assistance. The States requested a preliminary injunction, which the district court granted, and the Sixth Circuit affirmed based on the Winter factors. The Sixth Circuit also rejected challenges to the states’ standing, failure to exhaust administrative remedies, and right to bring a pre-enforcement challenge. Circuit Judge Boggs dissented; he would have vacated the relief for lack of standing.

Book People, Inc. v. Wong, 91 F.4th 318 (5th Cir. 2024).

A group of bookstores and trade associations sued the Texas State Library and Archives Commission and other state officials alleging state legislation (the Restricting Explicit and Adult-Designated Educational Resources Act or “READER”) that requires book vendors that sell books to Texas public schools to issue sexual-content ratings for all books and materials they have sold or ever will sell violates the First Amendment. The bookstores sought preliminary injunctive relief, which the district court granted. Texas appealed.
Under the Winter factors, the Fifth Circuit affirmed the grant of the preliminary injunction as to one party, and vacated it with respect to other defendants and remanded with instructions to dismiss the claims against them. The circuit’s assessment of the State’s interest merged its interest and harm with the public interest:

“‘When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws.’ We agree with the State that it has an interest in protecting children from harmful library materials. But ‘neither [the State] nor the public has any interest in enforcing a regulation that violates federal law.’ Indeed, “[i]njunctions protecting First Amendment freedoms are always in the public interest.” Because Plaintiffs are likely to succeed on the merits of their First Amendment claim, the State and the public won’t be injured by an injunction of a statute that likely violates the First Amendment. [Footnotes omitted; alteration in original.]

**Meinecke v. City of Seattle, 99 F.4th 514 (9th Cir. 2024).**

Plaintiff, a Christian evangelist, sued the Seattle police department and others for civil rights violations, alleging defendants failed to protect him from attendees at an abortion rally and LGBTQ pride event. The district court denied his request for a preliminary injunction and the Ninth Circuit reversed and remanded, finding that the district court could have issued an injunction that would meet Rule 65(d)’s specificity requirement and “provide the ‘fair and precisely drawn notice’ required by Rule 65.”

**Vans, Inc. v. MSCHF Prod. Studio, Inc., 88 F.4th 125 (2d Cir. 2023).**

The decision illustrates the ways in which procedure affects the production of knowledge and creation of art. Vans, a sneaker company, sued MSCHF, a Brooklyn-based art collective, for using its trademark on to parody consumerism and “sneakerhead culture.” Vans sought a TRO

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37 Here is a link to photos of the Vans sneakers and the parody sneakers: [https://1.next.westlaw.com/Link/Document/Blob/I8ca5c740939e11ee9177f7f2f3afbc239.png?originationContext=default]
and preliminary injunction, to stop MSCHF from advertising or selling the parody shoes (MSCHF sold 4,306 pairs of its parody sneakers through on-line marketing in one hour). The district court held the Winter factors were met and granted the relief. On appeal, the Second Circuit affirmed, and rejected MSCHF’s argument that in assessing the likelihood of success factor, it was entitled to First Amendment protection (relying on the Supreme Court’s decision in Jack Daniel’s Properties, Inc. v. VIP Product LLC, 599 U.S. 140 (2023)). The Ninth Circuit rejected MSCHF’s argument that the district court exceeded its discretion in ordering it to place in escrow all of the gross revenues earned from already-completed sales of its parody sneakers. Where a party in a trademark infringement suit has sought an accounting, and Vans did, the district court has authority to issue a prejudgment asset restraint injunction. MSCHF further argued that the district court erred under Rule 65(c) by failing to require VANS to post security or to find, expressly, that a bond was required. The circuit court agreed with Vans that defendant waived this argument by failing to seek a bond determination before the district court, but that it could return to the district court and seek security.


The case illustrates the role of preliminary injunctive relief and the Winter factors in the extradition context, and resolves that under an extradition treaty with Lithuania, the “charging document” for treaty purposes is defined as it is under Federal Rule of Criminal Procedure 58(b)(1). A citizen of Lithuania filed in federal court for habeas relief to prevent federal officials from carrying out his extradition to Lithuania. The district court denied his request for a preliminary injunction, finding he was unlikely to succeed on the merits and did not consider the remaining three factors. The Fourth Circuit reversed and remanded. The circuit court conducted an extensive analysis of the treaty:

[T]he charging document mandate spelled out in Article 8 § 3(b) of the Treaty requires the production of a discrete charging document — that is, the instrument (comparable to an indictment, information, or complaint) that has

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cument&transitionType=DocumentImage&uniqueId=70350d03-0f17-4029-be42-e088bb28ba9a&ppcid=b319254f8f8045038e05a81be04ad7d5&contextData=(sc.UserEnteredCitation).
initiated criminal charges against Vitkus. And, in these circumstances, the Notifications of Suspicion and Suspect Decisions have not initiated criminal charges against Vitkus. As a result, those documents are not “the charging document” required by Article 8 § 3(b), and Vitkus is likely to succeed on the merits of the charging document contention.

Turning to the remaining factors, the circuit court found that “the possibility of irreparable injury ... is evident: [the] appeal will become moot and will be dismissed since the extradition will have been carried out.” Moreover, on balance the public interest weighed in favor of the movant: although the public clearly has an interest in the extradition of persons suspected or charged as criminals, and the Secretary’s “compliance with valid extradition requests “promotes relations between ... countries, and enhances efforts to establish an international rule of law and order,” Lithuania’s extradition request did not satisfy the treaty’s conditions. (Emphasis and alteration in original.)

For other appellate cases applying the Winter factors in a variety of legal contexts, see Insulet Corp. v. EOFlow, Co., 104 F.4th 873 (Fed. Cir. 2024) (in trademark dispute, district court failed to assess statute of limitations in determining likelihood of success); N. D. v. Reykdal, 102 F.4th 982 (9th Cir. 2024) (in class action alleging violation of federal disabilities law, district court abused its discretion in weighing the Winter requirements, ignoring the categorical requirements of federal law and hardship); No on E v. Chiu, 85 F.4th 493 (9th Cir. 2023) (in First Amendment challenge to ordinance requiring disclosure of donors, district court properly denied relief; under the “exacting scrutiny” standard, plaintiffs did not show a likelihood of success on the merits); Pierce v. N. Carolina State Bd. of Elections, 97 F.4th 194 (4th Cir. 2024) (in racial challenge to redistricting plan, court properly denied “mandatory” preliminary injunction and according little weight to evidence of historical discrimination was not clearly erroneous); Baldwin v. Express Oil Change, LLC, 87 F.4th 1292 (11th Cir. 2023) (employee established likelihood of success on claim that geographic reach of restrictive covenant violated the Georgia Restrictive Covenants Act.)
Receiver

**Securities and Exchange Commission v. Barton, 79 F.4th 573 (5th Cir. 2023).**

The decision discusses the various contexts in which receivers are used and the standard for their appointment. The SEC filed an enforcement action against a real estate development company and others based on a $23.7 million Ponzi scheme. The district court in the Northern District of Texas granted the SEC’s motion for appointment of a receiver over all corporations and entities controlled by the developer, and then denied the developer’s motion for a partial stay of certain receivership activities pending his appeal of the appointment. On appeal, the Fifth Circuit vacated the appointment and remanded, explaining that the district court erred in appointing a receiver on the SEC’s prima facie showing of fraud and mismanagement. Instead, it was required to comply with the multi-factor approach set out in *Netsphere, Inc. v. Baron.* By applying the wrong test, the district court failed to address “whether legal and less drastic equitable remedies are inadequate or whether the benefits of the receivership outweigh the burdens on the affected parties.”

