To: Civil Procedure Professors

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

Date: July 2025

Re: 2025–2026 Update Memo

Thank you for using our casebook, CIVIL PROCEDURE: CASES AND MATERIALS (Thirteenth Edition) and/or CIVIL PROCEDURE: CASES AND MATERIALS COMPACT THIRTEENTH EDITION FOR SHORTER COURSES, and the accompanying 2025–2026 Rules Supplement. The Rules Supplement provides an up-to-date source that faculty can use with any casebook on pleading and procedure.

This Update Memo has three parts:

Part I provides a quick overview, organized by chapter, of recent cases that appear in the 2025-2026 Rules Supplement. These cases largely are post-2022 decisions of the U.S. Supreme Court. Please note that the Supplement also includes amendments to the Federal Rules of Civil Procedure; changes to local rules of the Eastern and Southern Districts of New York; court orders (relating, among other topics, to class actions, MDL, and Artificial Intelligence); and pending legislation pertinent to the 1L Procedure course.

Part II highlights additional recent cases that might be of interest to your course preparation. The cases largely are decisions of the lower federal courts and, again, we organize the material by Chapter. In some instances, we offer suggestions on how one might integrate these materials into class discussion. Some of the cases are complex; others are single issue and suitable for classroom hypotheticals or short writing exercises. This Part does not aim to be a comprehensive account of procedure-related cases over the last year. Rather, we have chosen to

[1] We thank Ann Ashley Daniel, Andrew Douglas, Gabriella Limón, Henry Muhlheim, Kenneth Noble, Brett Schratz, Pavel Shirley, Melina Stavropoulos, Sunila Steephen, Dan Tepler, Samson Tu, and Maia Vasaturo-Kolodner, students at New York University School of Law, for their research assistance in preparing these materials. We also thank John Forbis and Clement Lin for library support, and Tiffany Scruggs and Kristin Silberman for administrative assistance.

present 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 responsibility and judicial role, especially when one party is appearing pro se. Thus, our goal throughout is 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 in our summaries, but where appropriate do provide sources in footnotes; as with the casebook, alterations are marked with asterisks, not ellipsis.

Part III is an Appendix that 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 Recent Cases in the 2025-2026 Rules Supplement

Chapter 2. Jurisdiction over the Parties or Their Property

Consent as Another Basis for Jurisdiction: Consent by Registration in State

Mallory v. Norfolk Southern Railway Co., 600 U.S. 122, 143 S.Ct. 2028, 216 L.Ed.2d 815 (2023) (E).

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*).

Jurisdictional Reach of the Federal District Courts

Fuld v. Palestine Liberation Organization, 606 U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 2025 WL 1716140 (E).

The Court held, 9-0, that the provision of the Promoting Security and Justice for Victims of Terrorism Act (PSJVTA) authorizing a federal court to exercise personal jurisdiction over the Palestine Liberation Organization and Palestinian Authority in suits by U.S. citizens asserting a cause of action under the PSJVTA for certain injuries suffered outside the United States does not violate the Fifth Amendment's Due Process Clause. The Court clarified that the test used to assess the constitutionality of personal jurisdiction under the Fourteenth Amendment does not apply to the Fifth Amendment. To the extent that the personal-jurisdiction inquiry requires a sovereign-by-sovereign analysis, the national government and the states operate within different "sovereign spheres," and concerns of "interstate federalism," significant to the Fourteenth Amendment analysis, are irrelevant. "Rather, the Due Process Clause of the Fifth Amendment necessarily permits a more flexible jurisdictional inquiry commensurate with the Federal Government's broader sovereign authority." Moreover, to the extent that personal-jurisdiction limits reflect matters of individual liberty, that statement reflects the principle that "due process protects the individual's right to be subject only to lawful power" (quoting the plurality opinion in Nicastro, Casebook, p. 143; Compact, p. 96). The Court declined to define "the outer bounds" of the federal courts' power to hale foreign defendants into U.S. courts, but whatever those limits, the PSJVTA provision reasonably connected the assertion of jurisdiction with activity involving the United States that implicated foreign policy matters within the prerogative of Congress and the Executive. Justice Thomas filed an opinion concurring in the judgment, which Justice Gorsuch joined in part.

CC/Devas (Mauritius) Ltd. v. Antrix Corp., 605 U.S. ___, 145 S.Ct. 1572, 221 L.Ed.2d 867 (2025) (S).

This case involved the personal-jurisdiction section of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1330(b), under which personal jurisdiction over a foreign state "shall exist" in cases when an exception to foreign sovereign immunity applies, as long as the defendant has been properly served. In a unanimous opinion by Justice Alito, the Supreme Court held that the FSIA does not—as a statutory matter—require the plaintiff to prove "that the foreign state has made 'minimum contacts' with the United States sufficient to satisfy the jurisdictional test set forth in *International Shoe* * * * ."

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

Casebook, p. 302 Note 7 (distinguishing a statutory condition from jurisdiction)

Riley v. Bondi, 606 U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 2025 WL 1758502 (2025) (S).

Wilkins v. United States, 598 U.S. 152, 143 S.Ct. 870, 215 L.Ed.2d 116 (2023) (S).

MOAC Mall Holdings LLC v. Transform Holdco LLC, 598 U.S. 288, 143 S.Ct. 927, 215 L.Ed.2d 262 (2023) (S).

Santos-Zacaria v. Garland, 598 U.S. 411, 143 S.Ct. 1103, 215 L.Ed.2d 375 (2023) (S).

Harrow v. Department of Defense, 601 U.S. 480, 144 S.Ct. 1178, 218 L.Ed.2d 502 (2024) (S).

These five 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.) Riley* held that 8 U.S.C. § 1252(b)(1)'s 30-day filing deadline for seeking judicial review of a "final order of removal" is not a jurisdictional requirement.[2] *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

[2] Four justices dissented, however, regarding another issue in the case: whether an individual can obtain judicial review of a Board of Immigration Appeals decision in a "withholding-only" proceeding.

by the Merit Systems Protection Board to the U.S. Court of Appeals for the Federal Circuit. In all five cases, the Court found that the requirements were not jurisdictional, and were therefore subject to waiver and forfeiture.

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

Royal Canin U.S.A., Inc. Wullschleger, 604 U.S. 22, 145 S.Ct. 41, 220 L.Ed.2d 289 (E).

The Court unanimously held, in an opinion by Justice Kagan, that when a plaintiff amends her complaint to delete the federal claim that provided the basis for the defendant's removal of the action from state court to federal court under 28 U.S.C. § 1441(a), the federal court loses power to exercise supplemental jurisdiction under 28 U.S.C. § 1367 over any remaining state-law claims, and must instead remand the action to state court. Justice Kagan's opinion also provides a helpful summary of the relationship between the basic grounds for federal subject-matter jurisdiction (federal question and diversity jurisdiction), supplemental jurisdiction, and removal.

Chapter 8. Modern Pleading

The Complaint

Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos, 605 U.S. ___, 145 S.Ct. 1556, 221 L.Ed.2d 910 (2025) (S).

The Court held that Mexico's tort complaint against seven U.S. gun manufacturers was barred under the Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. § 7903(5)(A)(iii), because it failed to plausibly allege that defendants aided and abetted gun dealers' unlawful sales of guns to Mexican traffickers. Among other defects, the complaint did not "pinpoint …any specific criminal transactions that defendants allegedly assisted," and failed

to support its "more general accusation" that defendants assisted "some number of unidentified rogue gun dealers" with "plausible allegations of 'pervasive, systemic, and culpable assistance.'" Justices Thomas and Jackson filed concurring opinions.

E.M.D. Sales, Inc. v. Carrera, 604 U.S. 45, 145 S.Ct. 34, 220 L.Ed.2d 309 (2025) (S).

The Supreme Court unanimously held that the usual "preponderance-of-the-evidence" standard governs whether an employer has shown that a plaintiff falls within a category of employees who are exempt from the Fair Labor Standard Act's minimum-wage and overtime requirements. In reaching this conclusion, Justice Kavanaugh's opinion set forth some general principles regarding the standard of proof in federal civil litigation. First, the preponderance-of-the-evidence standard was the default standard of proof when Congress enacted the FLSA, and it has remained the default standard, supported by the sound policy of apportioning the risk of error "in roughly equal fashion" to the parties. Second, a more demanding standard is appropriate "in three main circumstances": (1) "if a statute establishes" a more demanding standard; (2) when the Constitution requires one; and (3) in "uncommon cases," which "ordinarily" arise "when the government seeks to take unusual coercive action—action more dramatic than entering an award of money damages or other conventional relief—against an individual."

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

This case is another 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.

Amendments

BLOM Bank SAL v. Honickman, 605 U.S. ___, 145 S.Ct. 1612, 221 L.Ed.2d 850 (2025) (S).

The issue before the Supreme Court was the proper standard for a motion for relief from judgment under Rule 60(b)(6) when the movant's goal is to obtain leave to file an amended complaint under Rule 15(a). Reversing, Justice Thomas's opinion for the Court emphasized that Rule 60(b)(6), while a "catch-all" provision, conditions relief on a showing of "extraordinary" circumstances, and the standard is not lessened when the movant seeks to reopen a case to amend a complaint under Rule 15's far more liberal standard for amending a complaint in an ongoing case. Justice Jackson filed an opinion concurring in part and concurring in the judgment.

Provisions to Deter Frivolous Pleadings

Mata v. Avianca, Inc., 2023 WL 3696209 (S.D.N.Y. 2023).

Mata v. Avianca, Inc., 678 F. Supp. 3d 443 (S.D.N.Y. 2023).

This case received considerable media attention:[3] 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

Settlement Classes

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

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

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 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

Taking the Case from the Jury—Motions for Judgment as a Matter of Law

Dupree v. Younger, 598 U.S.729, 143 S.Ct. 1382, 215 L.Ed.2d 636 (2023) (E).

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.

Chapter 14. Trial

Trial by Jury

Perttu v. Richard, 605 U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d___, 2025 WL 1698783 (E).

In a 5–4 decision, the Supreme Court held that a party is entitled to a jury trial on the issue of exhaustion of administrative remedies under the Prison Litigation Act (PLRA) when exhaustion is intertwined with the merits of a claim that would require a jury trial under the Seventh Amendment. The Court did not address whether "Congress could have required otherwise in the PLRA without violating a party's Seventh Amendment right to a jury trial." The Court rejected the argument that a jury trial was not required because the judge's factual finding related to exhaustion would not have estoppel effect; to the contrary, the Court declined to limit *Beacon Theatres* (Casebook, p. 1054) to cases involving estoppel. In this case, the Court found that the issues were intertwined. Justice Barrett filed a dissenting opinion, joined by Justices Thomas, Alito, and Kavanaugh, arguing that the jury right "does not depend on the degree of actual overlap between a threshold issue and the merits of the plaintiff's claim."

Securities and Exchange Commission v. Jarkesy, 603 U.S. 109, 144 S.Ct. 2117, 219 L.Ed.2d 650 (2024) (S).

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.

The Power to Set Aside a Judgment

BLOM Bank SAL v. Honickman, 605 U.S. ___, 145 S.Ct. 1612, 221 L.Ed.2d 850 (2025) (S).

This case, discussed above in the context of Chapter 8 and amendment to pleadings, concerned the standard for a motion for relief from judgment under Rule 60(b)(6) when the movant's goal is to obtain leave to file an amended complaint under Rule 15(a). Reversing, Justice Thomas's opinion for the Court emphasized that Rule 60(b)(6), while a "catch-all" provision, conditions relief on a showing of "extraordinary" circumstances, and the standard is not lessened when the movant seeks to reopen a case to amend a complaint under Rule 15's far more liberal standard for amending a complaint in an ongoing case. Justice Jackson filed an opinion concurring in part and concurring in the judgment.

Waetzig v. Halliburton Energy Servs., Inc., 604 U.S. ___, 145 S.Ct. 690, 221 L.Ed.2d 143 (2025) (S).

The issue before the Supreme Court was whether a voluntary dismissal without prejudice under Rule 41(a) qualifies as a "final judgment, order, or proceeding" that can be reopened under Rule 60(b). In a unanimous opinion authored by Justice Alito, the Court found that such a dismissal is "final" because it "is the conclusive and last filing on the docket, and it completes the particular lawsuit at issue." The Court also held that "a voluntary dismissal without prejudice counts as a 'proceeding' under Rule 60(b)," reasoning that "the term 'proceeding' encompasses all steps taken in the action." Accordingly, Justice Alito concluded that a "Rule 41(a) voluntary dismissal without prejudice counts as a 'final proceeding' under Rule 60(b). When the requirements of Rule 60(b) are satisfied, a district court may relieve a party from such a dismissal and reopen the case." The Court remanded for further proceedings, expressing no view

on whether relief was warranted in petitioner's case.

Kemp v. United States, 596 U.S. 528, 142 S.Ct. 1856, 213 L.Ed.2d 90 (2022) (E).

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

Chapter 15. Securing and Enforcing Judgments

Trump v. CASA, Inc., 606 U.S. ___, ___ S.Ct. ____, 2025 WL 1773631 (2025) (S).

This case involves three separate federal lawsuits brought by individuals, organizations, and States alleging that an Executive Order declaring that the "policy of the United States" is to deny citizenship to certain persons born in the United States violates the Fourteenth Amendment's Citizenship Clause and § 201 of the Nationality Act of 1940. Each district court preliminarily enjoined various executive officials from applying the policy "to *anyone* in the country." In a 6-3 decision, the Supreme Court held that the Judiciary Act of 1789 does not give federal courts authority to issue so-called "universal injunctions" (sometimes referred to as "nationwide injunctions"). Justice Barrett's majority opinion held: "A universal injunction can be justified only as an exercise of equitable authority, yet Congress has granted federal courts no such power." Rather, an injunction may not be "broader than necessary to provide complete relief to each plaintiff with standing to sue." The Court did not rule out the possibility of obtaining universal injunctive relief via a class action under Federal Rule of Civil Procedure 23. And the Court did not address whether the Administrative Procedure Act's provision authorizing federal courts to "hold unlawful and set aside agency action," 5 U.S.C. § 706(2), empowers the federal judiciary to render such actions legally ineffective on a universal basis if they violate federal law. The Court left open, however, whether universal injunctions—even when statutorily authorized—would exceed the federal judiciary's authority under Article III. Justice

Sotomayor's dissenting opinion, which was joined by Justices Kagan and Jackson, argued that "universal injunctions are consistent with long-established principles of equity" and were therefore permissible in appropriate cases. Separate concurring opinions were authored by Justice Thomas (joined by Justice Gorsuch), Justice Alito (joined by Justice Thomas), and Justice Kavanaugh. Justice Jackson authored a separate dissenting opinion.

Chapter 16. Appellate Review

Departures from the Final Judgment Rule in the Federal Courts: Decisions Involving "Collateral Orders"

Shoop v. Twyford, 596 U.S. 811, 142 S.Ct. 2037, 213 L.Ed.2d 318 (2022) (S).

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.

Part II. Additional Recent Decisions of Interest

Chapter 2. Jurisdiction over the Parties or Their Property

Media Matters for America v. Paxton, 138 F.4th 563 (D.C. Cir. 2025).

The case holds topical interest and offers a good fact pattern for applying a long-arm statute. Media Matters for America, a nonprofit media watchdog, filed a § 1983 suit against Kenneth Paxton, Texas Attorney General, in the District Court for the District of Columbia. The complaint alleged that Paxton violated the First Amendment by launching an investigation of Media Matters in retaliation for their reporting on Elon Musk and X.com. Paxton moved to dismiss, claiming that the court lacked personal jurisdiction. The district court denied the motion to dismiss and granted a preliminary injunction in favor of plaintiff, and Paxton appealed. On appeal, the D.C. Circuit affirmed the district court's personal jurisdiction holding.

First, the circuit court considered and rejected Paxton's argument that he was not a "person" within the meaning of the D.C. long-arm statute because he was sued in his official, and not his individual, capacity. As the court explained, the long-arm statute authorizes the D.C. courts to

> "exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's" transacting any business in the District. D.C. Code § 13-423(a)(1). And it defines a "person" as including "an individual ... whether or not a citizen or domiciliary of the District of Columbia." *Id.* § 13-421. At bottom, the plain meaning of the term "individual" clearly encompasses Paxton, who is a single human being.

Second, the circuit court agreed that jurisdiction was available under subsection (a)(1) of the D.C. long-arm, which allows D.C. courts to "exercise jurisdiction over any non-resident who 'transact[s] any business in the District,' directly or by an agent," citing D.C. CODE § 13-423(a)(1). The court noted that this provision has been interpreted to include even a single act causing in-forum consequences if that act is voluntary and deliberate rather than fortuitous, and that it authorizes the exercise of jurisdiction to the full extent allowed by the Due Process Clause. The court then conducted a due-process analysis. Applying the *Calder* effects test (Casebook, p.

126; Compact Casebook, p. 82), the court found that Paxton had intentionally caused effects in Washington D.C. by hiring a process server to serve process on a party he knew was in D.C. The court further noted that by trying to censor Media Matters, Paxton was causing harm to residents of D.C. who benefit from their reporting, creating additional in-forum effects. Finally, it noted that Paxton entered D.C. through an agent (the process server), further tilting the scale in favor of asserting specific jurisdiction. These facts, in the circuit court's view, sufficiently distinguished the dispute from those in *Walden* (Casebook, 159; Compact Casebook, p. 111).

Internet and Other Technological Contacts

Briskin v. Shopify, Inc., 135 F.4th 739 (9th Cir. 2025).

We included a summary of this case in last year's Update Memo. Since then, the en banc Ninth Circuit upheld personal jurisdiction. The opinion triggered two concurrences and a dissent. The case involved a putative class action against Shopify and its subsidiaries alleging violation of California privacy laws by intercepting consumers' personal data while they were making online purchases and without their consent. In Briskin's situation, he purchased athletic apparel from a California retailer in 2019, and later learned that Shopify's payment processing platform had installed tracking cookies on his device and collected his personal information, without his knowledge. The procedural history reflects the unsettled standards for Internet-based personal jurisdiction. The Northern District of California initially dismissed for lack of personal jurisdiction in May 2022. Briskin v. Shopify, Inc., 2022 WL 1427324 (N.D. Cal. 2022). A three-judge panel of the Ninth Circuit affirmed in November 2023, holding that Shopify lacked the requisite "forum-specific focus" for specific jurisdiction. Briskin v. Shopify, Inc., 87 F.4th 404, 419-20 (9th Cir. 2023). However, the Ninth Circuit voted to rehear the case en banc, vacating the panel opinion. Briskin v. Shopify, Inc., 101 F.4th 706 (9th Cir. 2024). On April 21, 2025, the en banc court reversed, overruling the "differential targeting" requirement from AMA Multimedia, LLC v. Wanat, 970 F.3d 1201 (9th Cir. 2020), and holding that an interactive platform expressly aims its conduct at a forum state when its contacts are its own choice rather than random or fortuitous, even if the platform cultivates a nationwide audience.

Hasson v. FullStory, Inc., 114 F.4th 181 (3d Cir. 2024).

The case presents an up-to-the moment fact pattern to explore *Calder* (Casebook, p. 126; Compact, p. 82) and the effects test for intentional torts when the contacts are technological — namely a challenge to the use of software that tracks a website user's actions and relays the information to third-party servers, or as the complaints put it, for unlawful wiretaps. It also raises the question whether the effects test is the exclusive basis for jurisdiction over an intentional tort claim, or whether the court may, in an appropriate case, assess defendant's contacts under what the Third Circuit calls the "traditional" test. The appeal combined two actions brought by Pennsylvania residents in Pennsylvania district court against Delaware companies headquartered in Georgia. In the first, an individual user of a mattress-sales website sued FullStory, the producer of Session Replay Code; in the second, a putative class sued Papa John's International for its use of the code. Both complaints alleged invasion of privacy and violation of Pennsylvania's Wiretapping and Electronic Surveillance Control Act. In both cases, the district court dismissed for lack of personal jurisdiction; in the individual action, the district court also denied jurisdictional discovery.

First, the appeals court rejected the argument that courts must exclusively rely on *Calder*'s effects test when assessing personal jurisdiction over intentional torts.

Second, the appeals court agreed that the class allegations against Papa Johns did not meet the effects test because the complaint failed to show that the company expressly aimed the code at Pennsylvania—the website was aimed at a national audience and was not accessible only in Pennsylvania, the company did not deploy the code only to users who access the site in Pennsylvania, and the website did not tailor its content to Pennsylvanians. It was not sufficient, according to the court, that defendant deployed the code in the forum state where it harmed state residents; that the code allowed users to filter restaurant locations geographically; and that Papa Johns operates 85 bricks-and-mortar restaurants and conducts other business in the state. Rather, the appeals court insisted that to meet the effects test, "[a]t a minimum," the complaint had to allege that Papa John's "knew that a given user was in Pennsylvania *before* it sent to code to that user's browser."

Third, the court considered and rejected the argument that Papa John's contacts with Pennsylvania made it amenable to suit under the traditional test for personal jurisdiction as set

out in *Ford* (Casebook, p. 175; Compact, p. 124). To be sure, Papa Johns purposefully availed itself of the benefits of the forum's market by operating restaurants, advertising, and conducting other business. But the claims, according to the court, lacked "a specific connection" between deployment of the code and the state; whether the claims arose out of or related to in-state activity was "a close call." In particular, the class-action complaint did not allege that Papa Johns promoted its website in Pennsylvania. Comparing the facts to those of *Ford*, the court emphasized the special concerns raised by Internet transactions.

Fourth, the court held that FullStory's contacts with Pennsylvania did not meet the *Calder* standard; once again the complaint did not show express aiming of the tortious conduct at the forum state; defendant had not devised forum-specific content. The fact that FullStory partnered with in-state companies was not sufficient meet the *Calder* standard. However, the court questioned whether the effects test covered the situation: "as [plaintiff] persuasively argues, the 'effects' test typically applies where the allegedly tortious conduct occurs outside the forum but is felt inside the forum. Here, by contrast, FullStory's Session Replay Code allegedly wiretapped [plaintiff] in Pennsylvania." Finding that the district court erred in not considering whether personal jurisdiction could be exercised under the traditional test, the Third Circuit vacated and remanded for consideration of that issue.

Circuit Judge Phipps concurred in part and dissented in part, agreeing that the suit against Papa Johns did not meet the *Calder* test but arguing that Pennsylvania could exercise specific jurisdiction over Papa Johns under the traditional test; Judge Phipps disagreed, however, with the majority's conclusion that the class claims did not relate to Papa Johns' contacts with Pennsylvania:

> As I see it, the strong relationship is clear: the common thread between the defendant, the forum, and the litigation is Papa Johns' use of a session replay code on its website to record online consumer activity from a browser in Pennsylvania that was used to place orders from Papa Johns' locations in Pennsylvania.

The dissent further argued that the majority erroneously assumed that the strong relationship required by *Ford* "can be demonstrated only by facts closely akin to those in *Ford*," emphasizing instead that the Court expressed its test in general terms and did not limit it "to any particular factual scenario." Indeed, by the dissent's lights, the relationship was stronger here than in *Ford*:

> There, Ford did not introduce the defective vehicles into the forum states, and the claims related to actions that Ford took outside of the forum states – the sale, design, and manufacture of the vehicles. * * * By contrast, Papa Johns chose to use its website to make sales in Pennsylvania, used the session replay code in Pennsylvania, and Schnur's claims are based on Papa Johns' recording his website behavior on his browser in Pennsylvania * * *. With a much tighter nexus among the defendant, the forum, and the litigation, there is no need here, as there was in *Ford Motor*, for additional contacts with the forum, such as through advertising of the website or product support of the website, to sustain the requisite strong relationship.

Cox v. CoinMarketCap OPCO, LLC, 112 F.4th 822 (9th Cir. 2024), cert. denied, ___ S. Ct. ___, 2025 WL 1787730 (2025).

The dispute involves a cryptocurrency-ranking website and, although complicated, the topic could interest 1Ls. The court addressed when contacts of a U.S. affiliate are to be attributed to a non-U.S. parent for jurisdictional purposes. The case also provides a good exercise in statutory interpretation, as well as for reenforcing the distinction between venue and personal jurisdiction. Finally, discussion may profitably focus on whether *Fuld* (this memo, p. 3) alters the analysis.

Boiled down, an investor filed a putative class action, alleging price manipulation in violation of the Commodity Exchange Act (CEA) and the Arizona Consumer Fraud Act.[4] The complaint alleged that defendants unlawfully suppressed the price of a cryptocurrency called HEX by inaccurately lowering its ranking among cryptocurrencies on a website called CoinMarketCap.com. Defendants were: the operator of the website, CoinMarketCap, a Delaware limited liability company headquartered in Delaware; Binance Capital, the owner of the operator, which was founded in China and "now operates in a decentralized manner with no publicly identified headquarters"; BAM Trading, a U.S. company with which Binance Capital partnered (after being banned from the U.S. market) to establish a new U.S. crypto exchange, Binance U.S., which operates as an affiliate of Binance Capital.

The CEA contains a venue and a provision for nationwide service of process. As an

[4] The decision did not address the state-law claim or the applicability to the federal claims of the state long-arm statute, Ariz. R. Civ. P. 4.2, which allows Arizona courts to exercise jurisdiction "to the maximum extent permitted by the Constitution of this state and the Constitution of the United States."

initial matter, the appeals court held that venue under the CEA is not a condition for the exercise of personal jurisdiction over a domestic company in any U.S. district. To reach this conclusion, the circuit court relied on its precedent interpreting "virtually indistinguishable" provisions of the federal antitrust and securities statutes. Then, the circuit court considered whether each defendant had sufficient minimum contacts with the United States "to satisfy due process," stating that the test looked to "whether the defendant has acted within any district of the United Stats or sufficiently caused foreseeable consequences in this country." The domestic companies were incorporated and headquartered in the United States, and on that basis the court concluded that *general* jurisdiction was present and that "each has sufficient contacts with the United States" to satisfy due process.

As to the foreign defendants, the appeals court agreed with the district court that they lacked "sufficient minimum contacts with the United States to be subject to general jurisdiction," finding they had no "home" in the United States; the court then turned to the separate question of whether contacts were sufficient for the exercise specific jurisdiction, i.e., whether "the defendant's purposeful conduct towards the forum, the relation between his conduct and the cause of action asserted against him, and the reasonableness of the exercise of jurisdiction." The complaint alleged that Binance Capital, "the world's largest cryptocurrency exchange," provides services to U.S. customers through U.S. companies with which it had partnered after being banned from the U.S. market. Nevertheless, the Ninth Circuit declined to attribute any U.S. contacts to the defendant:

> [T]he fact that a parent company is "closely associated" with a subsidiary that itself has minimum contacts is insufficient to establish personal jurisdiction. * * * "As a general principle, corporate separateness insulates a parent corporation from liability created by its subsidiary, notwithstanding the parent's ownership of the subsidiary." * * * [Plaintiff's] general reliance on Binance Capital's association with Binance.US therefore fails.
>
> Imputation of a subsidiary's minimum contacts to a parent company requires satisfaction of the "alter ego" test, which obligates a party to make out "a prima facie case (1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice." * * * The district court rejected [plaintiff's] argument that Binance Capital is the alter ego of Binance.US. On appeal, Cox does not argue that Binance Capital is an alter ego of Binance.US or that their relationship satisfies the alter ego test, and so has

forfeited reliance on an alter ego theory to establish minimum United States contacts for Binance Capital.

SnapPower v. Lighting Defense Group, 100 F.4th 1371 (Fed. Cir. 2024), cert. denied, 145 S.Ct. 1424 (2025).

The case illustrates the *Calder* "purposeful direction" test (Casebook, p. 126; Compact, p. 82) in the context of a patent dispute involving Internet contacts. The Federal Circuit in a series of earlier cases had held that patentees that send cease-and-desist letters to alleged infringers "should not subject itself to personal jurisdiction in a forum solely by informing a party who happens to be located there of suspected infringement." In this case, the patentee invoked an extrajudicial procedure offered by Amazon that allows a patentee to "take down" alleged infringing listings, and the Federal Circuit, reversing the district court, held that the patentee's enforcement conduct met the *Calder* purposeful-direction standard when sued by the infringer for a declaration of noninfringement in the infringer's home state.

Defendant Lighting Defense Group (LDG), a Delaware company with its principal place of business in Arizona, owns the patent for an electrical receptacle. Plaintiff SnapPower, a Utah company headquartered in that state, sells electrical equipment on Amazon. LDG invoked Amazon's procedure, Amazon Patent Evaluation Express (APEX), claiming that SnapPower was infringing its patent. After discussions between the companies produced no resolution, SnapPower sued LDG in Utah district court for a declaration of noninfringement, and granted defendant's motion to dismiss for lack of personal jurisdiction. The Federal Circuit reversed, arguing that LDG had purposefully directed enforcement activity at Utah when it initiated extrajudicial enforcement through APEX. Drawing an analogy to *Calder*, and distinguishing *Walden*, the circuit court emphasized that the enforcement action potentially impacted plaintiff's marketing, sales, and other activities in Utah and connected the defendant to Utah, and thus differed from cases that involved cease-and-desist letters. Moreover, LDG did not show that Utah's exercise of personal jurisdiction would be unreasonable: "Parties who participate in APEX by submitting an Agreement will only be subject to specific personal jurisdiction where they have targeted a forum state by identifying listings for removal that, if removed, affect the marketing, sales, or other activities in that state." Utah's long-arm statute, Utah Code Ann. § 78-

27-22 et seq., allowed for exercising "jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution."

DP Creations, LLC v. Adolly.com, 2024 WL 4491924 (10th Cir. 2024).

The case presents a compact exercise in statutory interpretation; the question is what it means to be "found" for purposes of jurisdiction under Tile II of the Digital Millenium Copyright Act of 1998. The question on appeal was whether the Utah district court could exercise personal jurisdiction over two Chinese companies that consented to jurisdiction in any judicial district in which Amazon "may be found," as that phrase is used in 17 U.S.C. § 512(g)(3)(D). The district court dismissed the action, interpreting the word "found" to require a showing that Amazon does business in Utah to make it amenable to service of process and suit in that state. The Tenth Circuit instead held that the inquiry "turns on whether its officers or agents are in Utah carrying on Amazon's business" in that state. To reach this result, the appeals court used standard tools of statutory interpretation, looking not only at the text of the statute but also to dictionary definitions to divine the meaning of an undefined statutory term. In particular, it rejected equating the term "found" within being at home in the state for general jurisdiction purposes.

Jurisdiction Based on Power over Property

Ultra Deep Picasso Pte. Limited v. Dynamic Industries Saudi Arabia Limited, 119 F.4th 437 (5th Cir. 2024).

The case involves a Rule B maritime attachment and garnishment of a nonresident defendant's property.[5] Although 1L courses do not typically cover maritime jurisdiction, the

[5] See Fed. R. Civ. P. Supp. R. B(1):

> **(1)** ... In an in personam action:
> **(a)** If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach

decision raises the interesting question of where to locate a bank account of a global bank for attachment purposes. Dynamic Industries Saudi Arabia Limited (Dynamic) contracted with Saudi Aramco to do an overseas project and subcontracted with plaintiff Ultra Deep Picasso Pte Limited, a company that operates undersea vessels for maritime construction projects. The Dynamic/Ultra subcontract contained an arbitration clause as well as payment terms, secured through a bank guarantee provided by Riyad Bank. Ultra alleged that Dynamic failed to pay more than $10 million for its services as required, and sued Dynamic in the Southern District of Texas; to secure the arbitration claims, it sought maritime attachment and garnishment of Dynamic's funds allegedly held by Riyad Bank at its office in Houston, Texas. The Fifth Circuit first held that a district court may attach property under Rule B only when that property is located in that district. Second, the Fifth Circuit held that to determine the location of a bank account, the court looks to the law of the forum state, in this case, Texas law. The Fifth Circuit rejected the argument that a customer's bank account—namely, Dynamic's—is found within a U.S. district for purposes of Rule B attachment if the foreign garnishee bank has a branch office in that district. Rather, under Texas law, a bank account is located in the district "where its funds can be withdrawn." Because there was no evidence that Dynamic could withdraw funds through the Bank's location in Houston, those assets were not located within that district for jurisdictional purposes.

Jurisdictional Reach of the Federal District Courts

Vanegas v. Signet Builders, Inc., 113 F.4th 718 (7th Cir. 2024).

The suit involved a collective action filed in Wisconsin district court under the Fair Labor Standards Act against Signet Builders Inc., a construction business incorporated and headquartered in Texas. Plaintiff, a construction worker with an H-2A guest worker visa, alleged that defendant had overworked and underpaid him at construction sites in three different states, including Wisconsin. The Wisconsin long-arm statute, Wis. Stat. § 801.05, authorizes personal jurisdiction over a defendant when, among other things, it is "engaged in substantial and not

---

the defendant's tangible or intangible personal property—up to the amount sued for—in the hands of the garnishees named in the process.

isolated activities within this state" or in any action which "arises out of a promise, made anywhere to the plaintiff […] by the defendant […] to pay for services to be performed in this state by the plaintiff." FLSA authorizes workers to bring actions on behalf of a group of workers; each worker must individually opt into the action; FLSA does not require the opt-in plaintiff to file a summons and complaint, and instead simply gives notice through service under Federal Rule 5. The question on appeal was whether a FLSA collective action is best analogized to a class action under Federal Rule 23, which under the law of the Seventh Circuit requires personal jurisdiction over only the claims of the representative plaintiff, or to a mass action, which, as in *Bristol–Myers Squibb* (Casebook, p, 173; Compact, p. 122), requires jurisdiction over the claims of each opt-in plaintiff. The Seventh Circuit rejected the analogy to a Rule 23 class, finding that "an FLSA collective action tracks with a mass action—and is quite unlike a class action." The court also rejected the argument that the Fifth Amendment, and not the Fourteenth Amendment, controlled the jurisdictional analysis. Likewise, the court declined to exercise pendent claim personal jurisdiction, underscoring that Congress had not authorized nationwide service of process under the FLSA and finding, further, that the exercise of such power would be incompatible with *Bristol-Myers Squibb*'s rejection of a "loose and spurious form of general jurisdiction." Finally, the court refused to accord jurisdictional significance to FLSA's requirement that opt-in plaintiffs need to comply only with Rule 5 service, which involves no summons, thus rejecting the argument that "once a court establishes its personal jurisdiction under Rule 4, any new claims or parties need only comply with the Fifth Amendment—unless the addition explicitly calls for a new summons as, e.g., Fed. R. Civ. P. 14(a)(1) does."

Circuit Judge Rovner, dissenting, argued that *Bristol-Myers Squibb* did not apply because FLSA collective actions were always brought in federal court and, therefore, the dispute did not implicate the sovereign interests of states. Further, even if *Bristol-Myers Squibb* did apply and was understood as establishing a dichotomy between class actions and mass actions, the FLSA collective action is best analogized to a class action. In light of *Fuld* and FLSA's text, students might consider whether the dissent has the better argument. The Ninth Circuit, on July 1, 2025, issued its decision in *Harrington v. Cracker Barrel Old Country Store, Inc.*, ___ F.4th ___, 2025 WL 1803034 (4th Cir. 2025), likewise holding that *Bristol-Myers Squibb* applies to

FLSA collective actions.[6]

Hardy v. Scandinavian Airlines System, 117 F.4th 252 (5th Cir. 2024), cert. denied, 145 S.Ct. 1308 (2025).

This case presents an accessible fact pattern involving a personal injury action. It also presents a good problem for statutory interpretation—whether the Montreal Convention independently creates personal jurisdiction over a defendant airline sued in federal court—and the standard for jurisdiction under Federal Rule 4(k)(2).

Plaintiff flew from New Jersey to Norway, and when she stepped off the plane, injured her leg. She sued Scandinavian Airlines System (SAS) in the Eastern District of Louisiana, asserting that Section 33 of the Montreal Convention created subject matter jurisdiction over the personal injury claim and personal jurisdiction over SAS in a U.S. court. As a matter of first impression, the Fifth Circuit agreed with the district court that the Montreal Convention does not create personal jurisdiction—although the section is titled Jurisdiction, it uses language "may be brought" and "must be brought," which the court found indicated venue. Moreover, the court emphasized that venue, "without language also authorizing the service of process," does not establish personal jurisdiction, relying on *BNSF* (Casebook, p. 170; Compact, p. 120), and the Convention did not include the requisite service-of-process language. In addition, the court rejected the argument that SAS waived objections to personal jurisdiction by acknowledging subject matter jurisdiction and venue, refusing to treat the Convention as akin to a forum-selection clause. Turning to Federal Rule 4(k)(2), the appeals court held that the district court relied on the wrong constitutional standard in assessing jurisdiction; what matters is whether defendant has minimum contacts with the United States, not with the forum state. The airline's contacts with the United States included flying into and out of seven U.S. cities, having a U.S. subsidiary, being FAA-regulated, advertising and selling tickets to U.S. buyers, and participating in the Star Alliance with United Airlines. Plaintiff's injuries arose out of the airline's advertising

[6] For disclosure, Professors Hershkoff, Miller, Sexton, and Steinman submitted briefs as amici curiae in *Signet Builders* and in *Cracker Barrel*, on appeal, arguing, among other things, that the Fourteenth Amendment does not by its own force limit the personal jurisdiction of federal courts and, further, that *Bristol-Myers* rests on constitutional principles that limit state-court authority but are in applicable in federal court.

and operating flights out of Newark. On these facts, due process was met.

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

In re Vista-Pro Automotive, LLC, 109 F.4th 438 (6th Cir. 2024), cert. granted by Coney Island Auto Parts, Inc. v. Burton, __ S.Ct. ___, 2025 WL 1603597 (U.S. 2025).

The Supreme Court has granted cert in this case on whether a motion under Federal Rule 60(b)(4) for relief from judgment—in this case, a default judgment alleged to be void due to improper service—is subject to a reasonable time-limitation. Vista-Pro, a Nashville auto-parts corporation in Chapter 11 restructuring proceedings, sued Coney Island, a New York corporation, for unpaid invoices. Vista-Pro addressed its summons and complaint to the corporation, Coney Island, itself without naming any officers or natural persons. Coney Island did not respond, and the clerk of the bankruptcy court entered a default judgment in 2015. In 2021, Coney Island moved to vacate the judgment as void for improper service of process. The bankruptcy court denied the motion, finding that Coney Island had actual notice of the default judgment in 2016 but waited an unreasonable time to move to vacate the judgment. The district court affirmed. On appeal, the Sixth Circuit, relying on circuit precedent, rejected the argument that Rule 60(b)(4) motions are subject to no time limit.

McKeague, J., dissenting, questioned whether circuit precedent covered this situation. In his view, the Sixth Circuit had never denied vacatur of a void judgment on timeliness grounds; to the contrary, denying such a motion was per se an abuse of discretion. Furthermore, the Sixth Circuit had never denied vacatur where a judgment was void for lack of personal jurisdiction, as distinct from subject-matter jurisdiction, and consistent with due process could be waived only with proper notice.

Chapter 3: Providing Notice and Opportunity to Be Heard

The Requirement of Reasonable Notice

A.A.R.P. v. Donald Trump, 605 U.S. ___, 145 S. Ct. 1364 (2025).

Students likely will be familiar with litigation challenging Executive Orders invoking authority under the Alien Enemies Act, 50 U.S.C. § 21 to remove Venezuelan nationals from the United States as suspected members of Tren De Aragua, designated as a foreign terrorist organization by Presidential Proclamation. Plaintiffs individually and on behalf of a class currently held in U.S. detention facilities sought injunctive relief from summary removal. Plaintiffs alleged that they received notice of removal on April 17, and the Supreme Court "understood the Government to assert the right to remove the detainees as soon as midnight central time on April 19." The Court held that the Fifth Amendment guarantee of due process applied to the noncitizens subject to removal proceedings, and explained that due process in this situation is intended to protect against "the mistaken or unjustified deprivation of life, liberty, or property." The Court relied upon *Mullane* (Casebook, p. 237; Compact, p. 173) for the proposition that the detainees must receive the requisite notice "within a reasonable time and in such a matter as will allow them" actually to seek relief, which in this case is habeas relief. "In order to 'actually seek habeas relief,' a detainee must have sufficient time and information to reasonably be able to contact counsel, file a petition, and pursue appropriate relief." The Court found that "notice roughly 24 hours before removal, devoid of information about how to exercise due process rights to contest that removal, surely does not pass muster." The Court remanded to the Fifth Circuit "to determine in the first instance the precise process necessary to satisfy the Constitution in this case."

Harrington v. Cracker Barrel Old Country Store, Inc., ___ F.4th ___, 2025 WL 1803034 (9th Cir. 2025).

This case illustrates the requirement of notice as a statutory matter, finding that the district court erroneously ordered nationwide notice without first determining personal jurisdiction. The suit alleged violations of the Fair Labor Standards Act (see this memo, p. 23), and the named plaintiff sought to litigate the case as a collective action. District courts generally assess the propriety of the collective mechanism using a two-step certification process that considers first whether plaintiff has facially satisfied the requirement that opt-in parties are similarly situated to the named plaintiff. If they are, the district court typically makes a

provisional-certification ruling, which triggers "the sending of court-approved written notice' to prospective-plaintiff employees, who may opt to join int the collective action by filling written consent with the court." In this case, the Ninth Circuit held it was error for the district court to send such notice without first determining "whether each opt-in plaintiff's claim bears a sufficient connection to the defendant's activities in the forum state. Because the district court authorized nationwide notice on the mistaken assumption that it would not need to assess specific personal jurisdiction on a claim-by-claim basis," the appeals court vacated and remanded.

Ryan v. Mansapit-Shimizu, 2025 WL 1752135 (9th Cir. 2025).

This case may be interesting to students in that it looks at notice and opportunity to be heard in the context of a property interest that is created by state law but differs from the real estate, wages, government benefits, and other forms of property discussed in the Chapter—namely, the proceeds of a whistleblower action that the government secretly settled and then claimed qualified immunity when sued for a portion of the recovery.

Plaintiff brought a whistleblower suit under Guam's qui tam statute; under the act, plaintiffs generally are entitled to 30 percent of any funds recovered. Unbeknownst to plaintiff, the Director of the Guam Department of Revenue and Taxation and other defendants settled the action without telling him. He then sued those government officials for violating his procedural due process right to notice and an opportunity to be heard.

On appeal, the Ninth Circuit first determined that plaintiff had a property interest created by state law. Although he did not show a clearly established property interest in the qui tam action itself, he did have a property interest in the proceeds of any settlement:

> The Whistleblower Act states that if the government declines to intervene in a relator's qui tam action, the government "shall award not less than thirty percent (30%) of the collected proceeds ... resulting from the action (including any related actions) or from any settlement in response to such action." * * *. Under Guam's statute, when the government pursues an alternate remedy, the relator "shall have the same rights in such proceeding as [ ] [he] would have had if the [qui tam] action had continued." * * *. The government has no discretion in awarding the proceeds: if the government declines to intervene, but later settles the suit, it must

> award the relator his portion of the proceeds. * * * The Whistleblower Act therefore creates a protected property interest in recovered proceeds, and the Act's unequivocal language is "clear enough that every reasonable official would interpret it to establish" that [plaintiff] has a protected property interest in the proceeds.

The appeals court then considered "what process is due." At a minimum, plaintiff was entitled to notice that defendants had settled the lawsuit, and defendants were not entitled to a qualified-immunity defense.

Opportunity to Be Heard

Hadwan v. United States Department of State, 139 F.4th 209 (2d Cir. 2025).

The facts of this case likely will hold interest for 1Ls who are interested in politics, immigration, and questions of government accountability. Plaintiff, "stranded" in Yemen, sued the Department of State for illegally revoking his Consular Report of Birth Abroad and passport. The district court granted defendant's motion for summary judgment, and the Second Circuit reversed, finding that under the balancing test of Mathews v. Eldridge (Casebook, p. 284; Compact Casebook, p. 207), the State Department had violated due process by failing to give plaintiff sufficient notice and an opportunity to be heard to challenge the adverse action. Because the agency revoked the certification and passport while plaintiff was abroad, he was not able to return to the United States to attend the revocation hearing and was not able in a meaningful way to challenge the adverse actions.

As a threshold matter, the appeals court found that plaintiff had not waived his constitutional arguments by failing to raise them before the agency; moreover, he preserved the arguments in his pleading and "the availability of judicial review is presumed." Second, the court found a liberty interest that triggered due process, namely, the right to travel to the United States to challenge the adverse action. Third, the balancing of factors tilted in plaintiff's favor. The court noted that the individual's liberty interests were extremely strong because the right to travel is fundamental, and it was especially weighty when a U.S. citizen would be stranded abroad. It noted that the government's national security and foreign policy interest in regulating its passports was also extremely strong. Accordingly, although a pre-confiscation hearing was not

necessary, a prompt post-confiscation hearing with a meaningful opportunity to be heard was constitutionally required. The court did not prescribe specific procedures, but it intimated that the government could have provided plaintiff with a limited validity passport to allow him to travel to the U.S. for his hearing; could have granted a continuance for additional time; or could have facilitated discovery in Yemen.

Judge Menashi dissented, and argued that the government did not violate due process; although plaintiff was not present at the hearing, he was represented by counsel, and he failed to identify any specific ways in which his absence harmed his ability to challenge the government's actions. The dissent also argued that the appeals court impinged on executive prerogative:

> Neither the Administrative Procedure Act nor the Due Process Clause authorizes a federal court to micromanage the State Department's procedures for revoking a passport or to countermand its decision because the court would have reached a different conclusion. But that is what today's opinion does—going so far as to lecture the State Department that it should have used various discretionary "tools at its disposal" to conduct its hearing in a way that no law requires. * * * There is no justification for such an intervention into State Department procedures.

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

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

Santiago-Colberg v. Busquets, 755 F. Supp. 3d 147 (D.P.R. 2024).

The case presents a compact fact pattern for applying the *Mas* rule (Casebook, p. 309; Compact, p. 224) to determine the citizenship of a person in transit, namely, a student who relocates to a state other than the student's domicile to enroll in a degree program. Two sons filed a medical malpractice suit in federal court in the District of Puerto Rico against the Puerto Rico surgeon who had treated their mother and caused her physical damage resulting in their own emotional pain and suffering. The court granted summary judgment, in part because one of the sons was domiciled in Puerto Rico, defeating complete diversity. dismissed for lack of

diversity jurisdiction. No one disputed that the son was physically present in Illinois for medical rotations when he filed the complaint. However, he failed to show by a preponderance of the evidence the requisite intent to remain in that state and not in Puerto Rico where he had lived prior to moving to St. Kitts for school. The court found insufficient a one-year lease on a Chicago apartment, the purchase of residential insurance for that apartment, and the payment of utilities in the Chicago apartment. As the court explained: "It is common knowledge that a student who moves to a new state for school, absent other conditions, does not become domiciled in the state where he is enrolled." Although plaintiff provided some evidence other than physical presence that was "probative of intent to remain," additional proof was needed, "such as the location of real and personal property, driver's license, bank account, place of employment, and transfer of phone service."

Collector's Coffee, Inc. v. Debevoise & Plimpton LLP, 2025 WL 1077507 (D.C. Cir. 2025).

The case illustrates the fact-intensive nature of determining the citizenship of a partnership and what it means to be "stateless" for purposes of § 1332 – which can refer to not having national citizenship, as in *Rubenstein* (Casebook, p. 315; Compact, p. 230), or not having state citizenship, as in *Sadat* (Casebook, p. 316; Compact, p. 231). Collector's Coffee and its founder and CEO sued their former lawyers at Debevoise & Plimpton for legal malpractice. The district court dismissed for lack of diversity and arising-under jurisdiction, and also denied plaintiffs' request for jurisdictional discovery. Debevoise successfully argued that it is "stateless" for diversity jurisdiction purposes because at least four of its U.S.-citizen partners are domiciled abroad. The court looked to two factors: whether the partners were physically present in a state, and whether they had an intent to remain in the state for an indefinite period of time. In support of its motion, Debevoise established that it is a partnership under New York law and is registered as a limited liability partnership; it provided its partnership agreement, listing partners by name; and it provided affidavits from four partners attesting they are U.S. citizens, have long lived abroad, and have no intention to return to live in the U.S.

Hensley v. Hartford Casualty Insurance Co., 113 F.4th 1327 (11th Cir. 2024).

The case offers a challenging set of facts combining the rule of complete diversity with removal and intervention by a required party, in this case an insurance company. Boiled down, plaintiff tripped and fell at a hotel, and she and her husband, both Georgia citizens, sued Merritt, a Connecticut hotel company, and other entities in state court for negligence and loss of consortium. Defendants removed to federal court on the basis of diversity jurisdiction, and the action proceeded to summary judgment in favor of defendants. In the meantime, Hartford moved under Georgia insurance law to intervene as of right to assert a subrogation lien. On appeal, the Eleventh Circuit vacated the summary judgment and remanded, finding that Hartford's intervention was permitted as of right under Federal Rule 24(a), that Hartford was an indispensable party under Rule 19(b), and that its presence in the action defeated complete diversity because Hartford "is a citizen of Connecticut [who] brought an intervenor complaint against another Connecticut citizen, Merritt," so "the district court lost subject matter jurisdiction over this case" the moment it "granted Hartford's intervention." Accordingly, the Eleventh Circuit vacated the district court's grant of summary judgment and remanded the case to state court.

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

Jenkins v. Howard University, 123 F.4th 1343 (D.C. Cir. 2024).

This case illustrates the jurisdictional rule of *Lightfoot v. Cedant Mortgage Corp.* (Casebook, p. 329, Note 1; Compact p. 244, Note 1): that federal jurisdiction arises in suits by or against a federally chartered institution "if, but only if" the entity's sue-and-be-sued clause "specifically mentions the federal courts." The dispute involved governance changes at Howard University, which was created by congressional charter in 1867. Howard University's Board of Trustees amended its bylaws to eliminate trustee positions that alumni, students, and faculty had historically held. In response, alumni filed suit in the D.C. Superior Court, seeking a declaratory judgment that the Board's action was *ultra vires* and violated the Board's bylaws. Howard then removed the action to federal court. The D.C. Circuit reversed and remanded. First, it found that the federal charter did not support arising-under jurisdiction because it did not specifically

mention federal courts. Second, the court of appeals rejected the argument that the internal affairs doctrine called for the application of federal common law. Finally, the D.C. Circuit found that federal question jurisdiction was not proper under the *Grable* test; the complaint did not raise a substantial federal question related to the charter, but rather arose from the Board's bylaws.

Collector's Coffee, Inc. v. Debevoise & Plimpton LLP, 2025 WL 1077507 (D.C. Cir. 2025).

We previously discussed this case in the context of diversity jurisdiction and statelessness. The district court also held that it lacked federal question jurisdiction over the state-law malpractice claims. The facts offer a twist on *Gunn*. Plaintiffs argued that jurisdiction was present because the law firm represented them in an SEC action and so was "obligated to interpret federal statutes" and was subject to the SEC's rules of conduct. Relying on *Gunn* (Casebook, p. 347; Compact, p. 255), the court concluded that "state legal malpractice claims, which require courts to review attorney conduct after the fact, are 'by their nature unlikely to have the sort of significance for the federal system necessary to establish jurisdiction.' * * * [and that] [a]sserting federal jurisdiction over such claims would upset the 'balance of federal and state judicial responsibilities' because states have a 'special responsibility for maintaining standards among members of the licensed professions.'"

Tobiason v. BMO Bank N.A., 758 F. Supp. 3d 927 (E.D. Wis. 2024).

Plaintiff bought a car and arranged for financing from the dealer. The dealer assigned the loan to BMO Bank. After plaintiff missed a payment, BMO repossessed the car and notified plaintiff that it would sell the car, credit him with the proceeds, and hold him liable for any deficiency. Plaintiff filed a putative class action in state court alleging BMO Bank violated Wisconsin law by miscalculating the deficiency and attempting to collect money that is not owed them. BMO removed to federal court invoking two grounds: § 1331 and § 1332(d)(2) (the Class Action Fairness Act). The district court granted plaintiff's remand motion: the claims did not depend on a question of federal law and the request for injunctive relief did not transform the

state claims into federal claims, even though the state relief mirrored federal law. As the court explained, "it is black-letter law that the existence of a federal defense does not give rise to federal question jurisdiction and nothing in *Grable* changes that fundamental point." (The court also rejected CAFA removal, finding that the amount in controversy fell short of $5 million due to defendant's improper inclusion of attorney's fees that the "prevailing part is entitled to recover . . . as part of its damages.")

(For another case involving remand of state-law legal malpractice case, see *Cantu v. Beck Redden LLP*, 2024 WL 5199328 (5th Cir. 2024), petition for cert. docketed by Beck Redden LLP v. Cantu (U.S. No. 24–2025). The Fifth Circuit applied the four-part *Grable* test (Casebook, p. 342; Compact, p. 250), finding that the claim did not meet the substantiality requirement and was, as in *Gunn*, a "run of the mill" state legal malpractice claim.).

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

Note on Nonstatutory Ancillary Jurisdiction

PNC Bank, N.A. v. 2013 Travis Oak Creek, L.P., 136 F.4th 568 (5th Cir. 2025).

This case can usefully be discussed as a follow-on to *Kokkonen* (Casebook, p. 379; Compact, p. 269) and illustrates the interplay of severance under Federal Rule 21 and non-codified supplemental jurisdiction. The parties settled a diversity action to modify a partnership. They later moved to reopen the case to enforce the settlement agreement. The court had jurisdiction to enforce the agreement because it explicitly had retained jurisdiction. The court granted the motion to reopen, severed the motions to enforce, created a new case, and granted each motion in part. On appeal, the Fifth Circuit held that remand was needed to determine whether jurisdiction existed over the new case (established when the enforcement motions were severed), and that jurisdiction in the new case could not piggy back on the order and findings in the initial suit. The court explicitly declined to take judicial notice of factual findings from a separate, but related, case on the citizenship of the parties. The decision contains a useful

discussion of a circuit division on when judicial notice of jurisdictional facts might be appropriate:

> Under Federal Rule of Evidence 201, a court may take judicial notice of an adjudicative fact "that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." * * *. Accordingly, we have previously taken judicial notice of jurisdictional facts drawn from public records. * * *
>
> But the parties do not point to public records to establish jurisdiction. Instead, they offer factual findings from separate, but related, cases. * * * The Second, Eighth, and Eleventh Circuits hold that a court may take judicial notice of a document filed in another court to establish a fact of such litigation and related findings, but a court cannot take judicial notice of the factual findings of another court. * * * The Seventh Circuit takes a similar, but not identical approach, holding that while courts generally may not take judicial notice of factual findings from other proceedings for the truth asserted therein, a court may take judicial notice of such findings that satisfy Rule 201's indisputability requirement. * * *
>
> [The Fifth Circuit in earlier cases] * * * noted that it would be difficult to "conceiv[e] of an adjudicative fact found in a court record that is not [the] subject of reasonable dispute." * * * Such a fact, we observed, "would have to obtain its 'indisputable' status from some source other than a court's imprimatur in the form of a factual finding." * * *
> Given these observations, it should come as no surprise that we have since interpreted [prior circuit cases] * * * to bar requests to take judicial notice of factual findings by other courts. * * * We have even held that a court may not take judicial notice of its own previous orders in proceedings concerning the same defendant where the plaintiff asks the court to take judicial notice of factual findings, rather than the fact of such litigation. * * *
>
> Because the factual findings of another court cannot overcome Rule 201's indisputability requirement, we decline to take judicial notice of such facts here.

The Subject-Matter Jurisdiction of the Federal Courts—Removal

Note on Removal Jurisdiction and Procedure

Palmquist v. Hain Celestial Group, 103 F.4th 294 (5th Cir. 2024), cert. granted in part by Hain Celestial Group, Inc. v. Palmquist, 145 S. Ct. 1960 (2025) (Docket No. 24-724).

The question of the jurisdictional significance of post-removal amendments once again are before the Supreme Court—now, to distinguish between allegations that clarify a state complaint to meet Federal Rule 8 and those that add new claims to defeat a defense of fraudulent joinder. In 2021, Texas parents sued Hain Celestial Group and Whole Foods in state court on behalf of their infant son for damages allegedly caused by the child's ingestion of organic foods that defendants manufactured and/or sold. Defendant Hain removed the action to federal court on the basis of diversity jurisdiction, arguing that Whole Foods, a Texas company, was fraudulently joined. Post-removal, plaintiffs filed an amended complaint to "clarif[y]" their claims against Whole Foods under the federal pleading standard, and moved to remand. The district court denied the remand motion and dismissed the action against Whole Foods with prejudice. The suit proceeded to the merits, and, after a two-week jury trial, the district court granted judgment as a matter of law to Hain. On appeal, the Fifth Circuit held that the district court erred in dismissing Whole Foods, vacated the final judgment, and ordered the matter remanded to state court to start from scratch. The Supreme Court has granted cert on the following question: "Whether a district court's final judgment as to completely diverse parties must be vacated when an appellate court later determines that it erred by dismissing a non-diverse party at the time of removal."

Hanson v. Depot LBX, Inc., 756 F. Supp. 3d 56 (W.D. Va. 2024).

Tortella v. RAKS Building Supply, Inc., 758 F. Supp. 3d 1323, 1325 (D.N.M. 2024).

The propriety of "snap removal" continues to percolate in the lower federal courts. In *Hanson*, the district court endorsed snap removal on the basis of a plain-meaning analysis and denied plaintiff's motion to remand. Hanson of Tennessee sued Depot LBX, a Virginia corporation, in Virginia state court. Prior to serving Depot, Hanson emailed a courtesy copy of the complaint to Depot's insurer. Depot seized the chance to remove the action two days after Hanson filed the complaint but before service. The district court found that "snap removal is not demonstrably at odds with clearly expressed congressional intent" and "does not rise to the level of absurdity that would allow this Court to inscribe its own preferred meaning onto the

statute." The court maintained that the "properly joined and served" language in Section 1441 likely is designed to deter fraudulent joinder and that a "literal application" of the statute, which allows snap removal, does not conflict with that purpose.

Tortella likewise involved a sole in-state defendant seeking to remove prior to service. The district court held that "pre-service 'snap' removal by a lone forum defendant . . . runs counter to the plain language of" § 1441 and agreed with "many courts" that snap removal "can produce absurd results." In the court's view, defendant's pre-service removal was "bizarre" because § 1441(b)(2) assumes "at least one party has been served prior to removal," but in this case, no party had yet been served yet, which would usually mean that the court could "not exercise any power" in the first place.