**Chapter 16. Appeals**

**AsymaDesign, L.L.C. v. CBL & Associates, Inc., 103 F.4th (7th Cir. 2024).**

When does a defective notice of appeal negate appellate jurisdiction? The Seventh Circuit acknowledged that a non-lawyer’s signature on an organization’s notice of appeal does not negate jurisdiction, but nevertheless dismissed the appeal because even a claims-processing rule “must be enforced when the beneficiary stands on its rights.” In federal court, a pro se party can represent itself, not anyone or anything else. As a result, the notice of appeal on behalf of an LLC could not be signed by its sole member. Although Illinois law permitted any person to represent a corporation, an LLC is not a corporation and further, federal rules govern the procedure in federal court. “The federal rule is clear: only a member of the court’s bar (or a

38 703 F.3d 296 (5th Cir. 2012). The factors are: “1) a clear necessity to protect the defrauded investors’ interest in property, 2) legal and less drastic equitable remedies are inadequate, and 3) the benefits of receivership outweigh the burdens on the affected parties.”
lawyer admitted *pro hac vice*) can represent another person or entity in litigation,” citing *Shady Grove* and *Gasperini*.

But the point of the decision seemed to be the circuit’s educative aim: “to urge all lawyers to read and follow this circuit’s *Practitioner’s Handbook for Appeals* (2020 ed.), which is available on the court’s web site at https://www.ca7.uscourts.gov/rules-procedures/Handbook.pdf,” and especially to adhere to guidelines about type-faces. Stating that the initial brief in this case used a font that is “suited to movie posters and used in the title sequence of the Twilight Zone TV show,” the court explained:

Judges are long-term consumers of lengthy texts. To present an argument to such people, counsel must make the words easy to read and remember. The fonts recommended in our *Handbook* and *Typography for Lawyers* promote the goals of reading, understanding, and remembering. Display faces such as Bodoni or Bernhard Modern wear out judicial eyes after just a few pages and make understanding harder.

We hope that Bernhard Modern has made its last appearance in an appellate brief.

**Stanley v. W. Michigan Univ., 105 F.4th 856 (6th Cir. 2024)**

The threshold question was whether the Sixth Circuit had jurisdiction under § 1291 when the notice of appeal was filed before the district court made its final decision:

On August 7, 2023, the district court dismissed all claims that Stanley brought against Defendants and denied Stanley leave to file an amended complaint. The district court also gave Stanley fourteen days to show cause why the John Doe and Jane Doe defendants should not be dismissed “for failure to timely identify and effect service on them.” * * * Stanley did not respond to the show-cause order. Instead, on September 5, 2023, he filed a notice of appeal. On September 7, the district court dismissed Stanley’s claims against John Doe and Jane Doe without prejudice and entered a final judgment. * * * Thus, Stanley filed a notice of appeal two days before the district court made its “final decision.” * * *
Stanley’s premature notice of appeal does not deprive us of jurisdiction. “A notice of appeal filed too early,” as we explained recently, “ripens when the window to appeal begins.”

On the merits, the case is something of a blockbuster. As a matter of first impression, the Sixth Circuit held that Congress did not have authority under § 5 of the Fourteenth Amendment to abrogate state sovereign immunity for retaliation claims based on a violation of Title I of the Americans with Disabilities Act of 1990. For 1L, the case could be considered as a part of Chapter 4 with supplemental jurisdiction; the court construed dismissal of federal disability claims on sovereign immunity grounds as a dismissal for lack of subject matter jurisdiction, and then held there was no basis to exercise supplemental jurisdiction over state claims. As the appeals court explained:

Not all pretrial dismissals are created equal. “When all federal claims are dismissed before trial, the balance of considerations usually will point to dismissing the state law claims[.]” * * * But when federal claims are dismissed under Federal Rule of Civil Procedure 12(b)(1), “supplemental jurisdiction can never exist” because a Rule 12(b)(1) dismissal indicates “that there never was a valid federal claim.” * * *. That is the case here. The district court did not have jurisdiction to decide Stanley’s state-law claims because “the district court lacked subject matter jurisdiction over any federal issues.”

**The Principle of Finality**

**Noble Prestige Ltd. v. Galle, 83 F.4th 1366 (11th Cir. 2023).**

The decision itself is likely too complex for a 1L class. But the fact pattern can be broken down into discrete problems that highlight issues suitable for 1L concerning litigation funding; the final judgment rule and appeals; the concept of pendent jurisdiction as applied to appeals; and the relation between in personam jurisdiction and equitable relief. Boiled down, plaintiff lent defendant money to pursue litigation. While the litigation was pending, a conservatorship over defendant’s assets was filed in Denver probate court based on defendant’s mental illness. The
conservator resolved the financed litigation and the funds went into the conservatorship estate—and the probate court refused to make payment to plaintiff citing concerns that the loan agreement was not enforceable. In response, plaintiff arbitrated the dispute in Hong Kong and received a favorable arbitral award. Plaintiff then moved to confirm the awards in Florida district court and sought a temporary restraining order barring the transfer of funds up to the amount owed to plaintiff under the arbitral award. The district court entered a TRO and granted defendant’s motion to dismiss in part. On appeal, the Eleventh Circuit recharacterized the TRO as a preliminary injunction, held that it had appellate jurisdiction to review the PI but did not have pendent appellate jurisdiction to review the dismissal order, and further held that because plaintiff’s petition sought legal relief, the district court lacked power to enter a freezing order and was barred under the doctrine of “prior exclusive jurisdiction” from entering relief beyond the scope of its in personam power.

Habelt v. iRhythm Tech., Inc., 83 F.4th 1162 (9th Cir. 2023), petition for cert. docketed (U.S. 2024).

Students may think that the party who files the complaint and whose name appears in the caption is a party to the lawsuit. That’s apparently not always the case under the Private Securities Litigation Reform Act of 1995 and illustrated by this case. Habelt, an investor, filed a putative securities class action. The district court appointed the Public Employees’ Retirement System of Mississippi (PERSM) as lead plaintiff, which filed a first and then second amended complaint. The district court dismissed for failure to state a claim and PERSM did not file any appeal, but Habelt, represented by PERSM’s counsel and his own additional counsel, did. The Ninth Circuit dismissed Habelt’s appeal because Habelt was not a party and as a putative class member he lacked standing to appeal. There were not exceptional circumstances present to confer standing on a non-party, and Habelt failed to invoke the appellate pathway available to him—namely, by moving to intervene in the action.

The dissent argued that Habelt was a party to the action, never withdrew from the action, and remained a party for purposes of appeal. The appointment of lead counsel did not extinguish his party status and he continued to be covered by the allegations of the amended complaints. Nor did he receive any notice that his party status had been terminate. The dissent explained:
I believe due process likely required pre-termination notice, not post-termination notice. But even if I am incorrect, if the district court (or anyone else) had given Habelt post-termination notice that his party status may have been or was terminated, Habelt would have had the opportunity to move to intervene in the district court, individually oppose Defendants’ motion to dismiss, or even file a separate complaint. ** The majority’s holding post facto deprives Habelt of the opportunity to preserve his substantive claims for appellate review, in a manner I believe is inconsistent with due process.

**Departures from the Final Judgment Rule in the Federal Courts**

**In re Grand Jury 2021 Subpoenas, 87 F.4th 229 (4th Cir. 2023).**

*Mohawk* (Casebook, p. 1226) held that appeal after a final judgment usually is sufficient to protect a claim of attorney-client privilege. The Fourth Circuit in this case extended that reasoning to a situation in which an order directs a third party to produce documents that belonged to the party objecting to disclosure, thus foreclosing the option that appeared to be open under *Perlman v. United States*, 247 U.S. 7 (1918). The circuit court stated:

> Of course, we remain cognizant of the fact that, where a privilege interest is concerned, once the cat is out of the bag, there is effectively no perfect remediation. “But deferring review [of privilege interests] until final judgment does not meaningfully reduce the ex ante incentives for full and frank consultations between clients and counsel.” **. Furthermore, other tools likewise guard against particularly injurious outcomes.

Students might consider whether appellate jurisdiction could have been exercised under § 1292.
Chapter 17. The Binding Effect of Prior Decisions: Res Judicata and Collateral Estoppel

Claim and Defense Preclusion

Starlink Logistics, Inc. v. ACC, LLC, 101 F.4th 431 (6th Cir. 2024).

A private landowner filed a citizen suit under the Clean Water Act and other federal statutes alleging that ACC’s improperly closed landfill was polluting its land by discharging fill materials into navigable waters without a permit. The Tennessee Department of Environment and Conservation later finalized a consent order requiring ACC to abate its polluting activities. To simplify, the district court then dismissed the citizen suit, and on appeal the Sixth Circuit considered, inter alia, whether all violations occurring prior to the consent decree were claim precluded. Tennessee law governed the preclusive effect of the consent order.

It provides that a claim that (1) “w[as] or could have been litigated in the former suit” is barred if (2) the former suit involved the same parties, and the prior judgment was (3) “final,” (4) “on the merits,” and (5) “involved the same cause of action” as the current suit. * * * An administrative agreement that was subject to judicial review, such as the 2012 consent order, “is entitled to preclusive effect” if it satisfies the requirements of claim preclusion.

The circuit court found that the claim of discharged fill material could not have been litigated in the consent decree proceeding because neither the Tennessee board nor the reviewing state court had jurisdiction to enforce the permitting requirement under the Clean Water Act. Moreover, the court found that claim preclusion did not bar the private owner from seeking remediation in the form of cleanup of its property, as that form of relief was not made available through the consent order proceedings. A partial dissent argued that because the counts arose from the same facts as the consent order, claim preclusion applied. According to the majority, that condition also addressed whether the suits involved the same cause of action. Whether that claim could have been or was litigated in a prior suit is a separate requirement, and it turns on the “legal possibility” of bringing a claim—which is not possible if the enforcing entity lacked jurisdiction.
Whitfield v. City of New York, 96 F.4th 504 (2d Cir. 2024).

The issue on appeal was the claim preclusive effect of an “Article 78” proceeding on a subsequent § 1983 action. Some background on this special New York administrative procedure is helpful: An Article 78 proceeding is a summary procedure under New York law that differs significantly from a plenary action; for example, the court may not award damages other than those incidental to the primary relief sought. A hybrid Article 78 proceeding enables a state court to choose to address, in a single proceeding, claims that are properly within Article 78 together with those that are not.

In this case, a job applicant sued New York City alleging he was not hired because of his prior criminal conviction and views on state criminal proceedings. He initially sought relief through an Article 78 proceeding, and while the state court action was proceeding, he filed a pro se federal suit in the Southern District of New York. The district court dismissed the complaint on claim preclusion grounds, treating the Article 78 proceeding as hybrid, meaning plaintiff could have received relief in state court on his damages claims.

The Second Circuit reversed. New York law, which governed the preclusive effect of a state court judgment in federal court, applies a transactional test to determine the preclusive effect of a judgment and “doubts should be resolved against imposing preclusion.” Claim preclusion will attach to an Article 78 judgment proceeding “only if it is clear that the state court treated the prior proceeding as one in which plenary relief was available.” The Second Circuit disagreed with the district court’s treatment of the Article 78 proceeding as hybrid; among other things, although plaintiff requested that the court convert his proceeding, the state court did not address the request and repeatedly stated it was “constrained” to consider the claims under the summary procedures. As such, it was error to dismiss the federal complaint on claim preclusion grounds. Circuit Judge Sullivan, concurring in part and dissenting in part, argued that the state court did treat the proceedings as hybrid because it considered constitutional arguments that fall outside of the scope of Article 78.
Bryant v. Chupack, 93 F.4th 1029 (7th Cir. 2024).

Owners of two parcels of real estate in Chicago brought a state court action alleging that the defendant banks attempted to foreclose on land that belonged to other financial institutions. After the state court held that the foreclosure was legal, but before the land had been sold or final judgment entered, the owners filed a parallel action in federal court. The district court dismissed the action under the Rooker-Feldman doctrine, which, simply, permits only the U.S. Supreme Court to review state court judgments in civil suits; hypothetically, the district court also stated that if it had jurisdiction it would dismiss the claims as precluded.

On appeal, after addressing the jurisdictional issue, the circuit court turned to the defense of claim preclusion. Illinois law governed the preclusive effect of the state judgment, and Illinois law “forbids sequential litigation about the same claim (such as who owns a note and mortgage) even when the plaintiff in the second case offers novel arguments.” Thus, the Seventh Circuit held that the plaintiffs were claim precluded in the federal action, even if they presented in the federal court constitutional claims that the state court did not address. The circuit court modified the judgment to reflect a dismissal with prejudice rather than a dismissal for lack of jurisdiction.

Scott v. City of Sherwood, Arkansas, 94 F.4th 778 (8th Cir. 2024).

A property owner filed a § 1983 action against city and city officials alleging that enforcement of city zoning ordinances violated his constitutional rights. He previously had brought a state court action on nearly identical claims that was dismissed on grounds of sovereign immunity. The district court dismissed the federal claims as claim precluded, and the Eighth Circuit affirmed. Arkansas law applied and defines res judicata as “a thing or matter [that] has been definitely and finally settled and determined on its merits by the decision of a court of competent jurisdiction.” (Alteration in original.) The circuit court rejected the argument that the judgment lacked jurisdiction because it was based on sovereign immunity; to the contrary, sovereign immunity is an affirmative defense, although it also has jurisdictional qualities, and the judgment met all of the conditions for claim preclusion: the original suit was “fully contested in good faith and resulted in a dismissal with prejudice, which constitutes a final judgment on the
merits.” The circuit court also affirmed dismissal on issue preclusion grounds, finding that the decision to grant defendants immunity was essential to the judgment.

*Autumn Wind Lending, LLC v. Estate of Siegel, 92 F.4th 630 (6th Cir. 2024).*

A debtor brought an adversary proceeding in bankruptcy court. Autumn Wind Lending, its parent company, was not a party to the proceeding. The parties stipulated to dismiss claims of fraudulent misrepresentation and tortious interference with prejudice. The parent then brought a separate action in district court asserting those claims against the same defendants, and the district court granted defendants’ motion to dismiss the claims on grounds of res judicata.

The Sixth Circuit reversed, relying on the following test for res judicata: “1. A final decision on the merits in the first action by a court of competent jurisdiction; 2. The second action involves the same parties, or their privies, as the first; 3. The second action raises an issue actually litigated or which should have been litigated in the first action; 4. An identity of the causes of action.” The general rule is that a stipulated dismissal with prejudice “operates as a final adjudication on the merits.” Nevertheless, the circuit court held that in this case, the stipulated dismissal satisfied only the first element of the test; it did not answer whether the claim could or should have been litigated, and the court held it was not. First, the issues underlying the claims were decided “without any contestation or litigation and without any judicial action”; they were dismissed “by virtue of the parties’ stipulation.” Second, the debtor should not have litigated the claim in the original action because it was not the proper party to seek damages; the parent was the entity that suffered the injuries from the fraud. Arguably the parent forfeited this argument by not raising it in the district court where it argued only that the bankruptcy court lacked subject matter jurisdiction over the claim. The Sixth Circuit rejected that contention, explaining that “[c]hallenging the subject-matter jurisdiction of the bankruptcy court ‘is merely an argument in support of’ Autumn Wind’s basic position regarding this third element of res judicata.” Indeed, the parent could not have raised the fraud issue in the adversary proceeding because the bankruptcy court “lacks related-to jurisdiction to adjudicate a prepetition dispute” that would have “no conceivable effect on the bankruptcy estate.” The Sixth Circuit then declined to “explore the open question in this circuit of whether a bankruptcy court has supplemental jurisdiction under 28 U.S.C. §1367.”
Sacks v. Texas Southern Univ., 83 F.4th 340 (5th Cir. 2023).