Attorney General of New Jersey v. Dow Chemical Co., 140 F.4th 115 (3d Cir. 2025).

Maryland v. 3M Co., 130 F.4th 380 (4th Cir. 2025).

Officer removal likely is beyond the scope of most 1L Procedures courses; notably, most of the ordinary jurisdictional presumptions do not apply and 28 U.S.C. § 1442 is an exception to the well-pleaded complaint rule. This pair of cases illustrates some of the current issues. In the New Jersey action, the Third Circuit affirmed the district court's order to remand holding that "[p]roviding a product to the [federal] Government does not guarantee federal-officer removal." The State of New Jersey had sued Dow in state court for environmental harms caused by a chemical known as 1,4-dioxane. The State pleaded state-law claims related to Dow's design, manufacture, and sale of this chemical. Dow argued that removal was proper under § 1442 because Dow acted under the direction of the federal government in producing 1,4-dioxane-inhibited TCA. The Third Circuit rejected this defense, reasoning that Dow developed and sold the product beginning in 1951, which was well before the federal government issued any tailored product specifications in 1967.

The Fourth Circuit decision addressed a far more complicated fact pattern—Maryland and South Carolina filed separate actions in state court against 3M for contaminating waterways with polyfluoroalkyl substances contained in firefighting foam that the company manufactured. 3M removed on the basis of federal officer removal, successfully arguing that it sold the foam

both to military and civilian consumers, and that the states' contamination claims plausibly satisfied the "nexus" requirement for federal-officer removal because it was virtually impossible to identify the precise source of contamination.

Abraham Watkins Nichols Agosto Aziz & Stogner v. Festeryga, 138 F.4th 252 (5th Cir. 2025).

The Fifth Circuit overruled its prior decision in In re Weaver, 610 F.2d 335 (5th Cir. 1980), clarifying that it "has jurisdiction to review a remand order based solely on defendant's alleged waiver of the right to remove." A law firm sued a former associate in state court. After 17 days of proceedings in state court, which included, among other things, defendant's motion to dismiss a SLAPP claim and an agreed-upon protective order, defendant removed to federal court. The district court granted the motion to remand, finding waiver. On appeal, the Fifth Circuit initially dismissed for lack of appellate jurisdiction. Rehearing en banc was granted, and the appeals court held that defendant waived his removal rights by participating in state court proceedings, and that this issue fell outside the bar on appellate review of remand orders because the order here was not neatly "grounded in either a (1) lack of subject matter jurisdiction or (2) a defect in the removal procedure." In particular, waiver by participation "is a judicially created, common-law doctrine," is not jurisdictional, and thus has "no footing in the removal statutes."

Sheppard v. Price Gregory International, LLC, ___ F. Supp. 3d ___, 2025 WL 1099713 (S.D. W. Va. 2025).

The case presents what the district court called "a unique issue: a defendant who objects to the removal of a case that occurred prior to his appearance and a plaintiff who opposes remand." Plaintiff filed a state court discrimination and tort action against an LLC and an individual. The LLC removed before plaintiff had served the individual defendant. The individual defendant, two months after appearing in the action, moved to remand (arguing that "the rule of unanimity" under §§ 1441(a) and 1446 "requires remand as he did not consent to removal") or, alternatively, to dismiss for lack of subject-matter jurisdiction (arguing that because of a settlement between plaintiff and the LLC, the case no longer met the amount in

controversy requirement). The court held that the individual had waived his objections to removal, finding that the 30-day time limit § 1447(c) for objections to removal based on defects applies to all defendants, including later-served defendants, and that "non-compliance with the rule of unanimity is a waivable error," and not jurisdictional.

A recurring question in the lower courts is when federal jurisdiction exists over an action to vacate an arbitration award. The question may be too advanced for 1L courses, but we list a few decisions that offer compact fact patterns and clear analyses:

Green v. Bank of America Merrill Lynch, 2025 WL 1378193 (2d Cir. 2025) (no federal jurisdiction over action to vacate an arbitration award that involved only state law claims, even when the claim raised issues about treatment of pro se litigants with mental disabilities).

Williams v. ProMedica Health Systems, Inc., 2024 WL 4927258 (3d Cir. 2024) (the Third Circuit rejected a petition to vacate an arbitral award, finding a lack of jurisdiction; whether his private arbitration agreement violated rules of the Centers for Medicare and Medicaid Services was "not a substantial federal issue under *Grable*"; "*Gunn* is clear that the bar for substantiality is high."). Like *Cantu*, this is a straightforward application of *Grable* and *Gunn*, but it is interesting as it is in the arbitration context. Plaintiff Williams filed a petition for a writ of certiorari on May 14, 2025, in the U.S. Supreme Court (No. 24-1253).

Hamilton Reserve Bank Ltd. v. Democratic Socialist Republic of Sri Lanka, 134 F.4th 73 (2d Cir. 2025).

Hamilton Reserve Bank sued Sri Lanka in U.S. federal court for breach of contract, alleging it had failed to pay $250 million in matured government bonds. Over a year later, account holders moved to intervene in the action, alleging that the bank converted their funds to buy the bonds and had defrauded them. The district court denied the motion, holding it lacked supplemental jurisdiction over their claims because they did not share a common nucleus of operative fact with the bank's claim against Sri Lanka. The Second Circuit affirmed. The court's test looked to whether "the facts underlying the federal and state claims substantially overlapped … [or] the federal claim necessarily brought the facts underlying the state claim before the court." (alteration in original). Under this standard, the bank's claim concerned a default on sovereign debt; the account holders' claim arose from their deposit of funds with the bank and refusal to

repay deposited funds to the account holder. Critically, the appeals court applied de novo review to determine whether jurisdiction existed under § 1367(a), and not the deferential abuse-of-discretion standard used to review decisions under § 1367(c). Moreover, the appeals court rejected the argument that a district court "necessarily" possesses jurisdiction over intervention claims when the requirements of intervention as of right are met—a principle that predated the codification of § 1367.

> That is a problem for Appellants' argument, because the Supreme Court has cautioned that courts should not assume that Section 1367 "did no more than ... to codify the existing state of the law of supplemental jurisdiction." * * * Instead, district courts have been instructed to "examine the statute's text in light of context, structure, and related statutory provisions." * * * And nothing in the text, context, or structure of Section 1367 supports Appellants' proposed approach to intervenor claims here. The text and structure of Section 1367(a) make no distinction between intervenor claims and other non-federal claims: the "same case or controversy" language applies to all claims that require supplemental jurisdiction to be heard in federal court. * * *. Moreover, the Federal Rules of Civil Procedure expressly provide that those Rules (of course including Rule 24) "do not extend or limit the jurisdiction of the district courts." Fed. R. Civ. P. 82. Thus, there is no reason to think that a special standard of supplemental jurisdiction applies solely to intervenor claims under Rule 24(a)(2), distinct from the standard applied under Section 1367(a) to all other claims that, under that statute, are subject to the "common nucleus" standard.

Joyner v. Morrison and Foerster LLP, ___ F.4th ___, 2025 WL 1717402 (D.C. Cir. 2025).

The case provides an accessible fact pattern for discussing the common-nucleus-of-fact standard for the exercise of supplemental jurisdiction when the anchor claim is § 1331. An attorney, hired by a staffing agency and assigned to work at Morrison and Foerster, sued the agency, the law firm, and several individual employees alleging racial discrimination and hostile work environment in violation of 42 U.S.C. § 1981 and Title VII, and wrongful discharge under D.C. law for having reported potential antitrust violations. The district court dismissed the complaint for failure to state a claim. On appeal, the D.C. Circuit held that the district court properly dismissed the federal claims, but lacked supplemental jurisdiction over the D.C. law claims. The appeals court found "no meaningful overlap between the operative facts of the

federal and state claims here"; the only thing in common was the employment relationship and that connection was insufficient to show a common nucleus of operative fact.

Note on Removal Jurisdiction and Procedure

Wilson v Hearos LLC, 128 F.4th 1254 (11th Cir. 2025).

Plaintiff sued Hearos, the manufacturer of earplugs, in Georgia state court for damages, filing his complaint on July 22, 2022, three days before the statute of limitations ran on his claims. What followed is an object lesson how not to litigate a case:

- On July 28, plaintiff served CT Corporation with the original summons and complaint.
- On August 15, plaintiff requested and received a second summons that was blank as to the recipient's name and address, but included a change in the caption listing Protective Industrial Products (PIP), Hearos' parent, as a defendant, but failed to file an amended complaint adding PIP as a party.
- On August 30, CT rejected service because it is not Hearos' registered agent.
- That same day, plaintiff unsuccessfully served the original summons on PIP.
- On September 1, plaintiff served PIP's registered agent in New York and included the second summons.
- On October 3, PIP removed the action to federal court
- On October 11, PIP and Hearos moved to dismiss the action on various grounds including insufficient process.
- On November 21, plaintiff served Hearos.
- On December 12, PIP and Hearos amended their motion to dismiss.

Thus, at no point did plaintiff amend his complaint to add PIP as a defendant, yet PIP, as a non-party removed the action. The district court, while calling the removal motion an "oddity," nevertheless exercised jurisdiction, decided the merits, and dismissed the tort claims as time barred under Georgia law.

On appeal, the Eleventh Circuit held that plaintiff waived his objections to the district court's exercise of subject matter jurisdiction. The removal was clearly procedurally defective because PIP was not a party to the lawsuit and did not have authority to remove; however, the district court could have exercised diversity jurisdiction as an original matter and the plaintiff failed to move to remand within 30 days, as required by § 1447(c). A defect other than a lack of jurisdiction as a basis for remand can be raised only by party motion and not sua sponte by the district court.

Turning to whether the state tort claims were time-barred, the court found that—under the *Erie* doctrine—the issue was governed by Georgia's service-and-diligence rule, not Federal Rule 4(m)'s 90-day window for service of the summons. The court treated the state rule as substantive for *Erie* purposes. As the court explained:

> Georgia's service-and-diligence rule is not merely a procedural rule like Federal Rule 4(m). "By holding that service of process does not relate back to toll the statute of limitations unless the plaintiff has acted diligently, the Georgia courts have interpreted their commencement statute and service of process statute as integral parts of the state statute of limitations." * * * State statutes of limitations are substantive law, and under the *Erie* doctrine, a federal court sitting in diversity must apply the controlling substantive law of the state. * * *
>
> Put otherwise, even after removal to federal court, Wilson as required by Georgia law still had to show diligence in perfecting service so that the service could relate back to the date he filed his complaint and his claim not be barred by the statute of limitations. Federal Rule 4(m)'s 90-days service window plays no role in determining whether Wilson timely commenced his suit under Georgia's statute of limitations. It merely sets the procedural maximum time allowed to serve defendants so that they have sufficient notice of the pending action and an opportunity to present objections. * * *. By contrast, "[t]he statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim." * * * Thus, each rule serves a distinct function. So even after the statute of limitations has run, a plaintiff can still serve the defendant within 90 days under Rule 4(m). The defendant then can either assert a statute-of-limitations defense or waive it. But "[t]he length of the limitations period, and closely related questions of tolling and application, are to be governed by state law." * * * A federal court has no authority to extend a state-defined statute of limitations. * * *
>
> We therefore conclude that the district court did not err in applying Georgia's service-and-diligence law, rather than Federal Rule 4(m), to determine whether Wilson's claims were time barred under Georgia's statute of limitations.

The appeals court affirmed the dismissal finding a lack of diligence.

Chapter 5. Venue, Transfer, and Forum Non Conveniens

Venue

Venue in the Federal Courts

Tobien v. Nationwide General Insurance Co., 133 F.4th 613 (6th Cir. 2025).

The case presents an accessible fact pattern for applying the § 1391 factors as well as the interest-of-justice condition of § 1406. A door-to-door salesman sued for injuries after being attacked by a dog in the driveway of a potential customer's home "in the serene hamlet of Loveland, Ohio." He filed two lawsuits: first, a personal-injury complaint against the homeowners in the Southern District of Ohio; and, second, a breach of contract claim against Nationwide, which insured the home but earlier had refused payment of his claim, in the Eastern District of Kentucky. The appeal concerns the second action. The district court, finding that the relevant action had taken place in Ohio, and that venue was not proper where filed, dismissed rather than transferring.

On appeal, the Sixth Circuit affirmed.

First, notwithstanding the rule that a defendant has the burden of establishing an affirmative defense, the Sixth Circuit held that plaintiff has the burden of proving venue by a preponderance of the evidence when defendant moves to dismiss under Rule 12(b)(3). The burden parallels plaintiff's burden to establish personal jurisdiction. The court explained:

> [W]here venue isn't available under § 1391(b)(1) or (b)(2), the fallback rule provides that venue is proper in "any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action." *Id.* § 1391(b)(3). In that situation, the questions of venue and personal jurisdiction are identical: whether venue is proper depends on whether the court can exercise personal jurisdiction over the defendant. A 12(b)(3) motion contesting fallback venue under § 1391(b)(3) is thus the substantial equivalent of a motion to dismiss for lack of personal jurisdiction. It wouldn't make sense for courts to use different

burdens of proof in evaluating these motions.

Second, plaintiff failed to meet this burden; he did not establish venue in the Eastern District of Kentucky by showing only that he resided in Kentucky and that he sent and received correspondence with the insurance company from his home in Kentucky. Moreover, the negative effects of the insurance company's actions in Kentucky did not establish venue in the selected forum.

Third, the district court did not abuse its discretion in refusing to transfer under § 1406 because the transfer would not be in the interest of justice. If transferred, the Ohio federal court would apply Ohio's choice-of-law rules, which would trigger Ohio tort law, and under that law, the claim against the insurance company lacked merit.

The Supreme Court addressed specialized venue provisions that apply to certain administrative challenges. Although the details of the actions are beyond the 1L Procedure course, brief attention might be given to textual differences between the provisions of these special statutes and that of § 1391 (Casebook, p. 409 Note 8; Compact, p. 290, Note 4). Discussion might also focus on why the parties preferred to litigate in one venue rather than another. Finally, the class might consider why Congress wants venue centralized in the D.C. Circuit for administrative actions that are nationwide in scope.

EPA v. Calumet Shreveport Refining, LLC, 605 U.S. ___, 145 S.Ct. 1735 (2025).

Oklahoma v. EPA, 605 U.S. ___, 145 S.Ct. 1720 (2025).

Under the Clean Air Act (CAA), challenges to nationally applicable actions of the Environmental Protection Agency (EPA) must be filed in the D.C. Circuit; challenges to locally or regionally applicable actions, in the regional Circuit Courts of Appeals. However, if locally or regionally applicable actions are "based on a determination of nationwide scope or effect," and the EPA finds and publishes that such a basis exists, then the action also must be challenged in the D.C. Circuit. See 42 U.S.C. § 7607(b)(1).

In *Calumet*, small oil refineries throughout the United States requested exemptions from

the Renewable Fuel Program, and the EPA denied them in an omnibus decision based on generalized considerations applicable to all the refineries, relying on individualized facts only to confirm its decision. The refineries challenged the EPA's action in their various Circuit Courts of Appeals. All but the Fifth Circuit dismissed the cases for improper venue or transferred them to the D.C. Circuit. The Fifth Circuit denied EPA's motion to transfer and ruled against it on the merits.

In an opinion by Justice Thomas, the Court explained that the EPA venue provision requires a two-step analysis. First, the court must determine what the relevant action is and its scope. Second, the court must determine whether the exemption applies. In this case, the denial of each refinery's exemption was the relevant "action" to trigger the Clean Air Act's venue provision and the decision had local application. The Court rejected the EPA's argument that the relevant decision was the agency's omnibus decision and emphasized that the EPA lacks authority to aggregate similar petitions into a single action for venue purposes. However, because the EPA based its decision-making on generic rather than refinery-specific arguments, it implicated the venue provision for decisions with nationwide scope or effect, making the D.C. Circuit the proper venue. Justice Gorsuch dissented, joined by Chief Justice Roberts. Among other criticisms, the dissent argued that the majority's multi-step test will prove too difficult for lawyers and judges to apply, emphasizing that litigation over "whether the case is in the right court is essentially a waste of time and resources."

In *Oklahoma*, that state and Utah, together with industry groups, challenged an EPA rule disapproving the states' implementation plans (SIP) for failure to comply with the Clean Air Act's "good- neighbor" provision with respect to ozone emissions. They filed suit in the regional circuits; four regional circuits found venue proper, but the Tenth Circuit disagreed, granting the EPA's motion to transfer. The Supreme Court, in an opinion again authored by Justice Thomas, this time held that the venue exception did not apply. Rather, the Court held that the denials of the SIPs were locally or regionally applicable actions, so venue was proper in the regional circuit. Justice Gorsuch concurred, joined by Chief Justice Roberts, stating he would have reached the same outcome as the Court by following the reasoning he laid out in his *Calumet* dissent.

FDA v. R.J. Reynolds Vapor Co., 606 U.S. ___, 145 S.Ct. 1984, 2025 WL 1716135 (2025).

This case involved the specialized venue provision of the Food and Drug Administration Act, as applied to challenges under the Family Smoking Prevention and Tobacco Control Act (TCA). The TCA provides that "any person adversely affected" by an FDA denial order can petition for judicial review in either the D. C. Circuit or "the circuit in which such person resides or has their principal place of business." 21 U.S.C. § 387*l*(a)(1).

In 2016, the FDA determined that the TCA applied to e-cigarettes as a new tobacco product and required manufacturers to apply for approval to continue marketing them. R.J. Reynolds applied to continue marketing its Vuse e-cigarettes, and the FDA denied their request. R.J. Reynolds is headquartered in North Carolina, within the Fourth Circuit Court of Appeals. However, instead of filing its petition in the Fourth Circuit or the D.C. Circuit, R.J. Reynolds filed a petition in the Fifth Circuit jointly with a Texas-based Vuse Retailer, a Mississippi-based trade association of gas stations and convenience stores, and another corporate affiliate of R.J. Reynolds based in North Carolina.

The FDA moved to dismiss the action or transfer it either to the D.C. Circuit or the Fourth Circuit for improper venue. The FDA argued that only the original applicants whose application was denied was "adversely affected" under the meaning of the TCA, so the Fifth Circuit petitioners had no right to seek review and venue would therefore be improper in the Fifth Circuit. The appeals court determined that the Fifth Circuit was a proper venue, and the FDA appealed. On appeal, the FDA argued that the meaning of "adversely affected" should be limited to parties to the original decision. It also argued that under the TCA, all parties to the action must independently establish venue, and so the Fourth Circuit-based petitioners should be dismissed even if the Fifth Circuit petitioners have standing. In an opinion written by Justice Barrett, the Court held that venue was proper in the Fifth Circuit because the other petitioners were adversely affected by the denial of approval of Vuse e-cigarette. She declined to decide whether all challengers must independently establish venue because the FDA raised it for the first time on appeal. Justice Jackson filed a dissent joined by Justice Sotomayor. She argued that the TCA's "adversely affected" language should be read as limited to those who participated in the proceeding that led to the adverse decision being challenged. She also suggested that R.J.

Reynolds had manufactured venue in the Fifth Circuit because Fourth Circuit and D.C. Circuit cases had already rejected similar claims to theirs, and that the majority was enabling improper gamesmanship.

Transfer of Venue in Federal Courts

In re Qualcomm Incorporated, 2025 WL 1743025 (Fed. Cir. 2025).

Red Rock sued Qualcomm and Apple in the Western District of Texas alleging that products with a 5G wireless transmitter infringed its patent for "Calibration of I-Q Balance in Receivers." Defendants moved to transfer the action to the Northern District of California. The district court applied the regional law of the Fifth Circuit and denied the motion. It reasoned that defendants had not shown the Northern District of California to be clearly more convenient and that other transfer factors were neutral. Qualcomm sought mandamus relief from the Federal Circuit to vacate the order denying transfer, Apple joined the petition, and the Federal Circuit denied the request. First, the Federal Circuit agreed that regional law applied because the petition did not involve substantive issues of patent law. Under Fifth Circuit law, transfer is granted "only if the moving party clearly establishes good cause"; moreover, review of a denial of a § 1404(a) motion is only for a "clear abuse of discretion."

The facts underscore the high bar that defendants faced. Defendants maintained offices in the Western District of Texas, but as the Federal Circuit emphasized, that factor, "standing alone," did not necessarily make the forum more convenient or give it a local interest in the dispute. The events giving rise to the dispute occurred in both federal districts, and witnesses and relevant information are present in both, as well. Moreover, although the district court applied a categoric assumption that certain prior art inventors or paper authors would testify at trial, rather than making an individualized case assessment, defendants failed to show that any of these witnesses would be unwilling to testify. Moreover, the Federal Circuit agreed that defendants had failed to show specifically that information would not be accessible in the Texas forum.

Note on the Panel on Multidistrict Litigation (MDL)

Uber Techs., Inc. v. United States Judicial Panel on Multidistrict Litig., 131 F.4th 661 (9th Cir. 2025).

The decision marks a new chapter in judicial approaches to private agreements that purport to oust Article III courts of power—in this case, a collective-action waiver that bars § 1407 transfer. The case involves claims by ride-share passengers against Uber alleging they were sexually assaulted or harassed by ride-share drivers and the company failed to take reasonable measure in response. The passengers moved to centralize the litigation in the Northern District of California, and Uber sought mandamus challenging the transfer order. Uber argued that the district court improperly applied the § 1407 statutory criteria rather than enforcing a collective action waiver included in the terms of use with riders that barred transfer. The Ninth Circuit denied the request finding no abuse of discretion in the decision to centralize: "Section 1407(a) calls on the JPML to balance a multitude of competing considerations concerning the benefits and drawbacks of centralization. Such a determination is necessarily 'case-specific' and 'turns not on a neat set of legal rules, but instead on the application of broad standards to multifarious, fleeting, special, narrow facts that utterly resist generalization.'" The appeals court also held that the terms-of-use waiving transfer did not displace the Panel's statutory discretion.

> Where a federal statute vests a court with the power (or duty) to act of its own accord, a private agreement cannot bind the court and the agreement is entitled to only so much consideration as provided for by Congress. Forum selection clauses neatly illustrate this rule. A forum selection clause cannot eliminate a district court's jurisdiction to hear a suit. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) ("No one seriously contends in this case that the forum selection clause 'ousted' the District Court of jurisdiction ...."); Restatement (Second) of Conflict of Laws § 80, cmt. a (rev. ed. 1988) ("Private individuals have no power to alter the rules of judicial jurisdiction."). Nor can a forum selection clause render venue "wrong" or "improper" under the governing federal venue laws. *See Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 55, 134 S.Ct. 568, 187 L.Ed.2d 487 (2013) ("Whether venue is 'wrong' or 'improper' depends exclusively on whether the court in which the case was brought satisfies the requirements of federal venue laws, and those provisions say nothing about a forum-selection clause."). Rather, courts enforce forum selection clauses because the general change-of-venue statute, 28 U.S.C. § 1404(a) ("Section 1404(a)"), requires that such agreements be considered in the venue analysis. *See Atl. Marine*, 571 U.S. at 58–63, 134 S.Ct. 568; *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988) ("The forum-selection clause ... should receive neither dispositive consideration

(as respondent might have it) nor no consideration (as Alabama law might have it), but rather the consideration for which Congress provided in § 1404(a).”). Whether Section 1407 requires the Collective Action Waiver must be given similar weight in the Section 1407 analysis is a matter of statutory interpretation.

It is clear from the text of Section 1407 that the statute does not create an individual right to centralization that may be waived but instead vests the JPML with a power to manage the federal docket by centralizing cases that is unfettered by private agreements. Section 1407(a) provides that “civil actions ... may be transferred to any district for coordinated or consolidated pretrial proceedings” and that “[s]uch transfers shall be made by the [JPML] upon its determination that” the statutory criteria are met. 28 U.S.C. § 1407(a). This provision makes clear that it is the JPML, not private parties, that must make the “determination” whether centralization is appropriate. * * * Conversely, the JPML often denies centralization even where all parties have joined in the transfer application.* * * Only the JPML may order Section 1407 centralization, and the JPML’s refusal to do so is completely unreviewable, making clear centralization is not a matter of individual right. *See* 28 U.S.C. § 1407(e). Under the plain text of Section 1407, the JPML may centralize a case, or decline to do so, notwithstanding any private agreement to the contrary.

* * *

Section 1407 was enacted “to furnish statutory authority for the kind of pretrial consolidation and coordination successfully implemented in the electrical cases, but which, in that situation, entirely depended on the voluntary agreement of all the parties as well as presiding judges.” H.R. No. 1130, 90th Cong., 2d Sess. 2 (1968); *PPA*, 460 F.3d at 1230. Significantly, Congress believed the system of voluntary cooperation used in the electrical equipment cases might prove inadequate in the future and accordingly “saw a need to create a *mandatory* version of that procedure” when it enacted Section 1407. *PPA*, 460 F.3d at 1230 (emphasis added); * * *.

Forum Non Conveniens

Dada v. NSP Group Technologies Limited, 2025 WL 1879527 (9th Cir. 2025).

This short unpublished decision offers a compact and topical fact pattern for discussing the presumptions that apply when U.S. and non-U.S. parties as a group elect to sue in federal court. Plaintiffs were journalists based in El Salvador. They sued alleging that their iPhone were attacked by Pegasus, a spyware system developed and deployed by defendants, two technology

companies incorporated in Israel. The district court dismissed the action on grounds of forum non conveniens, according their forum choice no deference because although three plaintiffs are domestic—one a U.S. citizen and the other two U.S. residents—none resided in the chosen forum. The Ninth Circuit vacated and remanded, over a dissent by Judge Bade, finding that the district court applied the wrong standard of deference:

> When a U.S. citizen sues in their home forum, "there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." * * * A U.S. resident is "entitled to the same deference as a citizen." * * * When the plaintiff is "foreign" (i.e., not a U.S. citizen or resident), their choice is "entitled to less deference, but 'less deference is not the same thing as no deference.' " * * * When co-plaintiffs are both domestic and foreign, we apply the domestic plaintiff standard, and the presence of foreign co-plaintiffs does not "somehow lessen[ ]" the "strong presumption in favor of the domestic plaintiff's choice of forum." * * *. Finally, when a domestic plaintiff sues in a forum where they do not reside, they are entitled to more deference than a "truly foreign plaintiff (i.e., someone who is not a [U.S.] citizen or resident)," but "less deference" than if they were a forum resident. * * *

Moreover, the district court erred in shifting the burden on the motion to plaintiffs. Thus, although the dismissal was subject to an abuse-of-discretion standard by the appeals courts, the district court made an error of law.

Judge Bade dissented, arguing that the district court properly accorded less deference to plaintiffs' forum choice because none are residents of the chosen district, not because they are non-U.S. citizens. Moreover, the dissent argued that the district court did not shift the burden, but instead did not credit speculative allegations in the complaint that plaintiffs relied upon to oppose the motion:

> Plaintiffs alleged, with no support, that some of those servers were located in California. Elsewhere in the FAC, they merely suggest that Defendants accessed some of Apple's U.S.-based servers, and that many of those servers are in California. To the extent that Plaintiffs allege that their iPhones were hacked through Apple's iMessage or iCloud services, there is no allegation that Apple's servers in California were exploited in so doing. And further obscuring matters, Plaintiffs allege that Defendants own and operate their own network of servers that they used to infect Plaintiffs' iPhones.

Venue-Selection Agreements

VCST International B.V. v. BorgWarner Noblesville, LLC, ___ F.4th ___, 2025 WL 1793228 (6th Cir. 2025).

The dispute, involving a $28 million breach-of-contract dispute, at this stage turned on whether plaintiff's chosen forum of a federal district in Michigan violated a contractual clause selecting Mexico as the forum. The problem is that the parties had entered into a series of relationships and it was not clear which clause applied.

> Contracts often contain forum-selection clauses so that parties may litigate any eventual dispute in the most efficient venue and obtain certainty over that location. Yet this case shows that forum-selection clauses can disserve these efficiency and predictability goals if the parties do not sign clear agreements that unambiguously identify when the clauses apply. The plaintiff in this case agreed to ship a car part that it made in Mexico to a Mexican plant that the defendants operated. Their initial contract documents contained a forum-selection clause pointing to a Mexican venue. So when the plaintiff sued in Michigan, the defendants moved to dismiss the suit under Federal Rule of Civil Procedure 12(b)(6) and the forum non conveniens doctrine. The district court granted the Rule 12(b)(6) motion and did not undertake any forum non conveniens analysis. But the complaint plausibly alleges that the parties switched to a Michigan forum-selection clause during the course of their transactions. A factual dispute thus exists over which of these competing clauses applies to the plaintiff's breach-of-contract claims. And we cannot resolve this venue issue on the pleadings under Rule 12(b)(6) or under the forum non conveniens doctrine without factual findings. We thus reverse and remand for further proceedings.

Thus, while acknowledging that under *Atlantic Marine* (Casebook, p. 433; Compact, p. 309), "[c]ourts must generally give controlling weight to a valid forum-selection clause," the question here was which clause applied.

Chapter 6. Ascertaining the Applicable Law

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

Paucek v. Shaulis, ___ F.R.D. ___, 2025 WL 1298457 (D.N.J. 2025).