Sacks, a law school professor, filed a § 1983 action against a state university and its employees alleging constructive discharge under Title VII of the Civil Rights Act, retaliation in violation of the Equal Pay Act, and other civil rights violations, and defendants prevailed on all claims. While that suit was pending, the professor resigned from her tenured professorship, and moved for leave to amend the complaint to add a claim for constructive discharge. The district court denied that motion. Sacks then filed a second suit against the same defendants plus a new defendant, Professor Weeden. The district court held that res judicata did not bar the constructive discharge or Equal Pay Act claims, but did bar her contract claims. On appeal, the Fifth Circuit applied the transaction test to affirm the district court’s finding. Wrongs that occurred after the first judgment did not share a common nucleus of fact with claims in the first action; they formed a new cause of action and were not extinguished by claim preclusion. Moreover, Weeden, who was not a party to the first action, nevertheless was in privity with parties in that action, and so was treated as the same party for purposes of claim preclusion:

We have recognized privity in three circumstances: “(1) where the non-party is the successor in interest to a party's interest in property; (2) where the non-party controlled the prior litigation; and (3) where the non-party's interests were adequately represented by a party to the original suit.” * * *

The new party was not a successor in interest and did not control the first case. However, the parties in the first action adequately represented his interests; the original parties employed Weeden, were vicariously liable for his conduct, and were “his virtual representative.”

The Satanic Temple v. City of Belle Plaine, Minnesota, 80 F.4th 864 (8th Cir. 2023).

The City of Belle Plaine, MN designated Veterans Memorial Park as a limited public forum and gave two groups, the Belle Plaine Veterans Club and the Satanic Temple, permits to place monuments there. Before the Satanic Temple installed its monument, the city closed the Park as a limited public forum and terminated both permits. The Satanic Temple sued the city under the federal and state constitution, federal law, and the theory of promissory estoppel. The district court dismissed the constitutional and statutory claims without prejudice and allowed the
claim for promissory estoppel to move forward; a magistrate judge denied plaintiff’s motion to amend the complaint. The Satanic Temple then sued the city a second time reasserting the same claims and adding others. The district court dismissed the suit on res judicata grounds.

On appeal, the Satanic Temple argued that the first action did not result in a final judgment and that the magistrate judge did not have authority to deny the motion to amend the complaint. The Eighth Circuit affirmed the district court, finding that even though a dismissal without prejudice does not by itself have a preclusive effect, the Magistrate Judge’s denial of the temple’s amendments qualified as a final judgement on the merits:

The Satanic Temple conflates a “binding decision on a dispositive motion” with a “final judgment on the merits.” The Magistrate Judge’s denial of the motion to amend did not dispose of any claims in *Satanic Temple I*. Rather, it prevented the Satanic Temple from later reasserting the claims that the district court had already dismissed. * * * So it was not a binding decision on a dispositive motion. Because the Magistrate Judge had the authority to decide the Satanic Temple’s motion to amend its complaint, see § 636(b)(1)(A) * * * the Magistrate Judge properly entered the order here that constitutes the “final judgment on the merits” for res judicata.

**Rivera-Rosario v. LSREF2 Island Holdings, Ltd., Inc., 79 F.4th 1 (1st Cir. 2023).**

LSREF2 Island Holdings (“Island Holdings”) presided over a foreclosure action against Rivera after acquiring his mortgage from First Bank. First Bank had allowed Rivera to sell a portion of his property to Gómez while the foreclosure action was ongoing, but Island Holdings refused to honor this promise and placed that portion of property for sale via auction. The Commonwealth Court of First Instance (in Puerto Rico) held the auction in abeyance and allowed Gómez to intervene in order to argue for his interests, but on appeal the Commonwealth Court of Appeals reversed this decision. While the Court of Appeals’ review was ongoing, Rivera filed a separate civil action seeking tort-based damages; the district court construed the complaint as resting on theories of abuse of process and malicious prosecution, and dismissed both complaints, finding the abuse of process claim to be time-barred and the malicious
prosecution claim to be premature. Rivera moved for reconsideration of the abuse of process claim, but the district court denied the motion; neither the court nor the plaintiff mentioned the malicious prosecution claim. Meanwhile, the Puerto Rico Supreme Court granted Rivera’s motion for a writ of certiorari and reversed the Commonwealth Court of Appeals, prompting Rivera again to raise the malicious prosecution claim in federal district court. Rivera argued that the earlier district court case should have no preclusive effect on the current proceedings because the motion for reconsideration was limited to the abuse of process claim. The district court rejected that argument, and the First Circuit affirmed. The circuit court first decided, following *Semtek*, that Puerto Rico law was not incompatible with federal interests and applied to determine the preclusive effect of the prior judgment.

Under Puerto Rico law as it existed when Rivera commenced the 2020 litigation, a party asserting claim preclusion “must establish three elements: ‘(i) there exists a prior judgment on the merits that is “final and unappealable”; (ii) the prior and current actions share a perfect identity of both “thing” and “cause”; and (iii) the prior and current actions share a perfect identity of the parties and the capacities in which they acted.’ ”

The first judgment claim precluded both claims. Admittedly, the complaint did not allege a malicious prosecution claim, but the district court construed the complaint as setting out two different theories of tort, and dismissed the entire complaint with prejudice. Moreover, plaintiff failed to oppose the court’s consideration of the malicious prosecution claim:

If Rivera disagreed with the district court’s decision to address the malicious prosecution issue, he should have sought to amend or appeal the district court's judgment regarding that claim. This he did not do. Rivera sought reconsideration solely of the dismissal of the abuse of process claim and addressed the malicious prosecution claim only in a footnote, noting that the doctrine “did not apply” to this case. Had Rivera wished to ensure he could bring this claim anew, he should have done more to ensure its dismissal was without prejudice. For example, he could have moved under Federal Rule of Civil Procedure 60 for the district court to amend its judgment to dismiss the malicious prosecution claim without
prejudice, or he could have appealed the district court’s decision. As he did not, we are bound by the prior court’s dismissal with prejudice as a final judgment on the merits.

_Emerald Pointe, LLC v. Taney County Missouri, 78 F.4th 428 (8th Cir. 2023)._  

Taney County, MO, through its Planning Commission, issued a stop-work order that Emerald Pointe cease its development of a gated community until it complied with requirements for certain public improvements. Emerald Pointe brought a state court action against the commission to enjoin the order, and lost. Plaintiff appealed and the Missouri Court of Appeals reversed and remanded and the Circuit Court vacating the stop-order. Plaintiff then filed a § 1983 action in federal court, and later moved to amend its state complaint to add Taney County as a party and to seek damages under § 1983. The Circuit Court denied the motion, and three appeals resulted, eventually resulting in a final judgment that the motion to amend was untimely. The district court dismissed the federal action as claim precluded.

On appeal, Emerald Pointe argued that defendants waived the defense of res judicata by failing to plead it in their answer, and in any event the defense did not apply. The Eighth Circuit disagreed and affirmed the district court’s judgment. On the first argument, the court found that, “though a party asserting res judicata must generally do so in the answer… ‘[a]s long as ‘an affirmative defense is raised in the trial court that does not result in unfair surprise” a failure to do so is not fatal. Further, a court sua sponte may dismiss on grounds of res judicata because it is consistent with the interest in avoiding “unnecessary judicial waste.” On the second argument, the court found that under Missouri law claim preclusion applied because plaintiff could have brought the § 1983 claim in state court.

Missouri requires four identities be met before _res judicata_ can apply: “1) [I]dentity of the thing sued for; 2) identity of the cause of action; 3) identity of the persons and parties to the action; and 4) identity of the quality of the person for or against whom the claim is made.” * * *

* * * Emerald Pointe argues a § 1983 claim could not have been added to the request for judicial review of the stop-work order under Missouri Revised Statute
§ 64.870. Section 64.870 is the exclusive remedy for challenging the issuance of a stop-work order. However, nothing precludes a plaintiff from adding an additional claim to the state court case for judicial review. See Mo. Sup. Ct. R. 55.06(a) ("A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim may join, either as independent or as alternate claims, as many claims, legal or equitable, as the party has against an opposing party."). A Missouri Circuit Court is a court of general jurisdiction. See Mo. Rev. Stat. § 478.070. We find Missouri law permits Emerald Pointe to add a § 1983 claim to the case for judicial review of the order.

Moreover, the identity of “things sued for” was met. Missouri law defined the thing as the claim or cause of action, and focuses on the facts “that form or could form the basis of the previous adjudication.”

The “thing sued for,” or the subject matter, of both cases included a finding that the stop-work order was unconstitutional. * * * Missouri law does not require the first court to have addressed the merits of the claim. Instead, res judicata “applies not only to points and issues upon which the court was required by the pleadings and proof to form an opinion and pronounce judgment, but to every point properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. * * Accordingly, we conclude the “thing sued for” in both cases included a finding that the stop-work order violated the U.S. constitution.

Likewise, the identity of the cause of action was met, even if the elements of the cases were based on different legal theories or plaintiff did not know “specifics of damages when the first suit was filed.”


A patent holder sued a competitor and its parent (ABS) for induced patent infringement, and the district court dismissed on grounds of claim preclusion. The parties had participated in
earlier and multiple patent infringement litigation. On appeal, the Seventh Circuit held that the district court erred in barring the induced infringement claim;

In patent cases, this court applies the general rule that res judicata does not bar the assertion of “new rights acquired during the action which might have been, but which were not, litigated.” * * * Indeed, claim preclusion requires that the claim either was asserted, or could have been asserted, in the prior action. If, for example, the claim did not exist at the time of the earlier action, it could not have been asserted in that action and is not barred by res judicata.

In the first case, the holder did not and could not have brought an inducement claim in the first action, and that claim rested on evidence and elements that went beyond those of direct infringement which was litigated in the earlier action.

**Foss v. Marvic, Inc., 103 F.4th 887 (1st Cir. 2024).**

Foss, a graphic designer, brought multiple lawsuits against Marvic, Inc. alleging the company made unauthorized use of a marketing brochure that she had created. Her first copyright-infringement claim was dismissed with prejudice because the Copyright Office had not yet acted upon her application for a copyright and plaintiff had failed to argue that the dismissal should not have been prejudice. Foss brought a second action against Marvic and three other defendants alleging copyright infringement based on the same facts alleged in her first suit, and the district court dismissed her claims as claim precluded. On appeal, the First Circuit reversed, finding the first action did not result in a “final judgement on the merits” because “a dismissal based exclusively on a failure to allege satisfaction of the registration-related precondition to copyright infringement suits * * * is not a final judgment on the merits for the purposes of claim preclusion,” regardless of how styled by the district court. Nor could the dismissal be characterized as a final judgment entered as a sanction for plaintiff’s litigation-related conduct.

Finally, the First Circuit rejected the argument that under Massachusetts law or Comment n of Section 20 of the Second Restatement of Judgments claim preclusion was appropriate because plaintiff in filing her first action had failed to meet the registration requirement of
Copyright law, thereby causing prejudice to defendants. Without deciding the scope of this rule, the circuit court held that any prejudice suffered by defendants derived only from having to defend the second suit, and not from any potential misrepresentations made in the first suit, thus failing to show why it would be “plainly unfair” not to bar the second suit.

**Smith & Wesson Brands, Inc. v. Attorney General of New Jersey, 105 F.4th 67 (3d Cir. 2024).**

The New Jersey Attorney General issued a subpoena for the production of documents to Smith & Wesson Brands, Inc., a gun manufacturer, pursuant to its authority under the New Jersey Consumer Fraud Act. In response, Smith & Wesson filed a civil rights lawsuit in federal court alleging that the Attorney General’s subpoena violated its constitutional rights. The Attorney General filed a subpoena enforcement action in state court, and the company asserted constitutional counterclaims nearly identical to the claims in the federal action. The federal and state cases proceeded simultaneously, but the state case resolved first, holding for the Attorney General. The federal court then dismissed the pending action on grounds of claim preclusion. On appeal, the Third Circuit affirmed the federal court decision, finding the state court’s order requiring the company to comply with the subpoena had preclusive effect, and that it had a full and fair opportunity to litigate the constitutional claims in state court. The circuit court also rejected the argument that intervening changes in the Supreme Court’s Second Amendment jurisprudence barred application of claim preclusion in this case. Circuit Judge Matey wrote a long dissent, arguing, inter alia, that the state action did not result in a final judgment on the

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39 Comment n provides: “The rule of this Subsection is not an inflexible one. In some instances, the doctrines of estoppel or laches could require the conclusion that it would be plainly unfair to subject the defendant to a second action.” Restatement § 20 cmt. n.

40 New Jersey law, which governed the dispute, provides that claim preclusion requires that

(1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one.
merits, that the subpoena enforcement proceeding was a limited action, and that the state and federal claims did not arise out of the same transaction.

**Defense Preclusion**

**Hughes v. Duncan, 93 F.4th 374 (6th Cir. 2024).**

A former prisoner brought a § 1983 action against members of the Tennessee Board of Parole for violating his due process right to liberty by refusing to give him a timely parole hearing before his scheduled release date. Plaintiff argued that defendants were precluded from raising the affirmative defense of immunity in that action, having failed to raise the defense in the state court action reviewing the administrative parole hearing decision. Relying on Lucky Brand, the circuit court held that claim preclusion does not bar a party “from asserting a defense in a second suit that ‘involves a new claim or cause of action,’” and that whether they do turns on whether the two claims “share a ‘common nucleus of operative facts.’” That test was not satisfied because the prior state action provided only limited review of the parole board’s decisions and defendants could not have raised the immunity defense.

**Issue Preclusion**

**In re Dorand, 95 F.4th 1355 (11th Cir. 2024).**

The facts illustrate the requirement of “necessary” to the judgment as an element of issue preclusion in a case in which the first judgment fails to distinguish between two independent alternative grounds. Creditors obtained a $1.6 million default judgement against Dorand arising from a failed condominium development and attempted to recover the money from his personal retirement account. Dorand filed a claim of exemption in Alabama state court to exclude the retirement account from the funds available for creditors to garnish but the court denied his claim of exemption on the ground that the creditors “‘filed a proper contest to the claim of exemption, making both procedural and substantive challenges.’” Dorand later filed for Chapter 7 bankruptcy and asserted that the retirement account was exempt property of his bankruptcy estate. The bankruptcy court agreed, and the creditors appealed, arguing that the exempt status of the account had been finally decided in the prior state court action. The Eleventh Circuit
disagreed. Alabama law governed the preclusive effect of the prior judgment. In Alabama, “collateral estoppel has four elements: (1) the issue in the present action must be identical to the issue litigated in the prior action; (2) the issue must have been actually litigated in the prior action; (3) the resolution of the issue must have been a necessary part of the prior judgment; and (4) the same parties must be involved in the two actions.” To be sure, the first action denied Dorand’s claim of exemption on the ground that the creditors “filed a proper contest to the claim of exemption, making both procedural and substantive challenges.” But as the Eleventh Circuit explained,

[The court never specified whether it was denying Dorand’s claim of exemption on procedural grounds, substantive grounds, or both. When a “judgment fails to distinguish as to which of two or more independently adequate grounds is the one relied upon, it is impossible to determine with certainty what issues were in fact adjudicated, and the judgment has no preclusive effect.”]

**Dixon-Tribou v. McDonough, 86 F.4th 453 (1st Cir. 2023).**

A former federal employee sued the Department of Veterans Affairs alleging disability discrimination under federal law. The district court entered summary judgment in the VA’s favor, finding the employee had not put forward evidence from which a reasonable juror could infer that the VA’s nondiscriminatory reason for the firing—work dishonesty—was pretextual. One of the issues on appeal concerned whether preclusive effect attached to a decision of U.S. Office of Personnel Management (OPM) granting the employee disability retirement, so that the VA was barred from arguing the termination was on other grounds. The circuit court rejected this argument, finding plaintiff failed to carry her burden; she failed to put forward facts showing what the parties before the OPM “actually litigated,” “instead relying on her own conclusory assertions about what OPM decided and her assumptions about the basis for its decision.”