An education company and its CEO sued a blogger for defamation and the company also raised a claim for tortious interference with prospective business relations; federal jurisdiction was based on diversity. Under the district court's individual Rules and Practices, defendant filed a pre-motion letter seeking leave to file a motion to dismiss based on New Jersey's anti-SLAPP statute, the Uniform Public Expression Protection Act (UPEPA), and also asserted a counterclaim under the SLAPP statute for fees and costs. Plaintiffs countered that Maryland (the individual plaintiff's home state) and Delaware (the company's home state) governed the claims, so New Jersey law did not control, but that even if New Jersey law did apply, the SLAPP statute did not apply in federal court because if conflicts with the Federal Rules of Civil Procedure.

The district court agreed that although New Jersey law governed the claims, the procedural portions of the New Jersey SLAPP act did not apply in federal court. These portions pertained to fee shifting, costs, the evidence considered on summary judgment, and the availability of interlocutory appeal if the court denied defendant's dismissal motion. The decision contains a very helpful explanation of SLAPP suits, identifying their public policy goals and the financial and procedural mechanisms designed to carry out those goals:

> Strategic lawsuits against public participation ("SLAPPs") are lawsuits filed to punish, silence, and intimidate defendants exercising their First Amendment rights. They are filed in an effort to force a defendant to abandon his speech or suffer through years of costly litigation. * * *
>
> Anti-SLAPP statutes protect defendants against the dangers of a SLAPP lawsuit. The strongest anti-SLAPP statutes broadly protect First Amendment rights by providing an expedited and streamlined process to dismiss claims implicating a defendant's speech to "reduc[e] the burden in terms of time and costs for a SLAPP defendant." * * * They also commonly shoulder the plaintiff with a heightened burden at the pre-trial motion to dismiss or summary judgment stages to show that his claims are likely to succeed on the merits. * * * Normally, it is the defendant who must show, on a motion to dismiss, that the plaintiff's complaint fails to state a claim for relief or, when the defendant is the summary judgment movant, that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. * * * Anti-SLAPP statutes also usually mandate a stay of discovery "to prevent unnecessary expenditure of resources on the parties' and court's time." * * * Moreover, if the defendant loses his anti-SLAPP motion, he is entitled to take an immediate interlocutory appeal. * * *.
>
> But if the defendant prevails on his anti-SLAPP motion, the plaintiff must pay the

> defendant's attorney's fees and costs. * * * Mandatory anti-SLAPP fee-shifting is one of the most important features of an anti-SLAPP statute. * * * Generally speaking, if a plaintiff knows that he is on the hook to pay a prevailing defendant's fees and costs, he might think twice before filing a lawsuit based on his critic's speech. And if a defendant knows that she can recover her fees and costs in defending against such a lawsuit, she is more likely to fight a legal battle in court rather than surrender to a settlement, which might include retracting her speech and, as a consequence, chilling public debate. * * *

The decision also offers a good synthesis of the *Erie/Hanna* approach to the substantive/procedural distinction, as well as a survey of existing circuit approaches to whether SLAPP statutes apply to diversity suits. Indeed, the case could provide the basis for a very useful classroom exercise, requiring students to examine the specific provisions of a state's SLAPP act to identify a conflict with a Federal Rule and whether to apply the state rule. The district court concluded that it would not apply provisions of UPEPA (1) authorizing the court to shift fees and costs if the non-movant plaintiff fails to establish a prima facie case as to each essential element of his claims; (2) providing that, in considering anti-SLAPP relief, the court could consider any evidence that could be considered in ruling on summary judgment motion; or (3) providing for immediate interlocutory appeal if court denied defendant's dismissal motion. But the district court would apply a provision authorizing court to shift fees and costs if a defendant established that plaintiff failed to state cause of action or that there was no genuine issue of fact such that defendant was entitled to judgment as matter of law.

SGM Holdings LLC v. Andrews, 743 F. Supp. 3d 545 (S.D.N.Y. 2024).

Delaney v. HC2, Inc., 761 F. Supp. 3d 641 (S.D.N.Y. 2025).

This pair of cases addresses whether New York Judiciary Law § 487, which creates a cause of action for attorney deceit, applies to federal court proceedings or whether it conflicts with Federal Rule 11, 28 U.S.C. § 1927, and/or the inherent authority of federal courts to regulate their proceedings and attorney behavior.[7] The cases do not raise a standard *Erie/Hanna*

[7] The state law, which is titled "Misconduct by attorneys," provides:

> An attorney or counselor who:

question, but provide excellent material that can be adapted into a useful classroom exercise. *SGM* was an independent suit for direct enforcement of § 487 against three Tennessee attorneys, and raises interesting questions of subject matter jurisdiction, although its discussion of preemption, and especially field preemption, likely is beyond the reach of 1L Procedure courses. *Delaney* focused on whether the claim can be raised against attorneys in federal bankruptcy court. The district court found a direct conflict between the state law and Rule 11 and § 1927, explaining that § 487

> serves the same aim as the federal rules, federal statute, and the power entrusted by the Constitution to the federal courts themselves: "safeguarding the integrity of the judicial system." * * * But it provides an entire different and incompatible manner of addressing this conduct. When an attorney perpetrates fraud on the court, the federal scheme is to address this through compensatory or deterrent sanctions, avoiding due process concerns and potential overdeterrence that could chill vigorous advocacy and flow from punitive regulation. New York has chosen to address such conduct through a statute that is expressly punitive, rooted in criminal sanctions and treble damages.

Nor was § 487 a typical tort statute that regulated primary behavior of private citizens; it specifically regulated only attorney deceit "in any court of justice."

> Although New York can comfortably regulate the relationship between attorneys and the public, or between attorneys and its own courts, the same does not apply to the relationship between New York attorneys and a federal court. The relationship between an attorney and court closely implicates a court's "inherent powers ... to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases," including by "fashion[ing] an appropriate sanction for conduct which abuses the judicial process."

Sumrall v. LeSEA, Inc., 104 F.4th 622 (7th Cir. 2024).

> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
>
> 2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,
>
> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

N.Y. Jud. Law § 487.

The facts of the case provide a good complement to Guaranty Trust Co. v. York (Casebook, p. 454; Compact, p. 322), focusing on whether a state laches rule applies to state claims heard in federal court through supplemental jurisdiction under 28 U.S.C. § 1367. The Supreme Court has held that "applying laches within a limitation period specified by Congress would give judges a 'legislation-overriding' role that is beyond the Judiciary's power.'" In this case, however, the claims were for damages under state law (although the suit also involved claims under the federal Copyright Act), and, as the Seventh Circuit observed, "[t]his difference between state and federal laches law implicates the *Erie* doctrine, which calls on federal courts applying state law to use state substantive law and federal procedural rules," and emphasized that this rule applies equally to state claims heard through supplemental jurisdiction. The Seventh Circuit easily concluded that laches is a substantive doctrine and so applied to state claims in federal court; it ascertained the meaning of the state laches rule, and held that under state law it applied to legal as well as equitable claims. The appeals court then affirmed dismissal of the state claims, emphasizing plaintiffs' long delay in asserting them.[8]

Wilson v Hearos LLC, 128 F.4th 1254 (11th Cir. 2025).

This case is included with material for Chapter 4 and is discussed earlier in this memo, p. 40.

The Problem of Ascertaining State Law

N'Jai v. United States Department of Education, 111 F.4th 1288 (D.C. Cir. 2024).

The case illustrates the use of certification by an appeals court faced with a question of personal jurisdiction under District of Columbia law. The dispute, involving student debt, likely holds inherent interest for 1Ls. Plaintiff sued Long Island University (LIU), New York

[8] The court wrote: "A family member may harbor a grudge for decades, not acting on a perceived injustice for man long years. He may not, however, turn to the courts for aid after such a long delay. Take this case: decades after a patriarch's death, his son and grandson claim they should have inherited part of his estate. They are too late. We affirm."

University (NYU), debt collectors, and the U.S. Department of Education, alleging false certification of student loans and illegal collection efforts, in violation of various federal statutes. The District's long-arm statute allows to court to "exercise personal jurisdiction if there is any basis consistent with the United States Constitution," but includes a "government contacts" exception. On appeal, the circuit court certified whether a party's entry into the District for the purpose of contacting a federal agency affected jurisdiction.

Chapter 8. Modern Pleading

The Complaint

Cunningham v. Cornell University, 604 U.S. ___, 145 S.Ct. 1020 (2025).

The case involves pleading requirements under the federal Employee Retirement Income Security Act (ERISA). It illustrates the distinction between the elements of the claim, which plaintiff must plausibly allege to avoid dismissal under Federal Rule 12(b)(6), and affirmative defenses, which generally defendant has the burden to raise.

Participants in retirement plans administered by Cornell University filed a putative class action against the university and its appointed fiduciaries, alleging breach of fiduciary duties, including the claim that defendants caused the plans to engage in prohibited transactions for recordkeeping services in violation of 29 U.S.C. § 1106(a)(1)(C). A separate part of the statute, § 1108, exempts certain transactions from § 1106's prohibitions. The circuits were divided on whether an ERISA complaint was sufficient if it plausibly alleged the elements of the prohibited-transaction claim without addressing the potential exemptions. In a unanimous opinion authored by Justice Sotomayor, the Court held that ERISA plaintiffs need only plausibly allege the elements of § 1106 to state a claim; § 1108's exemptions do not impose additional pleading requirements. As the Court explained, when a statute has "'exemptions laid out apart from the prohibitions,' and the exemptions 'expressly refer to the prohibited conduct as such,'" the exemptions are ordinarily affirmative defenses. (Internal citation omitted). Therefore, the defendant bears the burden to plead and prove that the exception applies, not the plaintiff. As the Court emphasized:

> Of course, a plaintiff will not prevail by simply pleading, and later proving, the § 1106(a) elements. If a defendant establishes that a § 1108 exemption applies, the § 1106(a)(1)(C) claim will ultimately fail. As relevant here, this means that if respondents establish that a transaction prohibited under § 1106(a)(1)(C) was for "services necessary for the ... operation of the plan" and "no more than reasonable compensation [was] paid therefor," § 1108(b)(2), they cannot be held liable for causing the plan to enter into the transaction. At the pleading stage, however, it suffices for a plaintiff plausibly to allege the three elements set forth in § 1106(a)(1)(C).

Moreover, concerns about meritless litigation, raised by defendants, could not overcome the statutory text and could be addressed by district courts using such tools as Rule 11 sanctions, ordering a Rule 7 reply, or ordering fee shifting (as permitted under the statute, § 1132(g)(1)). Justice Alito wrote a concurring opinion, joined by Justices Thomas and Kavanaugh, focusing on "safeguards" against meritless litigation, and emphasizing the majority's discussion of Rule 7:

> In Part III–C of its opinion, the Court sets out some alternative safeguards. Perhaps the most promising of these is the suggestion, offered by the Solicitor General, that a district court may insist that a plaintiff file a reply to an answer that raises one of the § 1108 exemptions as an affirmative defense. * * * It does not appear that this is a commonly used procedure, but the Court has endorsed its use in the past. See *Crawford-El v. Britton*, 523 U.S. 574, 598, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998). District courts should strongly consider utilizing this option—and employing the other safeguards that the Court describes—to achieve "the prompt disposition of insubstantial claims." * * * Whether these measures will be used in a way that adequately addresses the problem that results from our current pleading rules remains to be seen.

Stanley v. City of Sanford, 606 U.S. ___, 145 S.Ct. 2058 (2025).

First-year students do not always recognize the law-declaring function of a Rule 12(b)(6) motion, which assesses not only the factual but also the legal sufficiency of a complaint. This case illustrates that law-declaring role. *Stanley* involved a claim under Title I of the Americans with Disabilities Act. 42 U.S.C. §§ 12111–12117. A retiree brought the action; the circuits were divided on whether a retiree who does not hold or seek a job is a "qualified individual" under the statute entitled to relief. Justice Gorsuch, for a divided Court, held that plaintiff must plead (and prove) that she held or desired a job, and could perform its essential functions with or without

reasonable accommodation, at the time of the alleged disability-based discrimination, and thus, the retiree's complaint was legally insufficient.[9]

Otto Candies, LLC v. Citigroup Inc, 137 F.4th 1158 (2025).

When a complaint involves multiple claims, different pleading standards may be in play. In this case, the complaint alleged, inter alia, a violation of the Private Securities Litigation Reform Act (PSLRA), which sets out a heightened standard for pleading knowledge, and a Florida common-law fraud claim. The district court, rather than assessing the state claim under Federal Rule 9, imported the statutory federal pleading standard for PSLRA claims and dismissed. The Eleventh Circuit reversed and remanded. It emphasized the distinction between Rule 9(b)'s requirements and the heightened standard for securities fraud under PSLRA, noting that some district courts had improperly extended PSLRA's pleading standard to aiding-and-abetting claims by requiring that plaintiffs plead a "strong inference of actual knowledge regarding the underlying fraud." Rather, for common law fraud claims in Florida, it is "sufficient to plead the who, what, when, where, and how of the allegedly false statements and then allege generally that those statements were made with the requisite intent." The court explained that its approach comported with common sense, recognizing that a plaintiff will rarely be able to plead the defendant's state of mind before discovery.

Briskin v. Shopify, Inc., 135 F.4th 739 (9th Cir. 2025).

The en banc decision addresses both personal jurisdiction and pleading standards; the facts are useful for both types of classroom hypotheticals but we focus on the Rule 8(a)(2)

[9] Justice Thomas, joined by Justice Barrett, concurring, focused on whether it was appropriate, after the Court granted certiorari, for petitioner to ask the Court "to resolve an entirely different legal question." Justice Sotomayor concurred in part and dissented in part, emphasizing that "Title I's prohibition on disability discrimination does not cease the day an employee retires." Justice Jackson, joined by Justice Sotomayor, dissented, arguing that "the Court is wrong twice over. It should not have used *this* case to make any pronouncements about the viability of a Title I discrimination claim that arises after an employee retires. And it misreads Title I to introduce a time-related limitation that appears nowhere in the statute Congress wrote."

issue.[10] A consumer filed a putative class action against Shopify, the provider of web-based payment platforms, a Canadian corporation, and its New York and Delaware-based subsidiaries, alleging claims of unfair business practices under California law and invasion of privacy under the federal and California Constitutions. The district court dismissed the second amended complaint on the ground that it "collectively pleaded the claims against the three Shopify entities." The Ninth Circuit reversed. It recognized that a collective pleading in some situations may not provide fair notice of claims to a defendant where there are multiple defendants and claims and the complaint fails to differentiate among them. However, in this case, the complaint alleged one course of conduct across the three Shopify entities, and also described each company's role in the alleged scheme. Further, the complaint was "highly detailed as to the technology used," providing a further basis to conclude that the complaint was sufficiently detailed to give all defendants fair notice of the claims as required under Rule 8(a)(2).

Pearson v. Gesner, 125 F.4th 400 (2d Cir. 2025).

The decision illustrates the rule that on a motion to dismiss for failure to state a claim the district court is limited to the allegations of the complaint and may not consider material outside the pleading. There are exceptions to this rule; in particular, "extraneous materials * * * become integral parts of the complaint" if "the plaintiff relied on them in drafting the complaint" but, even then, the complaint does not automatically incorporate the full contents of any document adopted by reference. In this case, an inmate filed a handwritten, pro se complaint against corrections officers, alleging excessive force and deliberate indifference to his medical needs. The decision includes excerpts from the complaint, which on its face illustrates the difficulties that unrepresented parties face in presenting their claims and the challenges they present to the court. Defendants attached to their motion to dismiss a handheld video of the inmate taken when he sought medical care; according to the district court, it was proper to consider the video because the complaint mentioned it. The district court likewise also considered a Misbehavior Report authored by one of the defendants. The Second

[10] In particular, the Ninth Circuit held that an interactive platform "expressly aims" its wrongful conduct toward a forum state "when its contacts are its 'own choice," even if that platform cultivates a "nationwide audience[ ] for commercial gain."

Circuit vacated the judgment in part and remanded. In particular, the appeals court did not accept the district court's conclusion that plaintiff relied on the video tape in drafting his complaint; to the contrary, the complaint stated that the events "should be on video tape," not that they are on video tape, and the appeals court concluded that "perhaps * * * [plaintiff] did not even know whether a video existed." As to the report, again, the appeals court questioned whether plaintiff relied upon it in drafting the complaint, and found it was error for the district court to accept the report's "narrative as true."

Brown v. City of Tulsa, 124 F.4th 1251 (10th Cir. 2025).

The decision illustrates when limited discovery will be permitted in connection with a motion to dismiss. A police officer was terminated from his position for posting social media entries that violated department rules (e.g., a photo of Michelle Obama with the statement, "Go Back to Chicago and take our South Chicago Values and your Socialist Family with you."; and, a photo of "yet-to-be-president Donald Trump" riding a lion and carrying a Confederate flag). He filed two federal constitutional claims (under the First and the Fourteenth Amendments) and a state tort claim against various city officials. The district court dismissed the federal claims and declined to exercise supplemental jurisdiction over the tort claim. The Tenth Circuit reversed. As to the First Amendment retaliation claim, the appeals court held that because plaintiff lacks access to the government's specific interest in the adverse action against him or whether his conduct caused internal governmental disruption, the district court erred in deciding the retaliation claim on a motion to dismiss without first giving plaintiff an opportunity for discovery.

Southwestern Airlines Pilots Ass'n v. Southwest Airlines Co., 120 F.4th 474 (5th Cir. 2024).

The decision discusses the appropriate standard of appellate review when the merits question is intertwined with the jurisdictional question. A pilots union sued an airline for violating the Railway Labor Act, 45 U.S.C. § 151, alleging it intimidated and disciplined pilots who affiliated with the union. Defendant moved to dismiss for failure to state a claim and for

lack of jurisdiction. Generally, in this situation the district court will resolve the jurisdictional question first. However, under the act, so-called major disputes are subject to a bargaining and mediation process and the district court has subject-matter jurisdiction to enforce the status quo during that process; so-called minor disputes are subject to compulsory and binding arbitration before the National Railroad Adjustment Board or before a board established by the parties, subject to an exception for minor disputes involving anti-union animus. The district court held that the dispute was minor and subject to mandatory arbitration. The Fifth Circuit reversed.

The appeals court first resolved the standard of review. Whether under Rule 12(b)(1) or Rule 12(b)(6), the standard is de novo. However, if the merits and jurisdictional issues are intertwined, then the court proceeds under a Rule 12(b)(6) standard, accepting the well pleaded allegations of the complaint without weighing the evidence. In this case, the district court correctly held that the merits and jurisdiction were intertwined, but applied a Rule 12(b)(1) standard, which was error. The appeals court instead undertook a de novo review of the complaint under Rule 12(b)(6). To determine whether the dispute was minor, the appeals court applied the "arguable basis" test, which looks to whether there is at least an arguable basis for the conduct in the express and implied terms of the collective bargaining agreement. It found that such an arguable basis existed to discipline plaintiff under the terms of the collective bargaining agreement for his social media statements, and so the dispute was subject to compulsory arbitration. However, the appeals court further found that the complaint sufficiently alleged an anti-union animus, and so the court reversed and remanded.

Provisions to Deter Frivolous Pleadings

SGM Holdings LLC v. Andrews, 743 F. Supp. 3d 545 (S.D.N.Y. 2024).

Delaney v. HC2, Inc., 761 F. Supp. 3d 641 (S.D.N.Y. 2025).

This pair of cases addresses whether New York Judiciary Law § 487, which creates a cause of action for attorney deceit, may be enforced in federal court or whether it is in conflict with Federal Rule 11, 28 U.S.C. § 1927, and/or the inherent authority of federal courts to

regulate their proceedings and attorney behavior.[11] *SGM* was an independent suit for direct enforcement of § 487 against three Tennessee attorneys, and raises interesting questions of subject matter jurisdiction (although its discussion of preemption, and especially field preemption, likely is beyond the reach of 1L Procedure courses). *Delaney* focused on whether the state law applied in federal bankruptcy court. Both courts held that the state law did not apply in federal court. The cases include very helpful discussions of the "framework of regulation" that applies in federal court to regulate attorney conduct.

O'Brien v. Flick, 2025 WL 242924 (S.D. Fla. 2025).

The decision discusses the sanction of dismissal for a pro se plaintiff's "troubling use of citations to non-existence legal authority and his repeated failure to follow the Local Rules of this Court." On the facts, the court rejected plaintiff's argument that reliance on "fake cases" was just a "mix-up"; on the law, the court held that although use of technology is not barred, counsel as well as pro se parties have a "duty of candor," and that filing a memorandum that relies on non-existent case law manifests "an improper purpose." The decision discusses the systemic harms caused by reliance on fake citations and summarizes the case law on sanctions that result from reliance on AI. Relying on Chambers v. NASCO, Inc. (Casebook, p. 714; Compact, p. 462), and considering plaintiff's prior history with litigation in the district, the court held that dismissal was an appropriate sanction.

[11] The state law, which is titled "Misconduct by attorneys," provides:

> An attorney or counselor who:
>
> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
>
> 2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,
>
> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

N.Y. Jud. Law § 487.

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

Addition of Claims

Counterclaims

Kress Stores of P.R., Inc. v. Wal-Mart P.R., Inc., 121 F.4th 228 (1st Cir. 2024).

Puerto Rican merchants filed a putative class action in Puerto Rico alleging that chain retailers including Wal-Mart and Costco engaged in unfair competition by selling non-essential goods during the COVID-19 pandemic in violation of the governor's executive order barring such sales. The case raises important jurisdictional issues under the Class Action Fairness Act (CAFA); this memo focuses on the motion to sever for misjoinder and its relation to the test for counterclaims.

Defendants removed the action to federal court under CAFA. The district court denied the motion to remand; denied class certification; and, continued to exercise jurisdiction. It also denied Costco's s motion to sever under Federal Rule 21 (Costco was the only non-local defendant among the four defendants originally named in the complaint).

On appeal, the First Circuit reversed the denial of the motion to remand and vacated the judgment on the merits. Relevant here, the First Circuit affirmed the denial of the motion to sever finding no abuse of discretion. It applied a standard that it derived from the "transaction and occurrence" language of Rule 20. Because the circuit had not previously interpreted that language, the court looked by analogy to the similar language of Rule 13(a) and held that whether two claims arise from the same transaction turns on whether there is a "logical relationship" between them. In applying that test, the appeals court found that the "standard does not require that the exact same body of evidence be used to prove all claims for joinder to be proper; rather, joinder generally is found to be improper "in cases with an unusually large number of parties or without any factual overlap between the claims."

Judge Hamilton dissented, arguing that the claims against Costco did not arise from the same transactions as the claims against Wal-Mart and that the denial of the motion to sever should be reversed. The key factor, according to the dissent, is that the complaint alleged that

separate competitors took unlawful action to obtain a competitive advantage, but each did so independently of the other. In particular, in the dissent's view:

> [P]laintiff cannot establish a series of transactions for purposes of Rule 20 by alleging that independent defendants independently violated the same law in the same way, but in separate transactions. If the law were otherwise—i.e., if the common questions of law and fact were sufficient to establish a series of transactions or occurrences—the separate and independent requirements of Rule 20(a) would be merged.

O'Brien v. Flick, 2025 WL 242924 (S.D. Fla. 2025).

The case presents a compact fact pattern to illustrate the consequences of failing to raise a claim that is compulsory under Rule 13(a). (For a discussion of the court's dismissal as a sanction, see this memo at p. 61). Plaintiff, a business owner, filed tort claims against a former investor. Two years earlier the investor had sued plaintiff for securities fraud. The court dismissed the second suit finding that the claims "share a logical relationship with each of the prior suits; they arise out of the same transaction or occurrence, namely the unraveling of the business relationships" surrounding the company's break-up. Thus, the failure to assert them in the prior action was fatal.

Wells Fargo Bank, N.A. v. MM-FCDC Partners, L.P., 2024 WL 4507826 (E.D. Pa. 2024).

The decision involves both an *Erie* issue and application of Rule 13. Wells Fargo brought a foreclosure action against MM in federal court invoking diversity jurisdiction; MM answered and filed a counterclaim. Wells Fargo moved to dismiss, arguing MM had failed to comply with Pa. R. Civ. P. 1148. Pennsylvania Rule 1148 provides that "[a] defendant may plead a counterclaim which arises from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff's cause of action arose." Pennsylvania courts have held that under Rule 1148, in mortgage foreclosures, "only those counterclaims that are part of or incident to the creation of the mortgage itself" are permissible. Under the state rule, MM's counterclaim was thus barred because it was not "part of or incident to the creation of the mortgage at issue."

The court agreed that Pennsylvania law governed interpretation of the loan documents, but it held that Rule 13(a) applied to the counterclaim and that the counterclaims asserted—for breach of contract; for breach of the covenant of good faith and fair dealing; for promissory estoppel; and for declaratory judgment—were compelled by Rule 13 because they arose from the same transaction or occurrence as Wells Fargo's foreclosure claim and thus they could go forward in the foreclosure action.

Garcia-Dipini v. Larry Pitt & Associates, 2024 WL 5008505 (E.D. Pa. 2024).

Plaintiff sued her former employer alleging employment discrimination. In prior proceedings, the court had dismissed plaintiff's pro se claims as abandoned and found that defendants were entitled to judgment as to liability on their counterclaims, and the court directed that a hearing be held to determine damages. Upon the judge's retirement, the matter was then transferred to a Magistrate Judge, who appointed counsel for plaintiff. Plaintiff's counsel then moved to dismiss the counterclaims for lack of subject matter jurisdiction, and the Magistrate Judge granted the motion

The Magistrate Judge acknowledged that under the law of the case doctrine, she was bound by the prior grant of summary judgment. However, the counseled motion raised a defect of subject matter jurisdiction, and defendant had the burden to show that the court had power. The anchor claim, under the federal civil rights law, was within § 1331, and defendants argued that the court had power under § 1367 to exercise supplemental jurisdiction over their counterclaims, which they characterized as compulsory. The Magistrate Judge found that the court had never determined whether it could exercise jurisdiction over the counterclaim; that the test for compulsory counterclaims is the same as that for supplemental jurisdiction; that the counterclaim was not compulsory; and that supplemental jurisdiction was lacking. The Magistrate Judge carefully explained why the contract-based counterclaim was permissive, and not compulsory; boiled down, it lacked a sufficient relationship with the federal claims, and the parties would not be expected to rely on the same evidence to establish or defendant against the claims.

> To establish the elements of her discrimination and retaliation claims, Plaintiff would need to demonstrate her race and national origin, her request for coverage

> for her medical condition, and her termination. To defend these claims, Defendant must establish its non-discriminatory basis for the termination, consisting of Plaintiff's history of insubordination and her behavior to the lawyer at the Reading Office on September 19, 2019. To prevail on either of its contract-based counterclaims, Defendant would need to establish the existence of an enforceable contract, breach by Plaintiff, and damages arising from the breach. Rebuttal of these counterclaims does not require Plaintiff to rely on the same evidence she needs in order to prove that Defendant's asserted non-discriminatory reason for her termination was pretextual.

Moreover, the counterclaims relied on evidence that defendants had not discovered until 2020, and so could not have played any role in plaintiff's 2019 termination.

Crossclaims

Bennett v. Metro-North Commuter Railroad Co., 2024 WL 4851607 (D. Conn. 2024).

The facts of the case are disturbing but the decision otherwise is a good vehicle for discussing the mechanics of crossclaims. Harrington jumped onto the tracks of a moving Metro-North train, breaking through the window of the engineer's cab, and also injuring Raccio (the train engineer) and Bennett (the train conductor). Bennett and Raccio sued Metro-North, Kawasaki Rail Car, and Harrington's estate asserting federal and state law claims. Kawasaki brought crossclaims against the estate seeking contribution and indemnification. The decision focuses on the timeliness of a motion to dismiss the crossclaims; when a contribution crossclaim may be brought; and the plausibility of the indemnification crossclaim.

First, Kawasaki argued that the estate's motion to dismiss the crossclaim was untimely under Rule 12(a)(1)(B) which requires a cross-defendant to respond to a crossclaim within 21 days of being served. In this case, the motion to dismiss was filed after the deadline. Relying on Second Circuit precedent holding that "the defense of failure to state a claim is not waivable," the district court held that even if the motion is untimely, it would be construed as a Rule 12(c) motion, using the identical standard for reviewing a Rule 12(b)(6) motion.

Second, the estate argued that the contribution crossclaim was premature under the law of the forum, Connecticut, because the cross-party-defendant had not yet been determined liable to

plaintiffs. However, Federal Rule 13(g) provides that a "crossclaim may include a claim that the coparty is or may be liable," and the Second Circuit has interpreted that language, admittedly in the context of Rule 14(a), to authorize an action for contribution "even though the defendant's claim is purely inchoate—i.e., has not yet accrued under the governing substantive law." On this basis, the district court denied the estate's motion and held that the contingent crossclaim could be asserted prior to a determination of liability.

Third, the estate argued that the indemnification crossclaim was insufficient because it failed to plausibly allege the elements of a common law indemnification claim, which under Connecticut law required:

> (1) the party against whom the indemnification is sought was negligent; (2) that party's active negligence, rather than the defendant's own passive negligence, was the direct, immediate cause of the accident and the resulting injuries and death; (3) the other party was in control of the situation to the exclusion of the defendant seeking reimbursement; and (4) the defendant did not know of the other party's negligence, had no reason to anticipate it, and reasonably could rely on the other party not to be negligent.

The decision carefully walks through the elements, comparing them to the allegations of the complaint accepted as true, and denied the motion to dismiss.

Caekaert v. Watchtower Bible and Tract Society of New York, Inc., 2024 WL 2959314 (D. Mont. 2024).

Can a crossclaim be asserted against a party who has been dismissed from a case? The crossclaim in this case was asserted to establish a defense to plaintiff's affirmative claim against defendants, and not for affirmative relief. The district court held that because of the dismissal the co-defendant was not a party within the meaning of Rule 13(g).

Securities and Exchange Commission v. Giguiere, 2025 WL 51423 (S.D. Cal. 2025).

Can a defendant assert a crossclaim after final judgment has been entered for plaintiff? The district court answered no: Rule 13(g) requires the cross-claimant to be a party to the lawsuit at the time the crossclaim is asserted.

Claims Involving Multiple Parties

Permissive Joinder of Parties

Reyes Olmos v. U.S. Citizenship and Immigration Services, 2025 WL 1582941 (D. Neb. 2025).

Twenty plaintiffs sued U.S. Citizenship and Immigration Services (USCIS) alleging unlawful delays and inaction in processing applications for U nonimmigrant status filed by eligible noncitizen crime victims. USCIS moved to dismiss for lack of subject matter jurisdiction and to dismiss for failure to state a claim, and alternatively to sever plaintiffs' claims for misjoinder under Rule 20 because they did not arise from the same transaction, occurrence, or series of transactions or occurrences. In particular, defendant argued that the claims of delay did not show a common transaction or occurrence. The district court denied the motion to sever:

> In the present case, each plaintiff has filed an application for U-status with the USCIS and each application is pending at USCIS's Nebraska Service Center. * * * Each plaintiff has provided the necessary materials * * *. * * *. All plaintiffs claim they are at risk of removal from the United States due to the alleged delays by the USCIS. * * * The plaintiffs seek the same relief from the Court in the form of interim U status benefits. * * * The plaintiffs' claims fall within the flexible meaning of the word "transaction," and the defendants have failed to demonstrate a genuine burden or unfairness that would result from the joinder. * * * As such, the plaintiffs are properly joined in this action.

Cox v. Board of Parole, 2025 WL 1381469 (D. Neb. 2025).

Owens v. Connecticut, 771 F. Supp. 3d 92 (D. Conn. 2025).

This pair of decisions illustrates the relation between Federal Rule 20 and the Prison Litigation Reform Act (PLRA), which regulates filing fees and the limits the number of filings if deemed frivolous. In both, a prisoner appearing pro se combined claims in one action that arise from different adverse actions by different government officials during his detention. The courts

make clear that Rule 20 applies to prison actions, and cannot be read to circumvent the PLRA's limits on prisoner suits. For example, Cox alleged wrongful incarceration and also challenged the conditions of his confinement. The *Cox* court, finding the claims did not meet Rule 20's requirement, then identified three options: "(1) dismissing the unrelated claims and parties from this action, (2) severing the unrelated claims and parties into a new case (or cases), or (3) allowing the plaintiff to amend his complaint for a second time to decide which parties and claims he wishes to dismiss or sever into a new case or cases" The court elected to dismiss plaintiff's Fourth Amendment claim, explaining that defendants were shielded by absolute immunity, and granted leave to file an amended complaint. Owens offers the more extreme example: the § 1983 complaint, filed pro se, ran for 188 pages, and contained more than 60 claims asserted against 29 defendants. The district court found the claims to be unrelated; in particular "the facts supporting these claims span several years with no logical connection to justify adjudicating them together."

Roadbed Bus. PTE. Ltd. v. Individuals, 2024 WL 4132433 (N.D. Ill. 2024).

Plaintiff, the owner of the online fast fashion brand Shein, sued 24 foreign vendors selling similar products via the Chinese e-commerce platform Temur, alleging copyright infringement of at least one of 21 different copyrighted images. The decision raises an interesting personal jurisdiction question about contacts and the stream of commerce; we discuss here the Rule 20 question. Plaintiff voluntarily dismissed one of the defendants, and the others moved to sever or to dismiss. The district court applied the logical-relation test to determine whether the claims arose from the same transaction or occurrence, requiring a showing of "shared, overlapping facts that give rise to each cause of action." Claims against some of the defendants met this test because the defendants shared a corporate relation, and the court found on that basis joinder was proper. However, as to the other defendants, plaintiff failed to show the requisite logical relation, alleging only that they "all participated in the same mass infringement of one of * * * twenty-one copyrights by selling products on the same online platform, Temu."

> Courts in this district generally agree that alleging that multiple defendants have infringed on the same copyright in the same way does not create the substantial evidentiary overlap required to find a similar transaction or occurrence. * * *

> "Essentially, Plaintiff's complaint boils down to a claim that the defendants infringed on his design patent in the same way. That is not sufficient to link one defendant's infringement to another as part of the same transaction, occurrence, or series of transactions or occurrences." * * * This is especially true here because "not all the defendants used and sold the same [copyrighted] images." * * *

The court rejected the argument that claims arise out of the same series of transactions or occurrence "if there is 'a nucleus of operative facts or law in the claims against all the defendants,'" finding that this test "eviscerates" the same transaction-or-occurrence requirement and makes it "indistinguishable from the requirement that there be a common question of law or fact. Likewise, the court rejected the argument that the requirement was met because defendants' affirmative defenses and counterclaims are nearly identical, finding no case law support for that position.

Mandatory Joinder of Persons

Peterson v. Bank Markazi, 121 F.4th 983 (2d Cir. 2024).

The case has a complicated procedural history and can profitably be discussed in connection with *Pimentel* (Casebook, p. 783; Compact, p. 500). This appeal involved a turnover action by judgment creditors brought in connection with multi-billion-dollar judgments against the Islamic Republic of Iran based on Iran's involvement in the bombing of a U.S. Marine barracks in Lebanon. The appeal raised the question of whether ancillary jurisdiction could be exercised over the turnover action, an issue that is best discussed with respect to Chapter 4 (and especially *Kokkonen*, Casebook, p. 379; Compact, p. 269) or Chapter 15 (securing and enforcing judgments). On remand, the district court will need to consider whether Bank Markazi enjoys sovereign immunity, and, if it does, whether the turnover action nevertheless can go forward. We discuss the decision here focusing on Judge Lohier's concurring opinion addressing Federal Rule 19, and whether Bank Markazi is an indispensable party—the question the district court must resolve on remand.

In Judge Lohier's view, Rule 19 would not compel dismissal of the action even if the Bank is an indispensable party and cannot be joined because it enjoys sovereign immunity Application of Rule 19(b) is a "case-specific inquiry," and dismissal of this case, in his view,

would frustrate congressional intent to facilitate the enforcement of these judgment-creditors' claims.

> In determining whether "in equity and good conscience" this action should proceed among the existing parties (without Bank Markazi as a required party) or should be dismissed, we ask four questions: To what extent would a judgment rendered in the absence of the required party prejudice that party or existing parties? Are there protective provisions or measures in the judgment or other forms of relief available to avoid or reduce any prejudice to the parties? Is the proposed relief rendered in the absence of the required party adequate? And is there another remedy available to the plaintiffs if the action is dismissed for nonjoinder?

His key move is to distinguish *Pimentel.* First, *Pimentel* emphasized international comity; in this case, Congress has specifically legislated on the question and the statute provides that it is to be applied "without regard to concerns relating to international comity." 22 U.S.C. § 8772(a)(1). Second, *Pimentel* asked whether the judgment would be rendered meaningless if the sovereign were absent and not bound by it. In this case "exercising jurisdiction over Bank Markazi is not necessary to order turnover of the Assets, so Bank Markazi's participation in the litigation does not appear to be required for that purpose." Third, in *Pimentel* the equities favored dismissal in part because the action was an interpleader proceeding brought by the stake holder, but here plaintiffs are the judgment holders themselves and the balance of equities differs significantly.

TotalEnergies Mktg. P.R. Corp. v. Luma Energy, LLC, 2024 WL 4729238 (D.P.R. 2024).

The diversity action involved a contract dispute between two local energy companies. The district court founded that under Rule 19(b), interpreted in light of *Provident Tradesmen* (Casebook, p. 752; Compact, p.480), the Puerto Rico Electric Power Authority was a necessary and indispensable party but its presence destroyed diversity jurisdiction. The district court dismissed the action without prejudice and recommended that the plaintiff refile in in state court.

Impleader

Peyton v. Wyndham Hotels & Resorts, LLC, 2024 WL 5375878 (C.D. Cal. 2024).

The case present a compact fact pattern for applying Rule 14. A guest at a hotel alleged she was injured while sitting on a lounge chair in the pool area. The hotel purchased the chair from Amazon. The hotel filed equitable indemnity and contribution claims against Amazon alleging Amazon is contingently liable by either negligence or products liability if defendant is found liable to plaintiff. Amazon moved to dismiss and the district court denied the motion.

Amazon argued, first, that the third-party complaint was not timely because it was filed after defendant's answer was due, so that under Rule 14 leave of court was required but not sought. The court rejected Amazon's reading of the docket and held that the third-party complaint was timely and did not require leave of court. Moreover, were leave required, the court would have granted it to "help avoid a multiplicity of suits."

Amazon then argued it could not be held liable as a matter of law because it did not manufacture the chair and did not sell the chair; it merely functioned as a storefront. The court rejected this argument under California law, which in analogous cases has held Amazon liable for strict liability or products liability claim based on such factors as interacting with consumers, taking and processing orders, and receiving a percentage of profits.

Further Amazon argued that the third-party claims are not ripe because no judgment has yet been issued against the hotel. The court relied on the text of Rule 14(a) to reject this argument—the rule permits a defendant to file a third-party complaint against a nonparty "who is or may be liable" to the defendant for all or part of the claim against the defendant. The Ninth Circuit, as well as other circuits, have permitted third-party complaints for inchoate claims for contribution, indemnity, or subrogation. Nor does this approach violate Article III; the claims are sufficiently concrete to support a finding of constitutional ripeness. Further, the hotel would suffer hardship if it were not permitted to invoke Rule 14:

> Factual development may be required to make the indemnification and contribution issues fit for judicial review. However, Rule 14(a) permits the Court and parties to resolve those factual issues in one litigation in which all parties participate. In cases where courts have found contribution and indemnity claims were not ripe, because the underlying claims either were instituted in different suits or had not been initiated at all, the party seeking indemnification or contribution would not have been able to resort to Rule 14(a) to avoid the harms associated with duplicative suits.

While denying Amazon's motion, the court bifurcated the claims against Amazon and stayed discovery until resolution of plaintiff's claims against the hotel.

Intervention

Louisiana v. Burgum, 132 F.4th 918 (5th Cir. 2025).

States and trade associations sued to vacate a rule issued by the Bureau of Ocean Energy Management (BOEM) requiring lessees in the Gulf of Mexico to obtain financial assurance bonds. The American Petroleum Institute, an industry group, moved to intervene to join as a defendant in the suit. The Fifth Circuit held that the group was not entitled to intervene as of right, and that the district court did not abuse its discretion in denying permissive intervention. The appeals court held that the putative intervenor did not overcome the presumption that BOEM would provide adequate representation; it failed to show adversity of interest, collusion or nonfeasance, and did not identify any action taken by BOEM that was adverse to its own interest. The Fifth Circuit also found no abuse of discretion in denying permissive intervention under Rule 24(b); even if the industry group offered a perspective different from that of BOEM, its participation would be unduly burdensome and it could present its views as an amicus curiae.

Kumaran v. Adm. Inv'r Servs., Inc., 2025 WL 1600344 (2d Cir. 2025).

The unpublished decision turns on the pleading requirements of Federal Rule 24(c). Although in some cases, courts "have permitted an applicant to intervene despite such technical failures when the applicant's 'position … is apparent from other filings[] and where the parties to the litigation will not be prejudice," in this case, the movant failed to describe the nature of their claims against defendant and instead purported to rely on filings "from a completely separate action." The Second Circuit thus affirmed denial of the intervention motion.

Sweet v. Cardona, 121 F.4th 32 (9th Cir. 2024).

The lawsuit is part of the fallout stemming from the Corinthian College bankruptcy. Federal student loan borrowers filed a putative class action against the U.S. Department of Education alleging the arbitrary adoption of a "presumption of denial" policy in its processing of applications for borrower defense relief. The parties moved for preliminary approval of a settlement, and during the pendency of that motion, for-profit universities moved to intervene. The district court denied intervention as of right but granted permissive intervention for the sole purpose of objecting to the settlement at the final approval fairness hearing. After the district court approved the settlement, the university-intervenors appealed. On appeal, the Ninth Circuit agreed that the universities could not intervene as a matter of right, but any error was harmless, because the universities failed to show any financial interest; the Department of Education handles all the applications upfront and the Department had yet to initiate recoupment actions against the schools to recover the amount paid to students. Moreover, the harmless error doctrine applies to intervention rulings, and the universities failed to show that any error affected their substantial rights. The court's discussion of the standing of a permissive intervenor on appeal is beyond the scope of the 1L course.

Hensley v. Hartford Cas. Ins. Co., 113 F.4th 1327 (11th Cir. 2024).

Hamilton Rsrv. Bank Ltd. v. Democratic Socialist Republic of Sri Lanka, 134 F.4th 73 (2d Cir. 2025).

These two cases raise questions about jurisdiction and Rule 24 which this memo discusses with respect to Chapter 4, see this memo, p. 30 and p. 38.

Interpleader

United Wis. Ins. Co. v. Yuan Wang, 2025 WL 895837 (S.D. Tex. 2025).

The dispute offers a good vehicle for discussing the scope and limits of an interpleader action in a dispute over insurance proceeds. The deceased's three wives, three children, mother, and estate each claimed entitlement to some or all of a liability-insurance payout from his

accidental death. The insurer filed an interpleader action seeking to deposit the $1 million policy limit into the Court's registry and be dismissed from the action. One of the claimants objected to the terms of the dismissal order, wanting to preserve their right to sue the insurance company for negligently refusing to settle their claims against the insured. The insurance company wanted the dismissal order to dismiss that tort claim.

The district court denied the insurance company's motion, and emphasized "the basic limit of interpleader relief: while a court can resolve competing claims to the stake, it cannot reach claims based on the stakeholder's personal tort duties to nonparties for liability in excess of the state." Applying that rule, the court concluded that the objector's claims arising from the insurer's potential tort liability are not the proper subject of interpleader relief; the claim is for liability in excess of the stake; and if the tort claim goes to judgment, the objectors will be assignees of the claim, again suggesting that the relief is beyond the limits of interpleader. Thus, the court concluded that it could not discharge the insurance company from the potential tort liability.

Joinder, Consolidation, and "Aggregate" Litigation

Thomas-Packer v. Commissioner, 2024 WL 4038391 (11th Cir. 2024).

The Eleventh Circuit affirmed dismissal of two pro se consolidated cases alleging retaliation under Title VII of the Civil Rights Act by the Commission of the Social Security Administration. On appeal, plaintiff argued that the district court abused its discretion by consolidating the two cases and by denying her Rule 60(b) motion seeking relief from the consolidation order. As an initial matter, the appeals court had jurisdiction to review the consolidation order as a non-final order that merged into the final judgment. The appeals court underscored that a Rule 60(b) motion is not the proper mechanism for challenging a consolidation order on appeal, but also found the consolidation to be within the district court's discretion. District courts are "encouraged" to use Rule 42(a) "to eliminate needless repetition and confusion," and the consolidation order took account of the requisite three factors:

> (1) whether the particular risks of prejudice and confusion are overborne by the risk of inconsistent judgments of common factual and legal issues; (2) the burden

> on parties, witnesses, and judicial resources posed by multiple lawsuits; (3) the length of time required to conclude multiple suits compared to a single one; and (4) the relative expense of all concerned.

The appeals court also emphasized that Rule 42 does not require a hearing before consolidation, and that notice of the proposed consolidation given during a telephone conference satisfied due process.

Chapter 10. Class Actions

Overview and Themes

A.A.R.P. v. Trump, 605 U.S. ___, 145 S.Ct. 1364 (2025).

For a discussion of the due-process issue in this case, see this memo, p. 25.

The Supreme Court on May 25, 2025 granted an emergency application for a stay of removal brought by two Venezuelan nationals detained under the Alien Enemies Act. The Court did not resolve whether class-wide relief was available in habeas proceedings. Justice Alito dissented, arguing that Rule 23 does not cover habeas proceedings.

Operation of the Class Action Device

Rule 23(a): Prerequisites of Certification

G.T. v. Board of Education of County of Kanawha, 117 F.4th 193 (4th Cir. 2024).

This suit alleged that a West Virginia school board had failed to support students with disabilities in violation of the Individuals with Disabilities Education Act (IDEA). Plaintiffs asserted six questions common to the class to meet the commonality requirement of Rule 23(a)(2):

> whether the [Board] properly (1) identifies students with disabilities who need

> behavior supports; (2) develops and implements those supports, including in [behavior intervention plans]; (3) monitors whether the students then make academic progress; (4) avoids unjustified disciplinary removals from the classroom; (5) trains its staff to undertake these essential functions of educating children with disabilities; and (6) ensures students receive needed behavior supports to avoid discrimination.

The district court certified the class and the Fourth Circuit reversed. The appeals court, citing Wal-Mart Stores v. Dukes (Casebook, p. 810; Compact, p. 526), stated that meeting the commonality requirement requires plaintiff "to demonstrate that the class members 'have suffered the same injury.'" Further, although the question of commonality in an IDEA class was a matter of first impression for the Fourth Circuit, it emphasized that the three circuits that had considered the question had unanimously concluded that "after *Wal-Mart*, plaintiffs must 'identify[] a uniformly applied, official policy of the school district, or an unofficial yet well-defined practice, that drives the alleged violation.'" The Fourth Circuit agreed with these circuits' approach:

> We agree with our sister circuits that, to meet the commonality prerequisite for class certification, plaintiffs in an IDEA case like this one must identify a "uniformly applied, official policy of the school district, or an unofficial yet well-defined practice, that drives the alleged violation." * * * The typical IDEA lawsuit involves a highly individualized assessment of whether a child was denied a [free appropriate public education]. In a suit challenging hundreds of individualized special education decisions, satisfying the commonality prerequisite requires proof of some common driver—the " 'glue' " holding all those decisions together in a way that suggests they can productively be litigated all at once.

Applying this test the appeals court concluded that the class failed to meet the commonality requirement because the plaintiffs "do not identify a common contention central to the validity of all class members' claims." To the contrary, the class members' claims "are highly diverse and individualized," and the plaintiffs did not identify a "single or uniform policy or practice" that was consistently applied.

In re Nissan N. Am., Inc. Litig., 122 F.4th 239 (6th Cir. 2024)

Speerly v. Gen. Motors, LLC, ___ F.4th ___, 2025 WL 1775640 (6th Cir. 2025).

This pair of cases illustrates application of the commonality requirement post *Wal-Mart* to class actions involving tort claims. In both, the Sixth Circuit held that a failure to show commonality defeated certification. In *Nissan*, consumers from ten states sued the car manufacturer, alleging that defects in automatic braking systems breached consumer warranties, amounted to fraud and unjust enrichment, and violated state consumer protection statutes. Plaintiffs moved to certify ten statewide classes of owners or lessees of fourteen models with the particular kind of radar that caused phantom brake problems. The district court for the Middle District of Tennessee certified the classes, and the Sixth Circuit on an interlocutory appeal reversed. The appeals court held that distinct software upgrades created for different model cards showed a lack of commonality. Further, the district court was directed to analyze elements of each state law claim to determine which elements of each would yield common yes-or-no answers. The Sixth Circuit further held that the district court's predominance inquiry was "tainted" by commonality issues "from the get-go." On remand, the district court was directed to take a "second look," considering some of the individualized determinations that "might be 'ill-equipped for classwide proof.'" The suit against General Motors alleged defective transmissions and the Sixth Circuit, en banc, reversed the certification decision, again finding that commonality and predominance were not met. Both opinions triggered concurring and dissenting opinions.

Cheng v. HSBC Bank USA, N.A., 2024 WL 4835268 (2d Cir. 2024).

The decision addresses the adequacy requirement of Rule 23(a)(4) and could help students understand the distinction between adequacy and typicality. The action involved claims by former bank customers alleging that the bank engaged in deceptive business practices when it failed to provide interest on the same day a transfer is processed. The district court denied class certification, and the Second Circuit vacated and remanded on the grounds that the lower court "misapplied" the adequacy prerequisite. The Second Circuit disagreed that plaintiff's "susceptibility to unique defenses" undermined his adequacy as a representative, finding this concern better suited to the typicality inquiry under Rule 23(a)(3). Moreover, the appeals court suggested that the availability of individual defenses may not be fatal when reconsidered under

the typicality requirement.

> It is also far from "obvious in context" that the district court's denial of class certification could be supported under the typicality requirement of Rule 23(a)(3). * * * With respect to Cheng's contract claim, if the terms and conditions of an HSBC account are unambiguous, or if evidence of Cheng's statements during the phone calls at issue would not otherwise be relevant to determining the meaning of his agreement with HSBC, then the possibility of "individualized defenses against" Cheng's contract claim would "rest on little more than speculation." * * * Likewise, if Cheng's statements would have no bearing on the putative class claim under New York General Business Law § 349, then they would not give rise to individualized defenses with respect to those claims.
>
> We decline to rule on whether Cheng's proposed class satisfies Rule 23(a)(3) because neither party argues typicality on appeal. * * *

Stafford v. Bojangles' Restaurants, Inc, 123 F.4th 671 (4th Cir. 2024).

The decision focuses on the predominance requirement. The action was brought in the Western District of North Carolina by employees who worked as shift managers alleging that a fast-food chain that operated in eight states violated the Fair Labor Standards Act (FLSA) and state wage-and-hour law claim by not paying off-the-clock work and making unauthorized edits to employee time records to avoid paying overtime wages. The district court conditionally certified the action as a collective action under the FLSA, and then the district court granted in part the employees' motion for class certification of their state-law claims and certified classes of shift managers in North Carolina and South Carolina, and denied certification of the Alabama, Georgia, Kentucky, Tennessee, and Virginia classes on the basis of inadequate representation. Both certification orders defined the class as "All persons who worked as a shift manager" at the restaurant in the specified state "at any time from three years prior to the filing of this Complaint to the entry of judgment in the case."

The Fourth Circuit vacated and remanded the North Carolina and South Carolina class certifications:

> The classes certified had only one parameter: class members must have worked as a Bojangles shift manager in the relevant state within three years of the filed complaint. We hold that the district court abused its discretion in certifying this

> class action because it employed an inappropriately high level of generality when (1) identifying the policies which allegedly unify prospective class members' wide-ranging claims, and (2) creating overly broad class definitions. These errors cut to the core of the district court's Rule 23(a) and Rule 23(b)(3) analyses * * *.

The appeals court held predominance was not met by the mere showing that 80 percent of the putative class members shared a common claim of illegal pre-shift work; to the contrary, plaintiffs had failed to demonstrate that the existence of a generalized practice — in other words, a single question the answer to which could resolve each plaintiff's claim. On remand, the district court was advised to consider whether any recertification order should identify discrete subclasses.

Rule 23(b): The Types of Class Actions

Laboratory Corporation of America Holdings v. Davis, 605 U.S.___, 145 S.Ct. 1608 (2025).

The Supreme Court on June 5, 2025 dismissed the petition in this case as improvidently granted and did not decide the question presented: "Whether a federal court may certify a damages class pursuant to Federal Rule of Civil Procedure 23 when the class includes both injured and uninjured class members." Justice Kavanaugh dissented: "I would hold that a federal court may not certify a damages class that includes both injured and uninjured members. Rule 23 requires that common questions predominate in damages class actions. And when a damages class includes both injured and uninjured members, common questions do not predominate." In particular, he emphasized that the "real-world consequences" of a class "overinflated" with uninjured members would be grave in terms of threatening corporate defendants with of "massive liability" and "coerced settlements," the costs of which are passed on to consumers, to retirement account holders, and to workers.

The case itself was brought by visually impaired persons against Labcorp under the Americans with Disabilities Act and state civil rights law alleging that Labcorp's touchscreen kiosks discriminated against blind customers. The district court initially certified a damages class containing "[a]ll legally blind individuals in California who visited a Labcorp patient service

center in California" during the relevant time period and who were denied equal access and enjoyment of its services "due to Labcorp's failure to make its e-check-in kiosks accessible to legally blind individuals." Labcorp filed an interlocutory appeal under Rule 23(f), arguing that the class was overbroad and would necessarily include uninjured members. Before the Ninth Circuit had ruled on the interlocutory appeal, the district court clarified that the certified class included only those legally blind individuals who "due to their disability, were unable to use" the kiosks. Notwithstanding mootness objections, the Ninth Circuit ruled on the interlocutory appeal and affirmed the initial class certification.

Rule 23(c): Certification Decisions

Career Counseling, Inc. v. AmeriFactors Financial Group, LLC, 91 F.4th 202 (4th Cir. 2024), cert. denied, 2025 WL 1787723 (U.S. No. 24-86) (2025).

The Courts of Appeals are continuing to consider whether Rule 23 includes an implied ascertainability condition for the class definition (Casebook, p. 833; Compact, p. 546). The Fourth Circuit applied an "implicit threshold requirement that the members of a proposed class be 'readily identifiable,'" referred to as ascertainability, and affirmed the denial of class certification. The action alleged that the receipt of unsolicited fax advertisements violated the Telephone Consumer Protection Act (TCPA). The lower court denied class certification on the basis that it would be impossible to identify among the putative class which members used stand-alone fax machines (subject to the TCPA) as distinct from online fax services (not covered by the TCPA). In so doing, the district court rejected plaintiffs' proposed identification method and rejected their argument that an ascertainability requirement does not statutorily exist. The Fourth Circuit affirmed.

Kadel v. Folwell, 100 F.4th 122 (4th Cir. 2024), cert granted, judgment vacated by Folwell v. Kadel, 2025 WL 1787687 (U.S. 2025).

The Fourth Circuit clarified that the implied ascertainability requirement in Rule 23 does not extend to Rule 23(b)(2) classes. It reasoned that because those suits seek only declaratory and

injunctive relief, they do not raise the same notice and damages liability concerns as do Rule 23(b)(1) and Rule 23(b)(3) suits. The case involved an equal-protection challenge to health plans that deny gender affirming care to transgender patients. The Supreme Court granted cert. and vacated the judgment and remanded in light of United States v. Skrmetti, 605 U.S. ___, 145 S.Ct. 1816 (2025), in which the Supreme Court held, six-to-three, that Tennessee's law prohibiting certain medical treatments for transgender minors satisfies rational basis review under the Equal Protection Clause of the Fourteenth Amendment.

Jacks v. DirectSat USA, LLC, 118 F.4th 888 (7th Cir. 2024)

The case addresses the relation of the merits to the class certification decision and the requirement of superiority. Satellite service technicians brought a putative class action in state court against a satellite dish installation company under the Illinois Minimum Wage Law and the federal Fair Labor Standards Act. Defendant removed, and the district court granted plaintiff's motion for class certification on the state law claims. Defendant moved to decertify, and the district court vacated its previous certification order and certified instead an issue class of multiple issues. The case was then reassigned to another judge, and the new judge decertified the issue class. Plaintiffs then settled their individual claims but reserved their right to appeal the decertification order. The appeals court held it was not reversible error for the district court to consider merits questions when making its certification order. The opinion contains an excellent discussion of the governing rules on this question:

> Plaintiffs argue the district court erred by encroaching into merits issues when deciding the appropriateness of continued certification. Specifically, they say the district judge impermissibly made findings as to (1) whether individual supervisors exercised discretion in directing technicians how to fill out their time sheets, and (2) whether supervisors decided which activities technicians could record.
>
> Plaintiffs are correct that the "default rule is that a court may not resolve merits questions at the class certification stage." * * *. But, at the same time, "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." * * *

> This is precisely what the Supreme Court did in *Wal-Mart.* * * * The justices reminded us that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." * * *
>
> The district court here did exactly that. To determine whether class certification was proper, the court had to consider evidence that overlapped with the merits. It noted that [defendant] did have some uniform policies related to timekeeping. But it also pointed to evidence showing that individual supervisors often dictated how their technicians recorded their time. And, given the breadth of an individual supervisor's discretion, the court determined there was too much variation among technicians to resolve liability on a classwide basis. Because the district court only considered merits issues to the extent necessary to determine whether Plaintiffs met the requirements for class certification, it did not commit reversible error when doing so. * * *.

The Seventh Circuit then addressed the relationship between issue classes under Rule 23(c)(4) and the predominance requirement under Rule 23(b)(3). "The key question is this—when seeking certification of an issue class under Rule 23(c)(4) in a case requesting damages, must a party show that common issues predominate in the resolution of the entire claim, or is it enough that common issues predominate as to each issue to be certified? Our sister circuits have taken different approaches." The Seventh Circuit, agreeing with the Second, Third, Fourth, Sixth, and Ninth Circuits, held that "as part of satisfying its burden under Rule 23, a party seeking certification of an issue class * * * must show that common questions predominate in the resolution of the specific issue or issues that are the subject of the certification motion and not as to 'the cause of action, taken as a whole.'" Further, Rule 23(b)(3) requires a showing that class treatment is superior to other adjudicative methods. As applied to this case, the appeals court found, based on the record, that "proceeding to trial on the fourteen certified issues" would be superior.

Black Lives Matter Los Angeles v. City of Los Angeles, 113 F.4th 1249 (9th Cir. 2024).