**Patrick v. City of Chicago, 81 F.4th 730 (7th Cir. 2023).**

An arrestee, after serving five years in pre-trial detention, sued the City of Chicago and the law enforcement officers alleging an unlawful search and seizure, execution of a warrantless home search, and unlawful detention. The district court granted defendants’ motion to dismiss,
fing the search and seizure claim to be collaterally estopped and the other claims time barred or otherwise barred. On appeal, the Seventh Circuit held there was no issue preclusion. In the first action, the court, in screening the complaint, “read it as alleging false arrest,” but dismissed finding the complaint alleged facts that would support a finding of probable cause. In the second action, the complaint focused on the warrantless search of plaintiff’s home and seizure of property.

As the parties acknowledge, the defendants cannot demonstrate collateral estoppel because the [first action] did not resolve whether the warrantless search of Patrick's home and seizure of his property were justified. And even where a warrantless arrest may be proper, officers may not search and seize property inside a home without consent or exigent circumstances. None of those circumstances existed here.

Thus, even if the court in the [first] litigation determined there was probable cause for the alleged false arrest of Patrick, there were no facts to support the warrantless search of Patrick's home and the seizure of his property. The district court erred by finding that Patrick’s unlawful search and seizure claim was collaterally estopped.

Persons Benefitted and Persons Bound by Preclusion

**Santiago-Martínez v. Fundación Damas, Inc.,** 93 F.4th 47 (1st Cir. 2024).

The decision is a helpful application of *Taylor v. Sturgell* and its rejection of “virtual representation” as an exception to the rule against nonparty preclusion. Parents whose child suffered severe and permanent injuries at birth sued the owner of a hospital for medical malpractice under a theory of vicarious liability. The owner moved for summary judgement on the basis of issue preclusion because the parents' theory of liability rested on the question of the hospital’s ownership, which had previously been litigated in 2010 when hospital had filed for bankruptcy and defendant took it over. The district court granted the motion, finding that although the parents were not parties to the earlier bankruptcy proceedings, they were “‘virtually represented’” by medical malpractice creditors who had litigated the issue and shared the same
interest as the parents. On appeal, the First Circuit acknowledged that its precedent recognized a theory of virtual representation as an exception to the rule against nonparty preclusion. Nevertheless, it reversed, explaining that “the Supreme Court explicitly rejected the ‘virtual representation’ theory” in *Taylor v. Sturgell*. Further, the First Circuit held that a mere showing of equivalent interests did not transform the bankruptcy proceedings in a representative suit as the basis for an exception from the mutuality requirement.

**Chapter 18. Alternative Dispute Resolution**

**Arbitration**

*Coinbase, Inc. v. Bielski, 599 U.S. 736, 143 S.Ct. 1915, 216 L.Ed.2d 671 (2023).*

Bielski filed a putative class action in the Northern District of California against Coinbase. Coinbase, relying on a mandatory arbitration clause in its user agreement, moved to compel arbitration, and the district court denied the motion. Coinbase filed an interlocutory appeal under 9 U.S.C. § 16(a) and moved to stay the district court’s proceedings. Following Ninth Circuit precedent in *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (1990), the district court and the Ninth Circuit both refused to stay the district court’s proceedings during the interlocutory appeal. The Supreme Court reversed, abrogating *Britton*, and held in a 5-4 ruling that an interlocutory appeal under 9 U.S.C. § 16(a) divests the district court of its authority over a case and requires an automatic stay of the proceedings. (Footnote 2 nevertheless acknowledges that “matters that are not involved in the appeal,” such as awarding costs or attorney’s fees, may proceed). The majority reasoned that an appeal of an order denying arbitration cuts to a federal court’s authority to hear a case in the first place, such that even if the question of arbitrability were severable from the question of the merits of the case, it would be inappropriate for a district court to continue evaluating the merits during the appeal.

Justice Jackson dissented with Justices Sotomayor, Kagan, and Thomas (in part). The dissent emphasized that other parts of the FAA do provide for mandatory stays on appeal, whereas 9 U.S.C. § 16(a) is silent on the issue. Both the majority and the dissent cited *Wright & Miller* for competing propositions: the majority, for the conclusion that it makes good policy sense to stay proceedings pending an appeal involving questions of arbitrability, and the dissent,
for the “default” provision that stays during interlocutory appeals are generally discretionary. The two opinions also dueled over how to interpret *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam). The majority interpreted the case to represent the sweeping proposition that an appeal automatically divests a district court of control over any aspect of a case “involved in the appeal,” with the dissent suggesting that *Griggs* would only prevent a district court from modifying its order denying arbitration while that same order was being reviewed on appeal, without divesting the trial court of authority over other aspects of a case. The dissent also argued that the majority’s holding effectively creates an automatic stay requirement for appeals regarding arbitrability despite no such requirement existing for other disputes regarding the proper adjudicator for a case — such as disputes over jurisdiction, venue, forum selection clauses, or *forum non conveniens*.

**Smith v. Spizzirri, 601 U.S. 472, 144 S. Ct. 1173 (2024).**

9 U.S.C. § 3 states that, upon an application by a party, a court “shall” stay its proceedings pending arbitration. Plaintiffs filed a suit alleging violations of federal and state labor laws in Arizona state court. Defendants removed to federal court and moved to compel arbitration. Despite a request from plaintiffs that the district court stay its proceedings rather than dismiss the case outright pending arbitration, the district court followed Ninth Circuit precedent and concluded it had discretion to dismiss the case where “all claims raised are subject to arbitration.” *Johnmohammadi v. Bloomingdale’s, Inc.*, 755 F.3d 1072, 1074 (9th Cir. 2014). In a unanimous holding, the Supreme Court reversed, holding that the plain text of 9 U.S.C. § 3 requires a district court to stay its proceedings rather than dismissing a case. Justice Sotomayor’s opinion also emphasized that such a holding preserves some supervisory role for federal courts over ongoing disputes in arbitration.

**Coinbase v. Suski, 602 U.S. ___, 144 S.Ct. 1186 (2024).**

David Suski was subject to two different contracts with Coinbase: a user agreement containing a mandatory arbitration clause (which would also send to an arbitrator questions of arbitrability), and the official rules of a sweepstakes promotion, which instead included a forum selection clause sending disputes to California courts. When Suski sought to file a class action
lawsuit in the Northern District of California alleging that the sweepstakes violated state law, a question was therefore raised regarding which of the two contracts controlled. The Supreme Court, framing the problem as one of interpreting what the parties have in fact agreed to arbitrate, determined that the question is one of ordinary contract law to be settled by a court in the first instance. Because the issue is one of state law, a court confronted with two contracts containing different provisions must determine which one governs under the law of the state in which it sits. Justice Gorsuch concurred, agreeing with the basic premise that arbitration agreements are a matter of contract, but appearing to entertain that in some cases, the mere existence of two competing contracts would not be sufficient to send a case to court for resolution (as where an unamended “master contract” requires arbitration of all disputes arising out of subsidiary agreements).

**Bissonnette v. LePage Bakeries Park St., LLC, 601 U.S. 246, 144 S.Ct. 905, 218 L.Ed.2d 204 (2024).**

Under 9 U.S.C. § 1, “seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” are exempt from the Federal Arbitration Act. Plaintiffs were regional distributors of baked goods who filed a putative class action in district court alleging violations of state and federal labor laws. The district court granted a motion to compel arbitration on the grounds that plaintiffs had broader responsibilities than acting only as truck drivers, and the Second Circuit affirmed, on the different ground that the FAA exemption applied only to employees in the transportation industry. In a unanimous opinion authored by Chief Justice Roberts, the Supreme Court held that working for a transportation company was not a predicate requirement for an employee to claim that they are a “worker engaged in foreign or interstate commerce,” though still requiring that a worker “play a direct and necessary role in the free flow of goods across borders” to qualify. *Southwest Airlines Co. v. Saxon*, 596 U.S. 450 (2022) (internal quotation marks removed).

**Coatney v. Ancestry.com DNA, LLC, 93 F.4th 1014 (7th Cir. 2024).**

The case combines questions of consent to arbitrate with capacity in an interesting fact pattern concerning DNA testing. A group of children sued Ancestry.com for violating their
privacy rights by disclosing their genetic information to Ancestry’s new owner, Blackstone, Inc. Only adults are allowed to purchase and activate Ancestry DNA test kits, which require agreeing to binding arbitration and waiver of class actions. The children’s parents or guardians purchased their kits and submitted their saliva to Ancestry’s processing centers, in accordance with Ancestry’s rules. The children did not read the Terms and Conditions, which contained the clauses at issue. The district court held that the plaintiff-children did not assent to the Terms by using Ancestry’s services and that equitable principles did not bind plaintiffs to the terms. On appeal Ancestry argued that the children-plaintiffs are “closely related” parties to their guardians (or even third-party beneficiaries) and as such should be bound. The Seventh Circuit rejected that argument; the children were not parties to the agreement, closely related parties, or third-party beneficiaries and as such could not be bound to the terms.

**Lennar Homes of Texas Inc. v. Rafiei, 687 S.W.3d 726 (Tex. 2024).**

Rafiei purchased a home subject to an arbitration agreement that included a provision subjecting issues of arbitrability to arbitration. After he was injured by a garbage disposal explosion, he sued in state court, arguing that the arbitration agreement was unconscionable because the costs of arbitration would essentially prohibit him from pursuing his claims. Lennar moved to compel arbitration, and the trial court denied the motion with an appellate court affirming. However, the Supreme Court of Texas reversed in a per curiam opinion. Rafiei had provided evidence that arbitrating the merits of the case would be cost prohibitive, but this determination was a threshold one of arbitrability that should have been made by an arbitrator under the agreement. This did not absolutely foreclose Rafiei from showing that the arbitration-of-arbitrability clause was itself unconscionable, but to do so, he needed to show that even arbitrating the limited threshold issue would have been so costly that it would have foreclosed his ability to vindicate his claims. In addition, Rafiei had failed to provide any evidence of costs he would face during litigation or sufficient proof of his inability to pay arbitration fees.

**Ponkey v. LLR, Inc., 2023 WL 4863296 (9th Cir. 2023).**

This unreported decision marks a successful challenge to a mandatory arbitration clause in a leasing agreement as unconscionable as a matter of California law. The clause was written in
plain language in a contract of adhesion. The contract also included a confidentiality provision that would limit informal discovery, a waiver of statutorily authorized recovery of attorney’s fees, and a selective application of the mandatory arbitration requirement to claims and arguments that were more likely to be brought by plaintiff than defendant. California applies “a sliding scale approach in assessing unconscionability; where a contract is more substantively oppressive, less evidence of procedural unconscionability is necessary, and vice versa.” Boiled down, the Ninth Circuit in a short opinion held that the clause had a low level of procedural unconscionability, but significant substantive unconscionability, evidencing that defendant sought to impose arbitration, “not simply as an alternative to litigation, but as an inferior forum that worked” to defendant’s advantage.

**State Private Attorney General Statutes and Arbitration**

Most 1L courses will lack time to address the relation between state private attorney general statutes and compelled arbitration of employment claims. Still, the issue is topical and important, and highlights important themes of judicial access and the effect of resource asymmetries in litigation and enforcement regimes. We include a pair of cases from the California courts addressing post-*Viking River* developments as well as a recent statute from that state that would seem to narrow the scope of these state decisions.

**Adolph v. Uber Technologies, Inc., 532 P.3d 682 (Cal. 2023).**

The decision follows in the wake of the Court’s 2022 decision in *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022), addressing the relation between the California Private Attorneys General Act of 2004 (PAGA) and mandatory arbitration clauses in employment contracts. PAGA authorizes new civil penalties for state Labor Code violations and allows “aggrieved employees,” acting as private attorney generals, to recover penalties they have sustained in suits against an employer, acting as a proxy for the state labor agency and “on behalf of himself or herself and other current or former employees.” In an action in which a PAGA plaintiff is subject to a mandatory arbitration clause in the employment contract, the Court held that the FAA “preempted” the individual PAGA claim, and required the California court to sever that claim from non-individual claims; *Viking River* also construed PAGA’s standing
requirements to imply that, once a plaintiff’s individual claims had been severed from their non-individual claims and sent to mandatory arbitration, the plaintiff would lack statutory standing to pursue the non-individual claims, which would then require dismissal.

In Adolph, the California Supreme Court addressed the state statutory standing issue and held that an “aggrieved employee who has been compelled to arbitrate claims under PAGA that are ‘premised on Labor Code violations actually sustained by’ the plaintiff** maintains statutory standing** to litigate claims on behalf of other employees under PAGA.” In 2019, Adolph sued Uber bringing both individual claims and claims as a PAGA representative on the theory that Uber had misclassified him and other drivers as independent contractors instead of employees. A trial court compelled arbitration over the individual claims but promptly stayed that arbitration pending resolution of PAGA claims, holding under California precedent that PAGA waivers were unenforceable. Iskanian v. CLS Trans. Los Angeles, LLC, 327 P.3d 129 (Cal. 2014). The procedural history is complicated, but after Uber filed a petition for review, the Supreme Court decided Viking River. The California Supreme Court in Adolph disagreed with the Court’s interpretation of state rules governing PAGA standing. PAGA permits any “aggrieved employee” to bring suit, and requires a plaintiff to show that they were employed by the alleged violator and that they suffered at least one labor code violation. California courts have consistently interpreted this to mean that standing is conferred to litigate on one’s own behalf as well as on the behalf of other employees from the moment of the labor code violation, regardless of subsequent developments such as a settlement of individual claims for damages. E.g., Kim v. Reins Int’l California, Inc., 459 P.3d 1123, 1128 (Cal. 2020). However, although an aggrieved employee can still litigate on behalf of other employees, the threshold issue of whether they are an aggrieved employee may be resolved in arbitration of individual claims while litigation is stayed, which would require dismissal of non-individual claims if the arbitrator determines that the plaintiff is not an aggrieved employee.


Current and former employees of a bank subject to mandatory arbitration agreements brought putative class action and representative actions under PAGA to redress wage and hour violations. The bank moved to dismiss the non-individual PAGA claims and to compel
arbitration of individual claims, including PAGA claims. The waiver would have been unenforceable under *Iskanian* (see above entry), but the bank argued that in light of *Viking River*, the contract provision amounted to a waiver of “non-individual” PAGA claims only, which was not the same as a wholesale waiver of all PAGA claims that *Iskanian* would prohibit. The Court of Appeals rejected this argument, holding that the agreement was against public policy and the unenforceability of the waiver provision rendered the entire arbitration agreement null and void.