The case may hold interest for some 1L students and highlights the difficulties of certifying classes on behalf of large groups of individuals who allege violations of their constitutional rights during mass encounters with police officers. Black Lives Matter Los Angeles filed suit on behalf of protesters alleged that the Los Angeles Police Department

(LAPD) used excessive force in response to racial justice protests during the summer of 2020. The district court granted plaintiff's motion for certification of three damages classes (for direct force claims, arrest claims, and infraction claims) and a fourth class seeking injunctive relief. The Ninth Circuit vacated and remanded for further analysis of commonality and predominance, finding that the district court did not undertake a "rigorous" analysis of the requirements. In particular, plaintiffs failed to show "the existence of common evidence that can resolve in 'one stroke' the class members' claims that hinge on a wide array of facts and circumstances." The appeals court emphasized that in none of the damages classes did plaintiffs challenge a formal policy of the LAPD (the decision contains an extended discussion of *Monell* liability that likely is beyond the 1L curriculum).

Mr. Dee's Inc. v. Inmar, Inc., 127 F.4th 925 (4th Cir. 2025)

Three named plaintiffs, purchasers of coupon processing services, sued the service companies on behalf of manufacturers and retailers. The complaint alleged a horizontal price-fixing scheme that resulted in higher shipping fees. Plaintiffs sought class certification for two classes, one for manufacturers (which the district court denied) and one for retailers (which the district court granted). The appeal concerned only the manufacturer-class certification order. One proposed class was defined as a list of manufacturers that had purchased the coupon processing services. The appellate agreed that the "Fixed List Class" failed to meet the class definition requirements of Rule 23. As the appeals court explained, "Fatal to the Fixed List Class is the fact that it fails to *define* a class at all. The text of Rule 23 and our cases interpreting the Rule make clear why 'it is insufficient merely to provide a list, however lengthy, of persons said to be in the class and leave it to the court to devise a class definition.'" A second proposed class limited the members to those manufacturers who had paid above a certain amount for services. The district court rejected this definition as underinclusive, for it excluded thousands of manufacturers allegedly harmed by the same violation. The Fourth Circuit agreed, explaining that certifying an incomplete class "might expose defendants to a continued trickle of individual lawsuits and thereby impair the efficiency goal which is a key purpose of the class action mechanism." A third proposed class consisted of every manufacturer that had paid fees to the servicers, which the district court found overbroad, and the Fourth Circuit agreed with that conclusion. Further,

the appeals court considered the fact that 32 percent of the members of the proposed class were uninjured, a number that it found "as much too high" and in its view defeated predominance.

Class Action Waivers

Maldini v. Marriott International, Inc., 140 F.4th 123 (4th Cir. 2025).

The case has a complicated procedural history; the latest chapter marks the intersection of MDL proceedings and class-action waivers. Hotel guests filed a putative class action for damages and injunctive relief against a hotel chain and data security company asserting claims under different state laws for negligence, breach of contract, and consumer protection, arising from a data breach in which hackers accessed the guests' personally identifiable information. The guests moved to certify classes and subclasses, and the district court in the District of Maryland partially granted the motions. The Fourth Circuit vacated and remanded on the question of defendant's affirmative defense that a contractual provision waived the right of guests in the hotel's preferred guest program to bring a class action against the chain. The contractual term provided that the hotel's preferred guest program required that disputes "arising out of or related to" the program "be handled individually without any class action." On remand, the district court declined to enforce the contractual waiver and reinstated all classes as originally certified.

In this second appeal, the Fourth Circuit held that the hotel did not forfeit its defense of contractual waiver by participating in MDL consolidated proceedings. In particular, the hotel had raised the contractual defense in its answer, in its opposition to class certification, and in its motion to dismiss, and also had identified the waiver during discovery. The appeals court found that "[p]roperly understood, the class-action agreement here does not commit the parties to litigate each plaintiff's case 'individually' in all respects, and [the hotel's] participation in consolidation pretrial proceedings is fully consistent with that provision. Nor do the Federal Rules of Civil Procedure prohibit class-action waivers." Moreover, the appeals court held that "the 'arising out of or related to' language sweeps especially broadly," and includes "every dispute between the parties having a significant relationship to the contract regardless of the label attached" to the claims. Relying on the waiver, the appeals court held that the waiver barred the

certification of damages classes against the chain on behalf of guests in the preferred guest program. Further, the appeals court held that superiority was not shown for certification of an issue class against the data company after the damages classes against the hotel had been vacated; the sole basis for maintaining an issue class was the overlap between the two damages actions.

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

Judicial Supervision of Discovery and Sanctions

U.S. DOGE Service v. CREW, 145 S.Ct. 1981 (2025).

1L students likely are familiar with challenges to the efforts of "DOGE," the Department of Government Efficiency, to reorganize administrative agencies and reallocate funds. In this case, an individual requested documents under the Freedom of Information Act seeking expedited processing of requests for information about DOGE's activities. The district court granted in part and denied in part the motion for expedited discovery, and DOGE petitioned for a writ of mandamus and filed a motion for an emergency stay, including a request for an immediate administrative stay. The D.C. Circuit granted the administrative stay, but later denied the mandamus petition, dissolved the stay, and dismissed as moot the motion for an emergency stay. DOGE then applied to the Supreme Court for a stay and suggested treating its petition as a writ of certiorari. The Court granted cert, denied mandamus relief, and granted a stay, explaining that the discovery order was not appropriately tailored given "separation of powers concerns [that] counsel judicial deference and restraint in the context of discovery regarding internal Executive Branch communications." Justices Sotomayor, Kagan, and Jackson would have denied the application for a stay.

X Corp. v. Media Matters for America, 120 F.4th 190 (5th Cir. 2024).

The discovery dispute involves a high-profile party and likely will interest students. In November 2023, X Corp., formerly Twitter, sued Media Matters, a nonprofit journalism organization, arguing that it "knowingly and maliciously" portrayed X Corp. "as a social media

platform dominated by neo- Nazism." During discovery, X Corp. moved to compel Media Matters to produce the identities and addresses of its donors. The district court deferred ruling on the request and, recognizing First Amendment concerns, instead ordered Media Matters to provide a privilege log. Media Matters did not respond and X Corp. again moved to compel. This time, the district court granted the motion to compel and held that Media Matters had waived its First Amendment defense. Media Matters appealed and at the same time moved the appeals court for a stay of the district court's order. (Other activity also happened in the district court.) The Fifth Circuit granted the stay pending appeal. (The question of the appeals court's jurisdiction is discussed in this memo, p. 127, in connection with Chapter 16.) In granting the stay, the Fifth Circuit rested on Media Matters' Rule 26 objections to the discovery requests, and did not resolve any of the complicated First Amendment issues or waiver issues that the dispute presented. As an example, X Corp demanded

> Documents sufficient to show the identity of all Your donors or any others who provide financial support of any kind, their residence, the time and place of their donation or provision of financial support, and the amount of their donations or other financial support.

The appeals court found that this request was not proportional to the needs of the case, relying on Federal Rule 26(b)(1):

> We doubt that X Corp. needs the identity of Media Matters's every donor, big or small, to advance its theories. Nor does it need the full residential addresses for any of those stated purposes. Conversely, Media Matters and its donors would bear a heavy burden if Media Matters had to release this information. It could enable others to harass or intimidate Media Matters or its donors. Indeed, X Corp.'s owner, Elon Musk, has said that X Corp. would "pursue not just [Media Matters] but anyone funding that organization. I want to be clear about that anyone funding that organization, will be, we will pursue them."

Moreover, the appeals court questioned why the district court had declined to issue the protective order that the parties themselves had stipulated:

> It declined to do so, reasoning that parties could always "agree to any confidentiality or discovery-related contract" without using judicial resources. Unlike a private agreement, however, court orders are backed by courts' coercive

> power. True, the district court required X Corp. to "ask the Court before using an information beyond the Attorney's Eyes Only designation." But that was far from a blanket ban on sharing confidential information. We conclude that Media Matters was reasonably concerned, not because we doubt the "character of [X Corp.'s] lawyers" or the judgment of the district court, but because of the sensitive nature of the requested data.

U.S. Equal Employment Opportunity Commission v. Exxon Mobil Corporation, 347 F.R.D. 451 (M.D. La. 2024).

The case provides a compact fact pattern for considering various discovery issues raised by motions to compel and the entry of a protective order. It also offers something of a primer on discovery practice. The Equal Employment Opportunity Commission (EEOC) sued an employer on behalf of a Black employee, alleging that the placement of nooses in the employers' premises and other actions created a hostile work environment in violation of Title VII. The district court initially denied the EEOC's motion to compel as premature, and the EEOC later renewed its requests. As an example, the employer opposed the motion relying on a declaration of one of its supervisors; the EEOC moved to strike the declaration for lack of personal knowledge and for failing to attach the original writings referenced to prove their contents; the court declined to strike, but stated it would give the affirmation only the weight it was worth:

> "There is no procedural rule governing the motions to strike portions of a declaration attached to a memorandum in opposition to a discovery motion." * * * Indeed, the Court need not make evidentiary determinations to rule on the instant discovery dispute. Furthermore, the Court recognizes that the information submitted in [the] declaration is largely duplicative of information already submitted by Exxon in its opposition brief, which was submitted by Exxon's counsel in accordance with Rule 11.
>
> Given the foregoing, the Court finds no basis for striking [the] declaration from the record and will give it the appropriate weight, if any, in ruling on the underlying discovery motion.

The court also considered whether it should credit defendant's objections or whether they were conclusory and boilerplate—in opposition, defendant provided the "identical paraphrasing of the scope of discovery" as set out in the Federal Rules. However, in some instances defendant

proffered "particular objections mostly pertaining to the alleged overbreadth of the geographic and temporal scope of the information sought." The court held that objections set out only in general terms without additional specific language were waived.

In re Exactech Polyethylene Orthopedic Products Liability Litigation, 347 F.R.D. 572 (E.D.N.Y. 2024).

This multi-district litigation involved 1,800 claims by the recipients of certain implants against the manufacturer. The decision in part addresses the parties' competing proposals for the use of technology-assisted review (TAR) protocols to identify responsive documents.

The only dispute is related to Plaintiffs' proposal to permit them to review non-privileged documents coded as "non-responsive" to ensure the responsiveness of those documents. Specifically, Plaintiffs propose the following language in Section 4(b)(ii):

> Following this review of the ESTIMATION SAMPLE, the Exactech Defendants agree to make available to Plaintiffs the non-privileged documents coded as non-responsive in the ESTIMATION SAMPLE to be viewable in the DISCO platform. For any documents withheld as privileged, the Exactech Defendants will provide to Plaintiffs a log of the documents withheld for privilege that will allow for the identification of the subject matter, date, persons associated with the document, and basis for privilege within 30 days of making the ESTIMATION SAMPLE documents available for review. Should a disagreement arise regarding the responsiveness of certain documents within the sample, the Parties will meet and confer to resolve the disagreement. * * *
>
> Plaintiffs argue that their proposal efficiently explores the issue of Exactech's responsiveness at the beginning of the production process instead of at the end. * * * Exactech argues that Plaintiffs do not have a right to be involved in a producing party's responsiveness. * * *

The Magistrate Judge emphasized that "Courts generally decline to intervene in a responding party's decisions about how to use TAR, unless the requesting party shows a specific deficiency in production or unreasonableness in process."

> Here, the parties have largely agreed to a TAR protocol including detailed information regarding the collection criteria used and the culling and review process. * * * "This is sufficient information to make the production transparent."

> * * * Plaintiffs' assertion that they shall be permitted to review non-privileged documents coded as non-responsive is wholly unsupported by the law. * * *

Emphasizing that plaintiffs had not demonstrated deficiencies in defendant's TAR protocol, the court adopted it over plaintiffs' objections.

United States v. Veeraswamy, 347 F.R.D. 591 (E.D.N.Y. 2024).

The government filed a civil action to reduce to judgment Report of Foreign Bank and Financial Accounts penalties and statutory additions and accruals from the administrator of a spouse's estate (the administrator appeared pro se). The decision addresses the government's motion to compel the administrator to amend and supplement responses to different discovery requests and to stay discovery or to extend the discovery deadlines. The court began by emphasizing defendant's use of boilerplate objections in lieu of specific grounds for objections, and then turned to deficiencies in specific responses. For example, the court rejected the administrator's objection to interrogatories seeking information from third parties and not within her possession; as the court explained, the administrator stood in the shoes of the decedent, and the documents requested would have been within his custody or control. The court also considered whether the discovery requests were overbroad, and explained why it was limiting some of them, for example, to narrower time periods. The court also rejected the motion to stay discovery, finding the government did not meet its burden under the relevant factors: whether the movant has made a strong showing that the nonmovant's claim is unmeritorious; the breadth of discovery and the burden of responding to it; and the risk of unfair prejudice to the party opposing the stay. Nevertheless, the court granted the government's alternative motion to extend the period for discovery.

New York Times Company v. Microsoft Corporation, 2025 WL 1410658 (S.D.N.Y. 2025).

The decision concerns OpenAI's request for a protective order barring disclosure of certain "highly confidential documents" to an expert retained by plaintiffs, The New York Times and the Daily News. The expert witness is the owner of a six-person AI company that adapts AI

models to Spanish-language texts. OpenAI argued that a protective order was needed to bar the expert's use of the information in ways that would damage Open AI's competitive advantage in the AI field. Under Federal Rule 26(c)(1)(G), a district court may enter a protective order to require "a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specific way." The party seeking a protective order has the burden of establishing "good cause" for the order, which is established when there is a "particular need for protection" and when a party can show that "disclosure will result in a clearly defined, specific and serious injury." In making this determination the district court considered a number of factors, balancing the receiving party's need against the producing party's interest in shielding the information from a potential competitor:

> (1) whether the person receiving the confidential information is involved in competitive decision making or scientific research relating to the subject matter of the materials; (2) the risk of inadvertent disclosure of proprietary information; (3) the hardship imposed by the restriction; (4) the timing of the remedy; and (5) the scope of the remedy.

The district court also considered the expert's "specific expertise" and whether other consultants have similar expertise. The decision offers a careful explanation for the court's denial of the order.

Gregory v. State of Montana, 118 F.4th 1069 (9th Cir. 2024).

The discovery dispute raises a number of interesting questions, including whether surveillance video footage (in this case, of a probation office parking lot) counts as electronically stored information, and when sanctions may be imposed for loss or destruction of such a video as a matter of inherent judicial authority, rather than under Federal Rule 37(e)(2), which requires a "finding that the party acted with the intent to deprive another party of the information's use in the litigation."

The suit was filed by the mother of a probationer, alleging excessive force by Montana officers during an encounter outside the probation office in violation of the Fourth Amendment. The complaint alleged federal and state claims. The encounter was recorded by surveillance footage, but the Montana authorities auto-deleted the original footage from its recording system

"due to what the district court characterized as 'recklessness on the part of the State in failing to take appropriate steps to preserve the recordings before they were deleted." The district court found that the defendants had not acted with gross negligence or willfulness, and invoked his inherent authority to sanction the state by instructing the jury that it was established as a matter of law that defendants used excessive force in violation of the Fourth Amendment, submitting to the jury only questions of causation and damages. The jury awarded $75,000 on the federal civil rights claims, plus attorney's fees, but ruled against plaintiff on a related common-law claim. On appeal, the Ninth Circuit reversed the sanction order, reversed the § 1983 judgment, and vacated the fee award.

The appeals court reviewed the sanction under the abuse-of-discretion standard, and found that the district court committed legal error by relying on its inherent authority rather than on Rule 37(e), and that the requirements for such a sanction under the rule were not met. Expert testimony established that the video was generated by a digital system operating using a computer and software, and so the footage qualified as electronically stored information under the Federal Rules. The appeals court readily agreed that the defendants should have preserved the footage, that reasonable steps were not taken to preserve the footage, and that the footage was irreplaceable. However, the sanction imposed by the district court fell within the Rule 37(e)(2) required a finding of intent, which the court did not make, and the rule displaced the judge's inherent authority. Nor was the error harmless. Because the sanction was prejudicial to defendant, the adverse judgment was reversed and the matter was remanded for a new trial.

Atlantic Casualty Insurance Company v. Ross, 2025 WL 884106 (11th Cir. 2025).

The decision reads as a warning about a lawyer's duties under the Federal Rules of Civil Procedure and potential tensions in the attorney-client relation. Specifically, the Eleventh Circuit affirmed a district court's imposition of sanctions in the form of attorney fees on an attorney for failing to conduct a "reasonable inquiry" to confirm that his client's responses to a discovery request were relevant and given in good faith. The court rejected the attorney's argument that sanctions under Federal Rule 26(g)(3) require a showing of "bad faith." Bad faith is required for sanctions imposed as a matter of the court's inherent authority, but not under Rule 26:

> Rule 26 requires an attorney to certify that, after a "reasonable inquiry," a discovery response is consistent with the applicable rules, warranted by existing law, not intended for any improper purpose, and not unduly burdensome on the other party. Fed. R. Civ. P. 26(g)(1). If a certification violates the rule without substantial justification, the district court "must impose an appropriate sanction," which may include an order to pay attorney's fees. *Id.* R. 26(g)(3). A signature does not certify the truthfulness of a client's response but "certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand." *Id.*, Advisory Committee Note, 1983 Amendments. "[W]hat is reasonable is a matter for the court to decide on the totality of the circumstances." *Id.*

Under this standard, the record comfortably supported the district court's finding that counsel had not undertaken a reasonable investigation:

> The responses to requests for production directed Atlantic Casualty to over 900 pages of documents the defendants had produced without pointing to the documents that were responsive to each request or whether documents existed at all. At least one response to a request for production was completely nonresponsive to the request. Another stated a document would be produced but did not produce the document. Ross testified that although he looked at the documents before producing them, he took his client's word that she gave him what was necessary. He stated that he gave a general response to requests for production because a client might not appreciate the seriousness of an obligation to search for documents and might later find those documents. He also testified that he or his client might have misunderstood the request for production, which is why it was nonresponsive, and that he was required to give his client's truthful nonresponsive answer.

Stecklein & Rapp Chartered v. Experian Information Solutions, Inc., 113 F.4th 858 (8th Cir. 2024).

The opening paragraph says it all: "How much is too much in discovery? The district court concluded that Experian Information Solutions crossed the line when it demanded mostly irrelevant information. We affirm, including the decision to award attorney fees for the extra work it created." Consumers sued a credit reporting company in state court, alleging the agency violated the Fair Credit Reporting Act when it reported their auto loans as discharged through bankruptcy and failed to fix the error. Experian removed to federal court and there, as the appeal

court put it, "discovery took on a life of its own," with Experian issuing subpoenas and seeking documents and deposition testimony from plaintiff's law firm, including asking the firm how it structured its business and about its representation of other clients. The law firm sought relief from the subpoenas in the Western District of Missouri where its officers are located and compliance would be required, see Fed Rule 45(d)(3)(A). The district court concluded the information sought was not relevant, quashed the subpoenas, and awarded more than $90,000 in attorney fees. The Eighth Circuit affirmed, in a well-argued and engaging decision. Boiled down, as the appeals court put it, "The lesson is that Experian should not have cast its discovery net so wide." Even if Experian acted in good faith, that finding affected the nature of the sanction, not whether a sanction should be imposed.

SPS Corp I, Fundo de Investimento Em Direitos Creditórios Não Padronizados v. General Motors Co., 110 F.4th 586 (3d Cir. 2024).

In re Gliner, 133 F.4th 927 (9th Cir. 2025).

Those courses that cover discovery under 28 U.S.C. § 1782 might be interested in this pair of cases addressing the multi-factor test of *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 251 (2004). The Third Circuit held that the district court did not abuse its discretion in denying a Brazilian taxpayer's request for discovery for use in a Brazilian court proceeding, emphasizing that the Brazilian court had denied the request and thus, under the *Intel* test, was shown to be not receptive to American discovery. The Ninth Circuit vacated and remanded a district court's denial of a § 1782 discovery request. Plaintiff, a dual citizen of the United States and the United Kingdom, sought to subpoena a California company that provided domain registration and privacy protection services in order to identify the anonymous operator of a website and a pseudonymous author for use in a contemplated defamation suit in the United Kingdom. The district court rejected the application on First Amendment grounds. The appeals court found that the record did not support finding that the operator or author had a First Amendment right to speak anonymously in the United States, and further the evidence was insufficient to show that the discovery order would curtail the First Amendment right of members of the U.S. public to receive information.

Chapter 12. Case Management

The Operation of Rule 16

E-Numerate Solutions, Inc. v. United States, 175 Fed. Cl. 44 (2025).

The five-page order provides an excellent illustration of a court's on-going management of discovery and its scheduling of other procedural matters, such as the amendment of the complaint, and its discretion over important litigation issues. It also highlights the court's discretionary power to direct the parties to confer and to provide status report The suit alleged patent infringement by the government in its use of a computer markup language for use in financial accounting and other data matters. The order details the case chronology, considers the parties' opposing positions on future scheduling, and sets out the court's decisions with short but practical explanations of his reasons.

Gorrio v. Francis, 2025 WL 1669417 (3d Cir. 2025).

The appeal is by a pro se state inmate from the district court's order denying his motion for a new trial after a jury verdict and final judgment in favor of state correctional officials sued for alleged statutory and constitutional violations, including civil rights violations. Pursuant to the district court's standing practice for all civil rights cases filed by pro se incarcerated persons, a Magistrate Judge had been assigned to manage discovery and non-dispositive motions in the case. Relevant here, plaintiff's appeal included a challenge to the court's case management order concerning the scope of discovery and amendment of the complaint. The order barred "formal discovery" in the case "without leave of court." The order also "instructed" defendants to provide all reports, documents, and records relevant to plaintiff's claims and any information in their possession that would enable plaintiff to identify John and Jane Doe defendants. The order further provided plaintiff with the opportunity, within a month after receipt of defendants' materials, "to advise the court of any further discovery" he wished to request and to submit formal requests to the court for review. Pursuant to the order, plaintiff sought additional discovery, and the Magistrate Judge denied each request (while also extending the time for

plaintiff to explain the discovery he sought).

On appeal, the Third Circuit agreed that the case management order violated the Federal Rules of Civil Procedure, but held that relief was not warranted:

> On its face, the case-management order disallowing discovery without leave of court conflicts with the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 30(a)(1) ("A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2)."); Fed. R. Civ. P. 31(a)(1) ("A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2)."); Fed. R. Civ. P. 34(a) ("A party may serve on any other party a request ... to produce ... any designated documents or electronically stored information.").

As the appeals court explained, although district courts have discretion to manage discovery,

> they may not circumvent or deviate from the Federal Rules of Civil Procedure as a matter of course," and in this case, the Magistrate Judge "provide no case-specific basis for requiring leave of court to conduct discovery, let alone one consistent with the exceptions provided by the federal rules. * * * And no basis is apparent from the record.

However, although the case management order was "improper," plaintiff showed no entitlement to relief; relief on a claim concerning discovery requires a showing of "actual and substantial prejudice" from the procedures adopted such that "the district court's denial of discovery made it impossible to obtain crucial evidence." In the Third Circuit's view, plaintiff offered no more than "vague" and "speculative" assertions that he was deprived of "crucial evidence." (The appeals court also affirmed the denial of a new trial.)

Next Millennium Telecom Co. v. American Signal Corporation, 112 F.4th 481 (7th Cir. 2024).

The appeal is from the district court's dismissal of the action for failure to prosecute, based in part on plaintiff's failure to comply with the court's orders, its failure to cooperate in discovery, and its "flouting" of local rules. Plaintiff, a Saudi Arabian company, purchased siren systems from a company incorporated in Wisconsin and then filed a diversity action against the company alleging product defect and breach of contract. The Seventh Circuit affirmed the

dismissal, finding no abuse of discretion after looking "to the entire procedural history of the case." While the appeals court acknowledged that the district court "could have done more to push the case forward without having to resort to the sanction of dismissal (for example, it waited over a year to issue a scheduling order)," it emphasized that "ultimately, 'the duty of moving a case to trial is on the plaintiff and not on the court,'" but plaintiff consistently undermined the court's efforts "to spur" the party to make "progress on the key issues in the case":

> [Plaintiff] shirked its obligation to diligently prosecute its case, and its "pattern of delay and indifference" supports dismissal. * * * First, in persistently equivocating when American Signal sought to conduct inspections of the sirens to identify any defects, Nextel prevented the development of fundamental facts in the case. Second, Nextel caused delays by failing to cooperate in scheduling depositions. Third, it repeatedly disregarded the local rules. Finally, Nextel did not comply with the court's order at the final pretrial conference: it did not obtain local counsel or meaningfully converse with [defendant], and its plan was short and unsupported. The totality of this behavior was sufficient to justify dismissal for failure to prosecute, even if no single instance was particularly egregious.

The Final Pretrial Order

EAN Holdings, LLC, 2024 WL 3520449 (6th Cir. 2024).

The appeal involves various challenges to pretrial and trial decisions in an insurance dispute seeking declaratory relief. The Sixth Circuit affirmed the jury verdict against the plaintiff. The issues highlight the district court's broad discretion to manage its courtroom. For example, plaintiff challenged the district court's denial of its motion to continue the trial. Plaintiff based its challenge on comments made by the judge at a pretrial conference that, in the party's view, left it "concerned that it would be hamstrung in presenting its case." But, as the appeals court emphasized, plaintiff offered

> no precedent suggesting that learning the trial court's leanings about evidentiary and other matters during pretrial conferences justifies a continuance. This absence of supportive caselaw is unsurprising. After all, pretrial conferences are optional. * * * "In managing the course of a trial," moreover, a court "may wait to make a definitive evidentiary ruling until its decision can be informed by a fuller

> context." * * * By previewing its expectations at a pretrial conference, a court improves litigants' ability to prepare for trial. It would be counterintuitive to penalize that practice by treating information shared at a conference as grounds for a continuance motion from a party that takes issue with anticipated rulings.

In any event, the appeals court found no abuse of discretion in the denial of the continuance; on appeal, plaintiff did not put forward any witnesses or evidence that it would have produced had the continuance been granted.

Village Communities, LLC v. County of San Diego, 2024 WL 3963841 (9th Cir. 2024).

The case involved a challenge to a county's denial of a mixed-use development proposal. In the course of the proceeding the district court adopted the parties' proposed final pretrial order, which stated that plaintiff was pursuing only an inverse condemnation claim. On appeal, the Ninth Circuit affirmed the district court's decision to deny plaintiff's motion to amend its final pretrial order and introduce two new arguments and the court's subsequent sua sponte grant of summary judgment for the defendants. The Ninth Circuit found no abuse of discretion in the district court's application of Federal Rule 16(c), which allows modification of the final pretrial order "only to prevent manifest injustice." Although the appeals court disagreed with the district court's reasoning on summary judgment, it nevertheless affirmed on alternative grounds.

Newsome v. International Paper Company, 123 F.4th 754 (5th Cir. 2024).

The decision illustrates the intersection of summary judgment under Federal Rule 56, choice of law in a diversity action, and case management under Rule 16(b). We focus on the Rule 16 issue. A truck driver sued a paper-mill owner for negligence and gross negligence alleging injuries caused by exposure to gas while delivering chemicals to the mill. The district court granted summary judgment for the owner on the ground that the plaintiff failed to establish general and specific causation as required under the law of the forum state, which in this case was Texas, and also denied plaintiff's motion for additional time to name another expert witness. On appeal, the Fifth Circuit affirmed.

Turning to the district court's refusal to amend the pretrial order, the appeals court emphasized that under Federal Rule 16(b) the district court has "broad discretion to preserve the integrity and purpose of the pretrial order." In determining whether the district court abused its discretion, the appeals court considered: (1) plaintiff's grounds for failing to identify the expert earlier; (2) the importance of the expert's testimony; (3) potential prejudice in allowing the testimony; and (4) the availability of continuance to cure such prejudice. In this case, plaintiff filed his motion almost eight months after the expert-designation deadline, three months after the close of discovery, and one month after defendant had filed dispositive motions (including for summary judgment). The appeals court's consideration of these factors shows the strong deference accorded to the district court. For example, in reviewing the district court's treatment of plaintiff's explanation for his delayed request, the appeals court stated:

> [Plaintiff's] explanation for failing to meet the district court's deadlines was insufficient. He was required to show "that the deadlines [could not] reasonably be met despite the diligence of the party needing the extension." Whether Newsome gave the district court—which is far closer to the parties than we are—a sufficient explanation is soundly within the district court's broad discretion. But even if it weren't, Newsome's sole explanation for his tardiness was that he only "learn[ed] of the potential need for an additional expert" to opine on causation in this chemical-exposure case after International Paper moved for summary judgment on the issue. That is not a sufficient explanation. As the district court recognized, "[m]ere inadvertence on the part of the movant, even when coupled with the absence of prejudice to the non-movant, is insufficient to establish good cause." Indeed, under Rule 16(b), "inadvertence" is "tantamount to no explanation at all."

Plaintiff's weak explanation affected the appeals court's review of the remaining factors:

> No continuance would prevent the increased expense of reviewing and responding to a new expert, preparing for and deposing that expert, and potentially preparing rebuttal opinions—before, if needed, re-drafting and re-filing dispositive motions which had already been completed. The significant delay and lackluster explanation for that delay suggest "dilatory behavior," and "a continuance would not deter future dilatory behavior, nor serve to enforce local rules or court imposed scheduling orders."

Bigfoot Ventures Limited v. Knighton, 132 F.4th 1138 (9th Cir. 2025).

The case illustrates the role of Federal Rule 16 case management in shareholder derivative actions, in particular, the district court's determination of whether plaintiff is an adequate party to bring the suit as a representative under Federal Rule 23.1. The dispute has a long running procedural history in different courts. In 2019, Bigfoot, a venture capital firm, filed a shareholder derivative action on behalf of NextEngine, in which it had invested, against multiple entities. In 2023, a month before trial was set in the derivative action, Bigfoot brought a separate action against one of those entities. In response, the district court held a status conference to set a new trial date. At this conference, defendants announced they planned to file a motion to dismiss for lack of subject matter jurisdiction on the ground that Bigfoot could not fairly or adequate represent the interests of NextEngine's shareholders. The court extended the deadline for briefing, accepted supplemental briefing, and accepted declarations from NextEngine shareholders opposing Bigfoot's representation. The district court granted the motion to dismiss, and the Ninth Circuit affirmed.

The Ninth Circuit emphasized that review of the district court's Rule 23.1 decision was under the abuse of discretion standard. Moreover, that decision was considered in the light of Rule 16:

> The general rule is that "[t]he timing of trials and control of the docket are matters left to the discretion of the district court." * * * The district court's decisions in "supervising the pretrial phase of litigation ... will not be disturbed unless they evidence a clear abuse of discretion." * * * Because the district court is in a better position than an appellate court to reach conclusions about how a district court should manage its own docket, exceptions to the general rule above stated should be few and far between.

The appeals court also found no abuse of discretion in the district court's determination of adequacy. The district court considered factors identified in Ninth Circuit precedent, Larson v. Dumke, 900 F.2d 1363 (9th Cir. 1990), and those factors, the appeals court clarified, in any event are not exhaustive but rather provide guidelines for assessing adequacy. What is paramount is the text of Federal Rule 23.1, and courts have discretion "to choose the controlling factors upon which to focus and how much weight each of those factors should be given in deciding particular cases."

Chapter 13. Adjudication Without Trial or by Special Proceeding

Summary Judgment

The Motion for Summary Judgment Under Federal Rule 56

United States v. Stover, 131 F.4th 199 (4th Cir. 2025).

This eight-page decision offers a compact problem showing when genuine issues of material fact bar summary judgment. The suit was a collection action by the IRS against married taxpayers to recover unpaid incomes taxes. The district court granted summary judgment for the government finding, among other things, that the collection action was timely. On the taxpayer's appeal, the Fourth Circuit vacated and remanded, finding that the taxpayer's deposition testimony, although not a model of "clarity," created a fact dispute pertinent to timeliness.

> [I]it is inappropriate at summary judgment to ignore the fact dispute created by Arthur Stover's deposition testimony. While it's true that the Court "must view the evidence presented through the prism of the substantive evidentiary burden," we "grant summary judgment *only* when 'there is no genuine dispute as to any material fact.' " * * *. And the moving party may carry its initial burden on summary judgment only if it can show "there is an absence of evidence to support the nonmoving party's case." * * * By virtue of Arthur Stover's deposition, the Government can show neither the absence of a genuine dispute of fact or a dearth of evidence to support the Stovers' position. * * *
>
> One piece of evidence says the Stovers requested an installment agreement on December 12, 2008, while another supports an inference that they could not have done so until 2009. That fact dispute bears directly on the only dispositive issue in this case—whether the Government's attempt to collect the 2007 tax liability was timely—so summary judgment should not have been awarded. Accordingly, we vacate the district court's award of summary judgment and remand for further proceedings consistent with this opinion.

Technical Security Integration, Inc. v. EPI Technologies, Inc., 126 F.4th 557 (7th Cir. 2025).

The Seventh Circuit vacated the district court's entry of summary judgment for

defendant. The nine-page decision is a clear account of Rule 56 as applied to a contract dispute. The case itself has a somewhat unusual procedural history. Technical Security Integration (TSI) and EPI contracted to do business and agreed to submit contractual disputes to mediation; if mediation failed, the prevailing party in an eventual lawsuit would be entitled to attorney fees. Eventually a dispute arose; EPI requested mediation; after following up with TSI about such things as the choice of mediator and receiving no substantive response, EPI sued TSI in state court. EPI lost, and TSI then sued in federal court under the contract for attorney fees. The district court granted summary judgment in favor for EPI on the ground TSI had "slowed or prevented" mediation and therefore was not entitled to fees.

On appeal, the Seventh Circuit reversed and remanded. Interpreting the contract, the appeals court found that mediation was a condition precedent to recovery of attorney fees, and that under the law of the forum state (Illinois) a "party to a contract cannot avoid the consequences of a condition precent by preventing that condition from occurring"; thus, TSI had to show that EPI was at fault or failed to act in good faith to bring about mediation. However, there was a problem: the contract failed to specify who was required to seek mediation and when, and it was not possible on the record to determine whether the parties' actions were reasonable. As the appeals court explained:

> We respectfully conclude that the district court erred in faulting Technical Security for preventing mediation. The court did not consider whether it was reasonable for EPI to sue within six weeks of demanding mediation, or if Technical Security's responses were reasonably delayed due to factors beyond its control. Because neither party provides enough evidence to assess the reasonableness of each party's conduct, neither party is entitled to summary judgment at this stage. Accordingly, we reverse and remand for the district court to resolve the open fact issues through proceedings it deems appropriate.

Judge Hamilton concurred, urging the parties to settle:

> It's hard to overstate how petty that secondary dispute over dispute resolution processes is likely to seem in the majesty of a federal courtroom. Prospective jurors called to court might reasonably wonder why on earth they must take time from their daily lives to resolve this dispute. Based on my experience with trials and juries, I would not be surprised if a jury tried to find a way to punish one party, or perhaps both.

Sound & Color, LLC v. Smith, 2025 WL 1232639 (9th Cir. 2025).

The dispute involves alleged copyright infringement; defendant is the well-known pop artist Sam Smith; the song is Dancing with Strangers, also known as Dancing with a Stranger.[12] Pursuant to the parties' stipulation, the only issue presented for summary judgment was whether the "hook" in plaintiff's song was substantially similar to the "hook" in defendants' song under the so-called "extrinsic" test for clear copyright infringements.[13] The district court granted summary judgment against plaintiff, and the Ninth Circuit reversed and remanded.

> [A] selection and arrangement copyright is infringed only where the works share, in substantial amounts, the 'particular,' *i.e.*, the 'same,' combination of unprotectable elements." * * * "So long as the plaintiff can demonstrate, through expert testimony that addresses some or all of these elements and supports its employment of them, that the similarity was 'substantial' and to 'protected elements' of the copyrighted work, the extrinsic test is satisfied." * * * We do not have a " 'well-defined standard for assessing when similarity in selection and arrangement becomes substantial,' " but "[w]e have suggested generally that the 'selection and arrangement of elements must be similar enough that the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them.' " * * *

Here, a reasonable jury could find that the hooks share the same combination of unprotectable elements in substantial amounts. As Sound and Color's experts opined, the hooks share the same combination of several musical elements, including the same lyrics, the same "metric placement" of the beginning of each syllable, and the same downward "melodic contour" that starts at pitch 7 and ends at pitch 3. Defendants' experts do not identify any hook in the prior art that shares that same melodic contour with those starting and ending pitches. * * * Sound and Color's experts testified that the hooks also share various other similarities, such as a four-on-the-floor bass-drum pattern with syncopated hi-hats.

[T] This is Sam Smith's official music video of Dancing with a Stranger: https://www.youtube.com/watch?v=av5JD1dfj_c.

[13] For a definition of hook, see Matt E, What's the Difference Between a Hook and a Riff?, School of Composition, https://www.schoolofcomposition.com/hooks-and-riffs-in-music/.

In arguing that the differences between the hooks preclude a finding of substantial similarity, Defendants emphasize some variations in the pitch sequences and chord progressions. But "[o]bjective analysis of music under the extrinsic test cannot mean that a court may simply compare the numerical representations of pitch sequences and the visual representations of notes to determine that two choruses are not substantially similar," because "[u]nder that approach, expert testimony would not be required at all." * * * "[A]t summary judgment, so long as the [plaintiff] 'presented *indicia* of a sufficient disagreement concerning the substantial similarity of [the] two works,' " as Sound and Color has here, "then the case *must* be submitted to a trier of fact." * * *

Melino v. Boston Medical Center, 127 F.4th 391 (1st Cir. 2025).

A registered nurse filed suit under Title VII and state anti-discrimination law alleging that Boston Medical Center, her former employer, illegally denied her request for a religious exemption from the COVID-19 vaccine mandate and terminated her employment as a result. The hospital moved for summary judgment, and plaintiff opposed the motion contending there were issues of material fact at to the effectiveness of the vaccine, but conceded that if the vaccines were effective, then the hospital could establish as a matter of law that granting an exemption to her would cause it undue hardship. Plaintiff also moved to strike as hearsay portions of an affidavit proffered by defendant that referred to the hospital's reliance on recommendation of the Centers for Disease Control and Prevention (CDC). The district court denied that motion holding that plaintiff had failed to comply with Local Rule 7.1(a)(2), which required that she certify that she had conferred with defendant before filing the motion; found that it could take judicial notice of the CDC recommendations; and granted summary judgment in favor of the hospital. On appeal, the First Circuit affirmed.

The appeals court found that it was not an abuse of discretion for the district court to deny the motion to strike and to reject the hearsay objection, noting that the First Circuit itself had taken judicial notice of the substance of the CDC recommendations and that the quoted passages in any event were not hearsay. Assuming that plaintiff had established a prima facie case of discrimination, the appeals court turned directly to the Title VII defense of undue hardship, and found that no evidence in the record contradicted the hospital's position regarding

the vaccine's effectiveness.

Teradata Corp. v. SAP SE, 124 F.4th 555 (9th Cir. 2024), petition for cert. docketed by SAP SE v. Teradata Corporation (U.S. No. 24–1324 2025).

The decision illustrates the importance of expert testimony in antitrust cases; in this case, the expert testimony created a genuine issue of material fact as to whether a tying arrangement had substantial anticompetitive effects in the tied market under the rule of reason and so barred summary judgment. Teradata, a software vendor, sued SAP, a competitor, alleging violations of state law and of the Sherman Act by tying sales of its enterprise resource planning software to purchases of its enterprise data and warehousing software. SAP counterclaimed for patent infringement, moved for summary judgment, and moved to exclude portions of the plaintiff's expert testimony. The district court granted both motions. After some jurisdictional skirmishes before the Federal Circuit, the appeal came to the Ninth Circuit, which reversed and remanded finding that the district court abused its discretion by excluding the expert testimony and that genuine issues of fact existed as to market power in the tying market, whether the tying arrangement had substantial anticompetitive effects, and other issues.

Kirbaran v. Target Corp., 2025 WL 973050 (2d Cir. 2025).

The summary order presents a compact problem combining Federal Rule 56 and the *Erie* doctrine. Plaintiff sued Target in state court for negligence after slipping and falling in one of defendant's stores. Target removed the action to federal court based on diversity jurisdiction and the district court granted defendant's motion for summary judgment, holding that plaintiff did not establish a genuine issue of material fact as to whether Target created the dangerous condition or was aware of it. On appeal, plaintiff argued that the district court erred in applying Federal Rule 56 rather than the summary judgment standard applicable to slip-and-fall cases in New York courts. The state and federal rules differ in terms of the burden that applies to a defendant who moves for summary judgment. Under state law, that movant has the burden of making a prima facie showing that it neither created the alleged hazardous condition or had notice of it. Under Rule 56, the defendant movant may prevail merely by identifying an absence

of evidence to support the nonmovant's case. The Second Circuit easily found that Federal Rule 56 applied, treating the burden as procedural in nature and asking the classic question under the Rules Enabling Act:

> [F]ederal courts sitting in diversity apply state substantive law and federal procedural law." * * * "[P]rocedural law is 'the judicial process for enforcing rights and duties recognized by substantive law,' while substantive law is 'the law that governs the rights and obligations of individuals within a given jurisdiction.' " * * * When, as in this case, "state and federal law are in conflict, we ... ask[ ] whether the federal law or rule 'regulates matters rationally capable of classification as procedure.' " * * *
>
> "Concerning matters covered by the Federal Rules of Civil Procedure, the characterization question is usually unproblematic: It is settled that if the Rule in point is consonant with the Rules Enabling Act, * * *, and the Constitution, the Federal Rule applies regardless of contrary state law." * * * Accordingly, if Rule 56 "answers the question in dispute," then "it governs—New York's law notwithstanding—unless it exceeds statutory authorization or Congress's rulemaking power." * * *
>
> * * * Rule 56 "answers the question in dispute"—the defendant's burden of proof when moving for summary judgment—so Rule 56 applies unless it violates the Rules Enabling Act or the Constitution. * * * We have already held that Rule 56 complies with the Rules Enabling Act because it "affect[s] only the process of enforcing litigants' rights and not the rights themselves." * * * The district court therefore properly applied Rule 56 in this diversity case.

Doe v. University. of Kentucky, 111 F.4th 705 (6th Cir. 2024).

A student (Doe) sued the University of Kentucky under Title IX, alleging that the university's disciplinary appeals board ruled against her in retaliation for her earlier Title IX action alleging that the university was deliberately indifferent to another student's alleged sexual assault against her. The district court granted the university's motion for summary judgment, finding that as a matter of law the student lacked standing to bring the suit because she was not a student at the university. On appeal the Sixth Circuit reversed, and on remand, the district court entered summary judgment for the university. Once again before the Sixth Circuit, the appeals court again reversed and remanded, finding several legal errors and concluding that on the record a reasonable juror could find that plaintiff established a prima facie case. In particular, the

district court erred in how to viewed the record. The Sixth Circuit emphasized that when analyzing a motion for summary judgment, the district court should not limit its inquiry to the allegations of the complaint, but rather should consider the summary-judgment record. As the appeals court explained:

> In reviewing the summary judgment record, the district court constrained its analysis to the specific allegations detailed in the operative complaint, rather than to the full scope of record evidence Doe presented in opposition to summary judgment. It critiqued Doe for describing additional examples of the University's retaliatory actions beyond what she included in her complaint. Because it construed these additional examples of the University's retaliation as an improper attempt to "cure the inadequacies" of the complaint, the district court did not consider this evidence and declared that it would narrow its "attention to the facts most pertinent to the claims alleged in the complaint." * * * On appeal, Doe argues this was wrong. We agree.
>
> Summary judgment motions follow discovery, and our standard "expressly contemplates" that the non-moving party "may put forward evidence not contained in the pleadings in order to rebut a summary judgment motion." * * * The plain text of Federal Rule of Civil Procedure 56(c) itself mandates that a court should consider the plethora of material available in the record to determine whether the moving party "is entitled to judgment as a matter of law." * * * That includes: pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact. *See id.* Certainly, the factual allegations in the complaint must put a defendant on notice of the claims the plaintiff is likely to bring. * * * But there is no notice-pleading deficiency here. And Doe could oppose summary judgment by pointing to even more evidence of the University's retaliatory practices that were revealed in discovery than what she alleged in her complaint. The district court's failure to fully consider this evidence was a categorical error, and we now look at all the facts in the record to analyze Doe's retaliation claim.

Judge Batchelder dissented, arguing that "with conclusory allegations, improbable inferences, and unsupported speculation Doe has crafted an overarching conspiracy theory that UK has retaliated against her from the time that she filed this action in 2015 through every action that UK has taken since that filing." Although review of the summary judgment record is de novo, looking to the entirety of the record and construing the facts in the light most favorable to the nonmovant, Judge Batchelder argued that plaintiff had done no more than cast "metaphysical doubt" on the material facts. Regarding whether a reasonable juror would find that she

established a prima facie case of Title IX retaliation, she wrote: "To draw inferences in favor of the nonmovant does *not* mean that we blindly accept the nonmovant's assertions at face value. Instead, we construe favorably the nonmovant's statements of fact that are supported by the record."

Note on the Timing of a Federal Rule 56 Motion

Farabee v. Gardella, 131 F.4th 185 (4th Cir. 2025).

The case illustrates the relation between discovery and the timing of summary judgment; it also highlights the difficulties faced by pro se litigants. The Fourth Circuit held that the district court erred in granting defendants' motion for summary judgment without first providing plaintiff an opportunity for discovery. Farabee, a pro se plaintiff hospitalized with borderline personality disorder, brought an action under 42 U.S.C. § 1983 against defendants Gardella, a psychiatrist, McFarland, a psychologist, and Herr, a Deputy Assistant Commissioner. Farabee claimed that defendants denied him clinically recommended treatment, forcibly medicated him, unnecessarily restrained and isolated him, discriminated against him, and violated his First Amendment right to association and his Fourteenth Amendment due process rights. Farabee requested an opportunity for discovery and court-appointed counsel; in his request, he emphasized his limited education (only seventh grade), his mental health issues, and the fact that the case largely rested on witness credibility. The district court denied both requests and granted summary judgment for the defendants.

On appeal, defendants argued that discovery was not necessary and that plaintiff had failed to meet the Rule 56(d) requirements by not filing a motion or the required affidavit, did not serve any discovery requests on them, did not identify discovery that he thought essential, and did not ask for additional time. The Fourth Circuit rejected these arguments and reversed, emphasizing that summary judgment is appropriate only after discovery and especially so in pro se litigation. In this case, plaintiff was given no opportunity for discovery despite repeated requests. Moreover, the district court was "on notice of potential disputes as to the sufficiency of the summary judgment record." The appeals court also recommended that on remand the district court appoint counsel. Judge Harris concurred, arguing that the general rule for summary

judgment is that it is appropriate "only after adequate time for discovery," and that there was "no reason not to apply that general rule here."

> It is true, as the defendants argue, that Farabee did not formally oppose summary judgment through the ordinary Rule 56(d) procedures. * * * But even when a party is represented by counsel, we will "excuse[ ] technical noncompliance with Rule 56(d)" if the nonmoving party is not at fault and has otherwise put the district court on notice as to the need for discovery.

Judge Harris also pointed to deficiencies in the standard notice given by the court to pro se parties, which did not mention rights under Rule 56(d) or the procedure that a pro se litigant should follow to obtain discovery. As she wrote, the court does "not fault a pro se litigant for failing to formally seek discovery under Rule 56(d) when the district court has not informed him of his right to do so."

(For another case involving pro se litigation, summary judgment, and discovery, see Jenkins v. Woodard, 109 F.4th 242 (4th Cir. 2024), linking the denial of a Rule 56(d) request to the court's refusal to appoint counsel.)

Chapter 14. Trials

Trial by Jury

AT&T, Inc. v. Federal Communications Commission, 135 F.4th 230 (5th Cir 2025).

The case presents a straightforward application of *Jarkesy* (2025–2026 Rules Supplement). The FCC imposed a forfeiture order of $57 million on AT&T for failing to properly handle customers' data. AT&T paid the fine and sought appellate review. AT&T argued, among other things, that the FCC's "in-house adjudication violated the Constitution by denying it an Article III decisionmaker and a jury trial." The Fifth Circuit granted the petition and vacated the forfeiture order. The Fifth Circuit held that the FCC's in-house enforcement proceeding is an adjudication "at common law" and thus the Seventh Amendment applies. To reach that conclusion the appeals court looked at "two things: the cause of action and the remedy provided," emphasizing that the remedy is the "more important consideration." Turning to the

remedy, the FCC's civil penalties are "money damages"; they are "designed to 'punish or deter'" statutory violations; they "are not remedial"; and they are not designed to restore the status quo. Rather, as in *Jarkesy*, the appeals court explained that the penalties "here are 'a type of remedy at common law that could only be enforced in courts of law,'" and that fact "'is all but dispositive' of the Seventh Amendment issue." Turning to the cause of action, the appeals court drew an analogy between the misuse of customer data to common law negligence, finding the fact that the statute does not use the term "negligence" to be irrelevant. "The key inquiry," the appeals court stated, "is not what terminology the statute uses but whether the statute 'target[s] the same basic conduct' as the common law claim."

In re Abbott, 117 F.4th 729 (5th Cir 2024).

Students likely are familiar with this high-profile lawsuit. The United States sued the State of Texas and its Governor to enjoin defendants' installation of a 1,000-foot floating barrier that obstructs the navigable capacity of the Rio Grande River, alleging a violation of the federal Rivers and Harbors Appropriation Act of 1899 (RHA). During pretrial activity, defendants demanded a jury trial, and, when that request was denied, eventually sought mandamus relief from the Fifth Circuit, which the appeals court denied.

A threshold question pertained to the standard for assessing mandamus relief (a question addressed in Chapter 16 of the Casebook and in Chapter 15 of the Compact Casebook). Usually, petitioner must meet a three-prong test under Cheney v. United States District Court (Casebook, p. 1236; Compact, p. 810): (1) a clear and indisputable right, (2) satisfying the court that the writ is appropriate under the circumstances, and (3) there is no other adequate means to attain relief. However, some courts apply a "relaxed' standard when mandamus is sought to protect the Seventh Amendment jury right. As the appeals court explained, the standard in the Fifth Circuit is:

> that "a writ of mandamus is an appropriate remedy to protect the valued right of trial by jury and to avoid costly, multiple trials." *In re Jensen*, 946 F.2d 369, 371 (5th Cir. 1991); *see also United States v. Denson*, 603 F.2d 1143, 1146 (5th Cir. 1979) (en banc) (interpreting *Beacon Theatres* [Casebook, p. 1054; Compact, p. 733] to reflect a "narrowly constrained" mandamus inquiry in the Seventh Amendment context). We conclude that this statement indicates some level of

> solicitude for the jury trial right. But we need not decide how much, for even under the "essentially de novo" review Texas has proposed, it has not satisfied the first prong of the *Cheney* analysis. A litigant with no demonstrated right to a jury trial cannot be entitled to mandamus in vindication of that right.* * * For that reason, we pretermit analysis of the second and third *Cheney* prongs and deny Texas's petition on prong one.

The Fifth Circuit then considered whether the Seventh Amendment applied in light of the cause of action and remedy sought. First, relying on *Tull* (Casebook, p. 1070; Compact, p. 745), the Fifth Circuit rejected defendant's analogy of the RHA action to a common law action for ejectment. To the contrary, the appropriate analogy was to abatement of a public nuisance or purpresture, which has as its "essential function" the "protection of the public's right to use the public ways free of obstructions, * * *. That same function is served by suits for injunctive relief under the RHA, which is why the United States has specifically asked that Texas be restrained from impeding navigation." Second, again relying on *Tull,* the appeals court found "meritless" defendants' argument that the United States was seeking punitive fines. Critically, such fines are available only in a criminal proceeding under the RHA; indeed, the RHA does not provide for civil penalties. Further, the court rejected defendants' argument that the injunctive relief sought was the kind of injunctive relief that courts of law could issue and so was legal in nature.

In re Aquilino, 135 F.4th 119 (3d Cir. 2025).

The appeal addressed whether the imposition of disgorgement as a sanction for a lawyer's violating court rules triggers the Seventh Amendment jury right. The decision also addresses the distinction between waiver and forfeiture of an objection as applied to objections to a Seventh Amendment request. (The appeal also raised questions about the bankruptcy court's subject matter jurisdiction that are beyond the scope of most 1L Procedure courses.) To simplify, debtors hired counsel to represent them in bankruptcy proceedings. The law firm billed the clients for post-petition services, but did not disclose these fees to the bankruptcy court, as required under the Bankruptcy Code and bankruptcy court rules. 11 U.S.C.A. § 329(a); Fed. R. Bankr. P. 2016(b).

As a threshold matter, the attorney argued on appeal that his clients had waived their Seventh Amendment arguments. The Third Circuit rejected this argument, first, making clear

that the argument was one of forfeiture, not waiver, and, second, even if the objections were forfeited, the appeals court would revive them:

> We have plainly explained that "[f]orfeiture is the failure to make the timely assertion of a right, an example of which is an inadvertent failure to raise an argument," while "[w]aiver, in contrast, is the intentional relinquishment or abandonment of a known right." * * * Here, Spector Gadon argues that the Debtors failed to raise arguments before the District Court, not that they intentionally relinquished them.
>
> * * *
>
> Even if the Debtors forfeited their arguments, we would revive them. The preservation rule "is one of discretion rather than jurisdiction, and it may be relaxed whenever the public interest so warrants." * * * We have been "less reluctant to bar consideration of a forfeited pure question of law," * * * and "will reach 'a pure question of law even if not raised below where refusal to reach the issue would result in a miscarriage of justice or where the issue's resolution is of public importance,' " * * * Here, the District Court's decision, which stands to "unduly restrict bankruptcy courts' authority to enforce the protections of * * * chapter 7 cases," * * * and disrupt the administration of thousands of bankruptcy cases, is undoubtedly a legal question of significant public importance.

Then as a matter of apparent first impression, the Third Circuit reversed the district court, and held that a lawyer's violation of the Bankruptcy Code requiring a debtor's lawyer to file a statement of compensation paid or agreed to be paid for service, as well as the bankruptcy rule governing applications for compensation or reimbursement, give rise to equitable remedies that do not trigger the civil jury right. The appeals court applied the two-step inquiry set out in *Jarkesy*, looking to the cause of action and the remedy, with the wrinkle that when a cause of action "sound[s] in both law and equity," the more important consideration is the remedy, relying on *Tull*.

> While monetary penalties generally indicate that a claim is "legal," remedies that merely "order a defendant to return unjustly obtained funds" are equitable. * * * So where a violation calls for a monetary remedy designed "solely to 'restore the status quo,' " it does not trigger the Seventh Amendment jury-trial right. * * * Under this rubric, violations of § 329(a) give rise to equitable remedies, not legal ones. As our sister circuits have recognized, permissible sanctions for violations of § 329(a) include disgorgement of collected fees and cancellation of fee agreements for bankruptcy-related services. * * * Indeed, the Bankruptcy Court

> imposed precisely those sanctions here, ordering disgorgement of fees already collected by Spector Gadon and cancellation of its remaining fees.

This conclusion, the appeals court argued, was consistent with the Supreme Court's general treatment of civil sanctions, which in other contexts has held do not trigger the Seventh Amendment right. Moreover, the Third Circuit rejected the argument that the sanction would "preclude it from proceeding to trial" on related issues. Looking to *Parklane Hosiery* (Casebook, p. 1334; Compact, p. 884), the court explained:

> [T]he Supreme Court has long held that "the right to a jury trial does not negate the issue-preclusive effect of a judgment, even if that judgment was entered by a juryless tribunal." * * * So in evaluating whether the Seventh Amendment entitles a party to a jury trial in one proceeding, we do not consider the potential preclusive effect of that proceeding on another. Instead, we consider only the instant proceeding and the nature of the claim raised in it.

Instructions and Verdicts

Spirit of Aloha Temple v. County of Maui, 132 F.4th 1148 (9th Cir. 2025).

The Ninth Circuit held on an issue of first impression that under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc, et seq., the question of whether a land-use regulation imposes a substantial burden on a party's exercise of religion is question of law for the court to decide, not a question of act for the jury. The dispute involved a county's denial of a special-use permit sought by a nonprofit group seeking to conduct church events on agricultural land in Maui. Plaintiffs lost at trial and appealed, arguing that the trial court erred in instructing the jury to decide whether the government substantially burdened plaintiffs' exercise of religion. An instructional error warrants reversal if the error is not harmless. The Ninth Circuit acknowledged that a substantial burden inquiry involves factual questions, but rejected characterizing the issue as one of fact for the jury. Joining the First and Sixth Circuits, it argued that because the substantial-burden inquiry involves "defining the bounds of a legal principle" that implicates a constitutional right as well as considering "the values that animate legal principles," "the inquiry is best suited for the court, rather than the jury." However, the court

found the error to be harmless because the jury's verdict was "consistent with the required legal outcome," and under the totality of the circumstances, as a matter of law defendants did not impose a substantial burden on defendants' religious rights.

Demand and Waiver of Trial by Jury

Consumer Financial Protection Bureau v. CashCall, Inc., 124 F. 4th 1209 (9th Cir. 2025), amended and superseded on denial of rehearing by, 135 F.4th 683 (9th Cir. 2025).

The decision illustrates how litigation activity can be deemed a waiver of the civil jury right. The procedural history is somewhat complicated. CashCall is a payday lender operating in California making unsecured, high interest loans to individual consumers. CashCall sought to expand its operations and created a new entity operating under tribal law in South Dakota, presumably to avoid usury laws, The Consumer Financial Protection Bureau filed an enforcement action against CashCall, finding that it engaged in an "unfair, deceptive, or abusive act or practice" in violation of 12 U.S.C. § 5536(a)(1)(B), by attempting to collect interest and fees to which it was not legally entitled. On appeal, the Ninth Circuit agreed with that finding, but held that the district court's order denying restitution rested on a legal error, so it vacated and remanded for further proceedings. On remand, the district court ordered CashCall to pay more than $134 million in restitution. Restitution may be legal or equitable, and in a second appeal, CashCall argued that the district court's order of restitution was legal and triggered its Seventh Amendment right to a jury trial, and that its earlier waiver of the civil jury right did not reach this remedy. The Ninth Circuit disagreed and held that CashCall waived that right "during the initial district court proceedings, in which it voluntarily participated in a bench trial."