**State Statutory Developments: S.B. 92 & A.B. 2288.**

On July 1, 2024, Governor Newsom signed into law two bills that substantially amended PAGA. The two bills together make significant changes by lowering penalties in certain cases (as when labor violations are nonrecurring) and by granting employers a cure period to remedy any violation. The bills also changed the definition of an “aggrieved employee” from requiring that an employee suffered “one or more of the alleged violations” to requiring that they “personally suffered each of the violations” (except in certain cases brought by counsel at nonprofit legal aid organizations). The effect of this is to curtail the reach of *Adolph*. Although a person can still bring individual and non-individual claims under PAGA, and to litigate the non-individual claims even when the individual claims are subject to mandatory arbitration, the statute limits violations alleged on behalf of other employees to those alleged on the individual’s own behalf. However, A.B. 2288 exempts PAGA claims brought by certain existing nonprofit legal aid organizations from these standing limits, defined as:

*a nonprofit legal aid organization that has obtained Section 501(c)(3) tax-exempt status, is a qualified legal services project or qualified support center, as defined in Section 6213 of the Business and Professions Code, and has served as counsel of record in civil actions under this part for at least five years prior to January 1, 2025, may file a civil action pursuant to this part as counsel of record for an aggrieved employee on behalf of the employee and one or more current or former employees against whom one or more of the alleged violations was committed. Nothing in this provision establishes standing for the nonprofit legal aid organization as a party in the civil action.*
Domestic Discovery in Aid of Foreign Arbitration

Most 1L courses do not have space to cover issues pertinent to 28 U.S.C. § 1782, which permits domestic discovery for use in a foreign or international proceeding. The Supreme Court unanimously held in ZF Automotive US, Inc. v. Luxhsare, Ltd., 596 U.S. 619 (2022), that a private adjudicatory body, which includes a foreign arbitral panel, is neither a foreign tribunal nor an international tribunal within the meaning of the statute. The only other Supreme Court decision addressing § 1782, Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004), in dictum had seemed to suggest that the statute did cover arbitral tribunals.\(^\text{41}\) We include below some recent cases involving application of § 1782.

**In re BonSens.org, 95 F.4th 75 (2d Cir. 2024).**

BonSens, an association of scientists, filed suit against Pfizer in France related to the COVID-19 vaccine and a European Commission purchase agreement. At the same time, they submitted an application for domestic discovery (under 28 U.S.C. § 1782) in the Southern District of New York. While this application was pending, the French case was dismissed, pending appeal. The District Court found that BonSens failed to meet the “for use” requirement of § 1782 once the case was dismissed. The Court of Appeals affirmed.

\(^{41}\) *Intel*, 542 U.S. at 257-58:

Moreover, when Congress established the Commission on International Rules of Judicial Procedure in 1958, * * * it instructed the Rules Commission to recommend procedural revisions “for the rendering of assistance to foreign courts and quasi-judicial agencies.” § 2, 72 Stat. 1743 (emphasis added). Section 1782 had previously referred to “any judicial proceeding.” The Rules Commission’s draft, which Congress adopted, replaced that term with “a proceeding in a foreign or international tribunal.” * * * Congress understood that change to “provid[e] the possibility of U.S. judicial assistance in connection with [administrative and quasi-judicial proceedings abroad].” S.Rep. No. 1580, at 7–8, U.S.Code Cong. & Admin.News 1964, pp. 3782, 3788; see Smit, International Litigation 1026–1027, and nn. 71, 73 (“[t]he term ‘tribunal’ ... includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts”; in addition to affording assistance in cases before the European Court of Justice, § 1782, as revised in 1964, “permits the rendition of proper aid in proceedings before the [European] Commission in which the Commission exercises quasi-judicial powers”).
In re Application of Venequip, S.A. v. Caterpillar Inc., 83 F.4th 1048 (7th Cir. 2023).

Venequip, a Venezuelan company, sold and serviced products of Caterpillar, a U.S. company with Swiss subsidiaries. Venequip’s dealership was governed by agreements with the Swiss subsidiary. The contracts contained a forum-selection clause and choice-of-law clause channeling all disputes to Swiss courts. After the Swiss subsidiary terminated the agreement, Venequip sued the Swiss subsidiary in Swiss court alleging breach of contract. Venequip then filed multiple § 1782 applications in federal district courts across the country arguing that that “the parent company ‘has discoverable information that will assist in the ongoing proceedings and investigations in Switzerland.’” The district court denied the application, relying on Intel and two additional factors: the forum and choice-of-law clauses and Caterpillar’s agreement to provide discovery in Swiss courts. The Seventh Circuit affirmed.

The judge’s decision here rests on case-specific inputs carrying different weights and degrees of importance. Of these, the judge found it particularly noteworthy that the parties had contractually selected Swiss courts and Swiss law, that Venequip had cast a very wide net in its § 1782(a) request, that Swiss courts would likely be wary of the timing and breadth of American-style discovery, and that Caterpillar had agreed to comply with discovery in the Swiss court. At bottom, Venequip is asking us to reweigh these factors and substitute our own judgment for the district judge's exercise of discretion. We decline the invitation.

Before closing, we have one final observation. The judge’s careful wait-and-see approach is especially appropriate as an expression of respect for the prerogatives of the Swiss court—the forum freely and intelligently chosen by the parties—and the deference owed to its views about the scope of discovery needed to resolve this dispute. “After all, the animating purpose of § 1782 is comity ....” ZF Automotive US, Inc. v. Luxshare, Ltd., —– U.S. ——, 142 S.Ct. 2078, 2088, 213 L.Ed.2d 163 (2022). Because the judge faithfully applied the Supreme Court’s instructions in Intel and reasonably exercised his statutory discretion, the district court's judgment is affirmed.
Frasers Grp. PLC v. Stanley, 95 F.4th 54 (2d Cir. 2024).

The seller of call options filed a § 1782 application for use in a lawsuit brought in the High Court of Justice in Business and Property Courts of England and Wales. The district court denied the application, and the Second Circuit affirmed. The district court did not abuse its discretion in treating the factor that the person from which discovery was sought also was a participant in the foreign proceeding as weighing against granting the application; finding that the requestor could obtain this information in the foreign proceeding (and that this factor did not improperly impose an exhaustion requirement on the statute); and concluding that the request was “unduly intrusive or burdensome.”

Waiver of Contractual Arbitration

Schwebke v. United Wholesale Mortg. LLC, 96 F.4th 971 (6th Cir. 2024).

The decision addresses when litigation conduct can be treated as a waiver of the contractual right to compel arbitration. Plaintiff, who is deaf, sued his former employer for disability discrimination and retaliation. Defendant asserted a counterclaim. After seven months, when discovery was nearly complete, defendant moved to compel arbitration. The district court, after considering the effect of Morgan v. Sundance, Inc., 596 U.S. 411 (2022), denied the motion, and the Sixth Circuit affirmed.

Before Morgan, this circuit held that a “party may waive an agreement to arbitrate” when it both: “(1) tak[es] actions that are completely inconsistent with any reliance on an arbitration agreement; and (2) delay[s] its assertion to such an extent that the opposing party incurs actual prejudice.”

We have not yet had an opportunity to consider Morgan’s effect on our rule. At a minimum, Morgan eliminated the prejudice requirement. In this case, we need not decide whether Morgan did more than that because the parties agree that, once stripped of its prejudice requirement, our pre-Morgan case law remains intact. Given this posture, we assume without deciding that our precedent asking
whether a party’s actions are “completely inconsistent” with reliance on arbitration survives Morgan.

Applying this standard, the circuit agreed that defendant’s litigation conduct amounted to a waiver in that it:

(1) waited seven months before moving to compel arbitration; (2) did not raise arbitration as an affirmative defense; (3) raised other affirmative defenses; (4) participated in a discovery conference; (5) filed a joint discovery plan; (6) served interrogatories and requested documents; (7) noticed two depositions; and (8) agreed to an extension of the discovery deadline.

Moreover, the fact that arbitration likewise can involve discovery was irrelevant given the fact that defendant “requested discovery while the case was in federal court, invoking the power of that court under the Federal Rules of Civil Procedure.” And finally, the court rejected the argument that failure to raise arbitration earlier was simply a mistake, and not a waiver. Although counsel had not read the employment agreement and so did not know about the arbitration clause, defendant had imputed knowledge of the clause and produced the agreement during discovery.
APPENDIX

Thirteenth Comprehensive Edition Errata

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


p. 315: Plymer, change to Polymer

Thirteenth Compact Edition Errata

p. 230: Plymer, change to Polymer