First, the appeals court emphasized that

> CashCall made an express, knowing, and voluntary waiver of its right to trial by jury. At the pretrial hearing, the Bureau stated that it intended to "seek restitution of interest and fees." The Bureau explained that such an award would be "an equitable remedy that, unless the Court wanted to give it to an advisory jury, ... would be the Court's remedy to decide," adding that, based on the Bureau's "discussion with defense counsel," the parties "would be willing to waive [a] jury

> for any further proceedings." For its part, CashCall stated that it "generally agree[d] with everything that [the Bureau] has represented to the Court." The district court said, "I don't know and I haven't done the research to know whether or not [CashCall is] entitled to a jury trial," and it requested a joint status report setting out the parties' position on a jury-trial waiver. That joint status report stated, in no uncertain terms, that "[t]he parties have agreed to waive their right to a jury and proceed with a bench trial to determine the appropriate relief, should trial be necessary." * * *

Second, the appeals court found that the waiver was valid even if it rested on CashCall's mistaken belief that the government was seeking equitable and not legal restitution—which is how the government had characterized the relief it was seeking.

> [T]he Bureau was incorrect to characterize the restitution it sought as equitable. Instead, because that restitution was not limited to CashCall's net profits and did not seek "to restore to the [consumers] particular funds or property in [CashCall]'s possession," it was more properly characterized as legal. * * * The Bureau's error was perhaps understandable because the Supreme Court had not "previously drawn [a] fine distinction between restitution at law and restitution in equity." * * * More importantly, it was a legal error shared by both parties: CashCall told the district court that it "generally agree[d] with everything" the Bureau had said about the remedy it was seeking—including that it would be "an equitable remedy that ... would be the Court's remedy to decide." And [CashCall] separately told the district court that it understood the Bureau to be seeking "an equitable monetary award." It made those statements not because it was confused about the *substance* of the relief the Bureau was seeking—restitution in the form of the "total amount of interest and fees paid" by consumers on invalid loans—but because it shared the Bureau's mistaken understanding of the appropriate characterization of that relief. (Of course, it may also have made a strategic judgment that, having been found liable for employing deceptive practices to victimize thousands of consumers, it might fare poorly before a jury.)
>
> CashCall's waiver was valid even if CashCall would not have made it absent the parties' mistaken characterization of the relief the Bureau sought. We have never held that a party's legal error can vitiate its waiver of a jury-trial right, or that a party must demonstrate a correct understanding of the law for its waiver to be effective. Such a rule would be inconsistent with the settled understanding that a party can waive the right to a jury trial simply by doing nothing: Federal Rule of Civil Procedure 38 provides that a party who wants a jury trial must demand one in writing "no later than 14 days after the last pleading directed to the issue is served," and that "[a] party waives a jury trial unless its demand is properly served and filed." * * *. Applying that rule, we have held that " 'oversight or inadvertence,' " including "a good faith mistake of law," does not excuse the failure to make a timely jury-trial demand. * * * And even after a party complies

> with Rule 38, its "knowing participation in a bench trial without objection is sufficient to constitute a jury waiver." * * *

Taking the Case from the Jury—Motions for Judgment as a Matter of Law

Palin v. N.Y. Times Co., 113 F.4th 245 (2d Cir. 2024).

This case involves a cast of characters that should be familiar to 1L students. The facts can be adapted for discrete classroom problems on such matters as jury instructions and judicial bias. A politician sued a newspaper and an editor for defamation. This appeal is the second from the dismissal of the complaint. While the jury was deliberating the district court dismissed the case under Federal Rule 50, but advised counsel that the jury would not be informed of this decision until after it reached a verdict and the judge instructed the jury to "turn away" from media accounts. The jury found that the newspaper and editor were "not liable." The Second Circuit vacated and remanded for a new trial. Summing up its decision:

> Unfortunately, several major issues at trial—specifically, the erroneous exclusion of evidence, an inaccurate jury instruction, a legally erroneous response to a mid-deliberation jury question, and jurors learning during deliberations of the district court's Rule 50 dismissal ruling—impugn the reliability of that verdict.
> The jury is sacrosanct in our legal system, and we have a duty to protect its constitutional role, both by ensuring that the jury's role is not usurped by judges and by making certain that juries are provided with relevant proffered evidence and properly instructed on the law.

Sines v. Spencer, 2025 WL 927323 (4th Cir. 2025).

The appeal raises a number of issues; we focus on whether defendant's post-verdict motion complied with Federal Rule 50(b). Students likely are familiar with the defendant, Richard Spencer, and the facts of this case.[14] A civil action was filed against Spencer for conspiracy to commit racially motivated violence. On appeal, Spencer argued that the evidence

[14] Wikipedia describes Spencer as "an American neo-Nazi, antisemitic conspiracy theorist, and white supremacist" who claims to have coined the term "alt-right."

was insufficient to support the jury's finding of liability on Count IV, raising a claim under Virginia civil conspiracy law. The appeals court found that he had forfeited his argument:

> Spencer moved under Rule 50(a) for judgment as a matter of law in his favor before the case was submitted to the jury on the basis that the evidence was insufficient to show he conspired with anyone or sought to harm any of the Plaintiffs and because comments he made were constitutionally protected. When he moved, however, post-verdict, for judgment in his favor notwithstanding the verdict, he argued, among other matters, that the evidence was insufficient to support the verdict on count IV because no evidence was presented that he "directly harmed" the Plaintiffs or "expressly ordered someone else" to harm them. This is the sufficiency argument Spencer raises on appeal.
>
> We conclude that Spencer's post-verdict motion did not comply with the demands of Rule 50(b) on this point. Because Spencer did not move for judgment as a matter of law under Rule 50(a) with respect to count IV based on the absence of evidence that he directly harmed the Plaintiffs or expressly ordered someone else to harm them, he was "not allowed" to seek relief under Rule 50(b) on this basis. * * * In raising on Rule 50(b) an argument he was not allowed to raise, Spencer, we conclude, did not comply with the directive to "renew" his Rule 50(a) motion. And because Spencer failed to move "pursuant" to the requirements of Rule 50(b), he has "forfeit[ed] [his] sufficiency of the evidence challenge on appeal." * * * We therefore reject it on this basis.

Gonzalez v. Walgreen Co., 140 F.4th 663 (5th Cir. 2025).

The facts present the basis for a writing exercise on Rule 50. A Walgreens' patron sued in state court for injuries that he alleged resulted from a slip-and-fall in a store bathroom where water had accumulated. The store removed to federal court. After pretrial motions, the case went to trial, and after the close of plaintiff's case in chief, the judge granted Walgreens' Rule 50 motion and denied plaintiff's motion for a new trial. The case involved evidence that included surveillance video. The Fifth Circuit affirmed, finding no reasonable jury could have found that Walgreens had actual or constructive knowledge of the wet floor. The decision includes a helpful summary of the governing law and a careful review of the trial record.

The Power to Set Aside a Judgment

Schwindler v. Commissioner, 2024 WL 3666251 (11th Cir. 2024).

The appeal illustrates the use of Federal Rule 60(b) for relief from a voluntary Federal Rule 41(a) dismissal (although relief is denied). The action was brought by a Native American inmate at the Georgia Department of Corrections (GDOC), alleging various civil rights violations, including denial of access to courts, retaliation for protected speech, and violation of religious freedoms. Five years after the Rule 41(a) dismissal and the closing of the case, plaintiff moved under Rule 60(b)(6) asking to reopen the case, arguing that the parties had entered into two settlement agreements and that the defendants were in breach of those agreements. Whether such agreements existed turned on the interpretation of a letter sent by defendants to plaintiff; plaintiff argued that he would not have dismissed his claims if they had not been settled. The district court found that the letters did not constitute an agreement, and the Eleventh Circuit agreed. As such, plaintiff failed to show the "exceptional or extraordinary circumstances [that] warrant such relief."

Chapter 15. Securing and Enforcing Judgment

Methods of Securing the Judgment—Provisional Remedies

D.P v. Mukwonago Area School District, 2025 WL 1659279 (7th Cir. 2025), rehearing granted, vacated by, 2025 WL 1794428 (7th Cir. 2025).

The suit was brought by a transgender middle school student in Wisconsin alleging that the school district's bathroom policy violated the Equal Protection Clause and Title IX. Based on *United States v. Skrmetti*, 605 U.S. ___, 145 S.Ct. 1816, the Seventh Circuit sua sponte vacated its earlier opinion and granted panel rehearing. Relevant here, in the earlier appeal, defendant argued that the district court violated Federal Rule 65 by granting a preliminary injunction without holding an evidentiary hearing. Relying on circuit precedent, the Seventh Circuit found no error and determined that preliminary injunctions can be ordered despite a lack of evidentiary hearings.

> An evidentiary hearing is not always required prior to the issuance of a preliminary injunction. Though the procedural rules contemplate a hearing, *see*

> Fed. R. Civ. P. 65(a)(2), the court may proceed without one if the opponent's response does not suggest the existence of factual disputes that might affect the resolution of the motion. Here the school district neither requested a hearing nor identified material factual issues in need of resolution, so the judge reasonably dispensed with a hearing and moved directly to decision. If the opponent's response does not suggest factual disputes that might affect the resolution of the motion, the court can proceed without an evidentiary hearing and grant an injunction. The school district relied on [the student's] factual submissions and did not submit its own evidence. The judge was not required to check with the Defendant to ensure they submitted evidence to rebut Plaintiff's factual submissions. The Defendant did not request a hearing.

In light of these factors, the Seventh Circuit affirmed the lower court's judgment.

Methods of Collecting and Enforcing the Judgment

Execution

Justiniano-Ramirez v. Social Security Administration, 2024 WL 5323211 (1st Cir. 2024).

This appeal involves the use of Federal Rule 69 to compel the Social Security Administration to pay back-benefits that plaintiff alleged were owed to him during the four months after the district court remanded his appeal to the agency for a new hearing. The claimant also invoked the district court's inherent authority and sought discovery. The district court denied all relief. On appeal, the agency countered that during that period, the agency had issued a new decision holding the claimant was not entitled to the back benefits; it further argued that the back-benefits order did not count as a money judgment for purposes of Rule 69 and that the court's inherent authority could not be used to compel enforcement. Plaintiff countered that the court should convert his Rule 69 motion to a Rule 70 motion. Under an abuse of discretion standard, the First Circuit found no error and affirmed.

First, the appeals court rejected the argument that the agency had purposefully withheld the back-payments ("we do not consider a four-month delay in processing back-benefits to be inherently suspicious or unreasonable in the absence of authority to the contrary").

Second, the appeals court concluded that Rule 69 was not the appropriate vehicle for

relief; the award of back benefits was not a money judgment; rather, when "a plaintiff seeks an award of funds to which it claims entitlement under a statute, the plaintiff seeks specific relief, not damages." Nor did the district court have an obligation to convert the Rule 69 motion to a Rule 70 motion, and so its refusal to do so was not an abuse of discretion.

Finally, the appeals court found no error in the district court's refusal to invoke its inherent authority to convert the request to a Rule 70 motion ("Appellant cited no legal authority, and, in briefing before this court, he has failed to identify authority suggesting that the district court could have and should have wielded inherent authority in the manner requested.").

Edmondson v. Lilliston Ford Inc., 2024 WL 5155557 (3d Cir. 2024).

The appeal is from the district court's post-judgment order granting defendant's motion to execute on plaintiff's real property and denying plaintiff's motion to dismiss in opposition, and the Third Circuit affirmed. The dispute involved sale of a defective used car for which the consumer received a trade-in credit; initially an arbitrator dismissed the consumer's claims and granted the vendor attorney fees and storage fees for every day the trade-in car stayed in the vendor's lot without turning over title or payment of a $800 trade-in credit. Since then, the litigation has gone on "for over a decade, and has spawned five appeals," and the award, fees, and costs have ballooned to more than $10,000. Relevant here, the decision illustrates the relationship between Rule 69 and state law. Under New Jersey law, the movant was required to make reasonable efforts to identify and locate personal property before attempting to execute on real property. Defendant met that burden by serving subpoenas to locate bank accounts, hiring a private investigator, and undertaking discovery. During her deposition, plaintiff testified "she had no personal assets worthy levying, and she did not meaningfully contest the motion to execute." The Third Circuit found that defendant had made reasonable efforts and followed state law and so affirmed the district court's judgment.

Chapter 16. Appellate Review

The Principle of Finality

Diaz v. FCA US LLC, 134 F.4th 715 (3d Cir. 2025).

The appeal marks "the interplay" between the final-order requirement of § 1291 and a partial final judgment ordered under Rule 54(b). The opening paragraph of the court's opinion sets the stage:

> Plaintiffs alleged that an automobile manufacturer designed, manufactured, and sold defective vehicles. They asserted causes of action based on warranty and fraud. The District Court dismissed the fraud counts and some warranty counts before entering a partial final judgment under Rule 54(b) as to the fraud counts filed by all but one of the Plaintiffs. Six of the eight named Plaintiffs appealed, arguing that the District Court erroneously dismissed their fraud counts. Because the District Court's Rule 54(b) judgment is not final, we will dismiss the appeal for lack of jurisdiction.

The opinion offers something of a primer on the legal principles governing Federal Rule 54(b), and emphasizes the traditional distinction between theories of recovery and claims for relief. Judge Phipps dissented, offering an alternative test that looks to the elements of a claim to determine whether two claims are one or two. Thus, in the dissent's view, because fraud and breach-of-warranty do not have the same elements, "the dismissed fraud-based counts are not part of the same 'claim' as the breach-of-warranty counts."

Garton v. Crouch, 2024 WL 3569520 (6th Cir. 2024).

The appeal addresses whether a voluntary dismissal of claims against the last remaining defendants in a multi-party action which is filed under Rule 21, and not under Rule 41, counts as a final judgment for purposes of appellate jurisdiction under § 1291. Plaintiff sued nine Tennessee officials and entities following dismissal of harassment charges against him (which led to his temporary jailing) for posting "a photoshopped picture on Facebook depicting two men desecrating the grave of a deceased police officer." The district court granted dismissal of six defendants, and plaintiff then settled his claims with the remaining defendants and stipulated their dismissal. On appeal, plaintiff challenged the district court's grant of a protective order entered prior to the settlement and voluntary dismissal. Ordinarily a Rule 21 dismissal for misjoinder does not result in a final judgment, and it generally is accepted that "mistakes in this

area are 'not a ground for dismissing an action.' " * * * But that general rule did not cover this specific situation:

> [H]ere, Garton was not dismissing Crouch, Craig and Vallee because he had improperly added them to the lawsuit. Moreover, they were the last three defendants in the case; the court had dismissed with prejudice Garton's claims against the other six defendants over a year before his stipulated dismissal of these three. So, while dismissing parties under Rule 21 ordinarily would not end an action, where dropping a party discharges all remaining defendants and claims with prejudice, such dismissal would necessarily operate as a "final order" for purposes of appellate review.* * * Garton's voluntary dismissal with prejudice—albeit under Rule 21—of the only remaining claims and defendants in this case left the district court with nothing to review. As such, the entry of the stipulation ended the litigation, and the court's order rejecting Garton's notice constituted a final decision from which appeal could be taken.

Honeywell Int'l Inc. v. OPTO Elecs. Co., 135 F.4th 170 (4th Cir. 2025).

We include this decision involving § 1295, a specialized grant of appellate jurisdiction, because of the appeal court's reliance on case law interpreting Federal Rule 13(a) and § 1331 to fill in statutory gaps; the analysis reenforces some of the key doctrines in the 1L course. The cross-appeal involved a dispute over a patent-licensing agreement. Honeywell alleged patent infringement; OPTO filed several counterclaims, one of which was for a declaratory judgment that Honeywell's conduct amount to patent misuse. The case involved multiple claims and counterclaims, and resulted in "splintered" litigation. Relevant here, Honeywell filed a notice of appeal to the Fourth Circuit, and OPTO cross-appealed. Later, Honey filed a second notice of appeal to the Federal Circuit; OPTO again cross-appealed. Honeywell moved to dismiss the first notice of appeal, and OPTO opposed the motion, with "mirror-image" motions submitted to the Federal Circuit.

The Fourth Circuit dismissed the appeals for lack of appellate jurisdiction, finding that the Federal Circuit had exclusive appellate jurisdiction over the patent appeals including the counterclaim under § 1295(a)(1). Section 1295 sets two conditions for the Federal Circuit's exclusive appellate jurisdiction: the counterclaim must be compulsory and it must arise under the patent law. The statute, however, does not define the term compulsory counterclaim, and to fill

in the gap the appeals court looked to practice under Federal Rule 13(a):

> [W]e understand Congress to have incorporated the term's "well-established legal meaning[ ]"—and the "cluster of ideas [ ] attached to" it—from Rule 13(a) * * * Rule 13(a) defines a compulsory counterclaim as one that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." That definition alone makes clear OPTO's counterclaim is compulsory. In this case, the "opposing party's claim" is Honeywell's breach-of-contract claim for OPTO's failure to pay royalties. The subject matter of that breach-of-contract claim is the 2020 licensing agreement. The very same 2020 licensing agreement forms the basis of OPTO's patent-misuse counterclaim, which asserts that the agreement constitutes an "unreasonable restraint on competition by *unlawfully extending the reach* of the licensed patents." * * * Thus, to resolve OPTO's patent-misuse counterclaim, we would need to compare the scope of the licensing agreement to the scope of Honeywell's underlying patents because "patent misuse covers only activity falling outside of the patent grant." * * * Half the subject matter of that comparison, of course, is the licensing agreement. So both claim and counterclaim straightforwardly arise out of the same transaction or occurrence—the 2020 licensing agreement—making OPTO's counterclaim compulsory

The appeals court then considered the second § 1295 condition—that the claim arise under the federal patent laws. The court looked to the test for federal question jurisdiction under § 1331, recognizing the special rules that apply to declaratory judgment actions involving patents:

> A claim can arise under the federal patent laws by one of two avenues. Either (1) federal patent law "creates the cause of action asserted," or (2) the claim involves a patent issue that is "necessarily raised," "actually disputed," "substantial," and "capable of resolution in federal court without disrupting the federal-state balance approved by Congress." * * * The two avenues are each independently sufficient for "arising under" jurisdiction. * * * We do not consider the second avenue because we determine that OPTO's counterclaim arises under the federal patent laws by the first: The patent-infringement statute, 35 U.S.C. § 271, created the cause of action for OPTO's counterclaim seeking a declaration of patent unenforceability due to patent misuse.
>
> Key to our conclusion is the fact that OPTO's counterclaim is a declaratory judgment action, which alters how we determine its cause of action. OPTO is arguing that Honeywell committed patent misuse. * * * Ordinarily patent misuse cannot be brought as a claim, as it "is simply an affirmative defense." * * * In other words, OPTO ordinarily would have to wait for Honeywell to attack first with a lawsuit before defending itself by raising patent misuse as a shield. But the Declaratory Judgment Act allows defenses—including patent misuse, * * *—to

> be preemptively asserted in a request for the court to "declare the rights and other legal relations of any interested party seeking such a declaration, whether or not further relief is or could be sought." * * That's precisely what OPTO did here.

Vanderlan v. United States, 135 F.4th 257 (5th Cir. 2025).

The decision addresses, among other issues, whether § 1291 jurisdiction attached to an appeal from a voluntary dismissal, in this case, the government's voluntary dismissal of a qui tam action under the False Claims Act. A doctor filed a relator action alleging that a hospital violated the Emergency Medical Treatment and Labor Act. After many years and many motions, the United States moved to dismiss the action with prejudice with respect to the relator but not itself. The district court granted the motion, but as the appeals court explained, "The district court granted dismissal based on written filings but did not specify whether it did so with or without prejudice. After reconsidering in light of intervening precedent, the court reaffirmed its decision post-hearing but again failed to specify the nature of the dismissal. The court entered a separate Rule 58 judgment, which similarly omitted any mention of prejudice."

The appeals court held that the voluntary dismissal fell within Rule 41(a)(1), because the government moved before defendant answered or moved for summary judgment. Moreover, in its motion under 31 U.S.C. § 3730,

> the government moved to dismiss the claims *with prejudice* as to Vanderlan but *without prejudice* as to itself. Because under Rule 41(a)(1), we look to the government's notice of dismissal to determine finality, we conclude that the dismissal was with prejudice as to Vanderlan. * * * That resolves the jurisdictional question. The dismissal was final, and we have appellate jurisdiction * * * .

Chemical Solvents, Inc. v. Greenwich Insurance Co., 2025 WL 40943 (6th Cir. 2025).

Under hornbook law, an appeals court lacks § 1291 jurisdiction over an order disposing of fewer than all of the claims unless there is a Rule 54(b) certification. This decision illustrates that principle. The lawsuit involved an insurance dispute; to simplify, the district court granted summary judgment in favor of the insurer-defendant on plaintiff's bad-faith claim. Plaintiff

appealed the grant of summary judgment. Four months later, the parties filed a voluntary stipulation under Rule 41(a)(1)(A)(ii) to dismiss then-pending counterclaims and crossclaims. Thus, at the time of the appeal, the district court had not yet entered a final judgment. The subsequent stipulation did not cure the problem, because the counterclaims and crossclaims were not dismissed with prejudice, meaning the claims could be reasserted. The appeals court stated that on remand, the parties could pursue two options to cure the jurisdictional defect: dismiss the claims with prejudice or obtain a Rule 54(b) certification. However, defendant might want to keep another option alive: in the event the appeals court reversed the district court's grant of summary judgment on the bad-faith claim, defendant might want to revive its counterclaim.

Zivkovic v. Laura Christy, 137 F.4th 73 (2d Cir. 2025).

The appeal addresses the jurisdictional significance of a district court's conditional dismissal of federal claims pending resolution of state claims brought in the same class action lawsuit. Current and former "tipped" workers at two restaurants filed a putative class action in federal court alleging violations of the federal Fair Labor Standards Act and state law. The district court certified a class and, after a jury trial on the state claims, entered partial final judgment in favor of plaintiffs. Defendants appealed, and the Second Circuit remanded for clarification of the federal claims. On remand, the district court entered a conditional dismissal of the federal claims, allowing their reinstatement if the judgment on the state claims was vacated or reversed on appeal, and the Second Circuit then again took up the appeal. This time the appeals court held that it lacked jurisdiction because the conditional dismissal was not a final decision and that the district court's Rule 54(b) certification was not proper. First, the conditional dismissal was an impermissible "end-run around" the finality requirement of § 1291 that placed "plaintiffs in a win-win situation, allowing them to appeal the [state] aspect of the case without a final resolution of their overlapping [federal] claims, and allowing them to pursue their overlapping [federal and state] claims even if they lose on appeal." Nor would an immediate appeal serve the judicial efficiency goals of Rule 54(b); to the appeals court "it seem[ed] obvious that there would be overlapping issues." The appeals court emphasized that in this situation, although the district court could reasonably have certified a subclass of federal and state claims for immediate appeal after adjudication, "that possibility cannot justify the certification for

immediate appeal of the [state] claims while the [federal] claims have not been adjudicated and are to be reinstated by plaintiffs if they lose on appeal."

Virtus Pharmaceuticals, LLC v. Woodfield Distribution, LLC, 2025 WL 548247 (11th Cir. 2025).

The decision addresses the sufficiency of the district court's Rule 54(b) certification which did not explicitly conclude that there was no just reason for delay to warrant an immediate appeal. The appeals court underscored that the district court "did not need to include the magic words 'no just reason for delay' in its Rule 54(b) judgment because the parties stated that there was no just reason for delay in their motion for approval of the Rule 54(b) judgment, and the court's grant of that motion is sufficient indication that it found that there was no just reason for delay." Nevertheless, the appeals court found that a basis for certification was not "obvious" from the record.

> No such basis is obvious here because this is not the type of "unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties." * * * Additionally, the unadjudicated claims are * * * interrelated because they all generally address the same underlying allegations concerning the contract between the appellees and Virtus and the seizure of Virtus's products that the appellees were storing.
>
> Furthermore, none of the "special circumstances" that we have identified as warranting Rule 54(b) certification are present here. * * * Specifically, this case does not concern multiple related consolidated cases, the case is not in an early stage of litigation considering its age and the completion of extensive discovery and dispositive motion proceedings, and there is a relatively small number of defendants. * * * Ultimately, there is no indication that a delayed appeal "would cause anything other than inconvenience," which is an insufficient basis for Rule 54(b) certification.
>
> Accordingly, we GRANT the appellees' motion to dismiss and DISMISS this appeal for lack of jurisdiction.

Chapman v. Dunn, 129 F.4th 1307 (11th Cir. 2025).

The district court dismissed a prisoner's pro se § 1983 action for indifference to medical needs as against all defendants but one who had filed for bankruptcy, and entered final judgment for the dismissed defendants under Rule 54(b), after adopting the magistrate judge's report and recommendation. On appeal, the Eleventh Circuit held that the certification was proper because the decision "disposed entirely" of the claim against all but one of the defendants and there was no just reason to delay the appeal because it would not require considering issues that might arise with respect to the remaining defendant. Moreover, the appeals court found this to be one of "those rare cases in which 'equitable concerns' warrant certification." The remaining party's ongoing bankruptcy proceeding would prejudice plaintiff's ability to pursue his claims, would negatively impact his ability to recover at a later date given his age and poor health, and would risk losing critical witness testimony, and "hamper" plaintiff's "efforts to seek injunctive relief * * * for surgery to his right eye," the denial of which was alleged to constitute an ongoing constitutional violation.

Decisions Involving "Collateral Orders"

Stansell v. Revolutionary Armed Forces of Colombia, 120 F.4th 754 (11th Cir. 2024).

The appeal is part of "a decade-long attempt by a number of plaintiffs to satisfy a 2010 default judgment in the sum of $318 million against the Revolutionary Armed Forces of Colombia, colloquially referred to as the FARC, in a suit brought pursuant to the Anti-Terrorism Act, 18 U.S.C. § 2333." The Eleventh Circuit affirmed the district court's declaration of a default judgment as a sanction for a fugitive party's failure to appear at a deposition. A threshold question concerned the district court's jurisdiction to enter that default judgment after a notice of appeal had been filed seeking review of the denial of protective orders. The Eleventh Circuit held that the notice of appeal did not deprive the district court of jurisdiction because its orders denying the protective orders were not final; they did not end "the litigation on the merits," and a jury trial was still to take place. Moreover, the orders were not immediately appealable under the collateral order doctrine:

> An order is considered collateral if it "(1) conclusively determines an important issue that is both (2) completely separate from the merits of the case and (3) effectively unreviewable on appeal from a final judgment." * * * The * * * appellants have failed to convincingly explain how the orders satisfy this standard. They claim that the application of the fugitive disentitlement doctrine would have been unreviewable on appeal from a final judgment because the "district court ordered [appellant] and his counsel not to file any motions seeking relief." * * * But the district court never made such a ruling. It stated that it would not grant Mr. López any affirmative relief while he remained a fugitive. Moreover, in assessing the "third condition of the collateral order doctrine, which asks whether a right or claim can be vindicated adequately on appeal following final judgment," the focus is not on the specific case under consideration but rather on the "entire category to which a claim belongs." * * * Absent unique matters like the denial of anonymity for a party, * * * orders denying motions for a protective order do not satisfy the collateral order standard. * * *

X Corp. v. Media Matters for America, 120 F.4th 190 (5th Cir. 2024).

This discovery dispute is discussed earlier in this memo, p. 85. Relevant here, the Fifth Circuit held that jurisdiction to review the discovery order—seeking to compel Media Matters to disclose information about its donors, including their identity—existed under the collateral order doctrine, because the decision was conclusive, resolved important questions separate from the merits, and would effectively be unreviewable on appeal from the final judgment. In particular, the appeals court emphasized that the collateral order doctrine applies "in cases in which pre-trial orders arguably infringe on First Amendment rights," which in its view described the district court's order. The weightiest consideration for the collateral order doctrine is the importance of the issue at stake, and the loss of First Amendment rights, "for even minimal periods of time, unquestionably constitutes irreparable injury." Moreover, the order was conclusive, "because failure to comply is likely to result in sanctions"; and the order was effectively unreviewable on direct appeal "because once the donor information is disclosed the First Amendment injury could not be undone."

Grippa v. Rubin, 133 F.4th 1186 (11th Cir. 2025).

Vivos Therapeutics, Inc. v. Ortho-Tam, Inc., ___ F.4th ___, 2025 WL 1873125 (10th Cir. 2025).

This pair of cases involves, in part, the doctrine of pendent appellate jurisdiction in the context of interlocutory appeals under the collateral order doctrine of orders denying absolute and qualified litigation immunity. Although the cases are complex and the doctrinal issues beyond most 1L courses, they deal with attorney conduct and the potential exposure of a lawyer for the consequences of action taken as a part of vigorous adversarial representation, and so might be of interest.

The Eleventh Circuit case arose from a defamation suit. Rubin, a job applicant, sued Grippa, naming her as a member of a criminal enterprise. His lawyer sent a letter, allegedly defamatory, to state officials asking them to investigate the alleged enterprise and attached copies of the complaint. The letters triggered a great deal of media attention, and eventually Grippa sued Rubin alleging that the attorney's letters defamed her. The district court denied Rubin's motion for summary judgment, finding the letters were not absolutely privileged because his lawyer sent the letters outside the course of a judicial proceeding and questions of fact existed as to whether the letters were made with express malice or cloaked with qualified immunity. On appeal, the Eleventh Circuit held that as a matter of first impression, the collateral order doctrine permitted the exercise of jurisdiction over the issue of absolute immunity because the denial of summary judgment was a conclusive determination of the issue; the availability of the immunity was "critically important to the continued functionality of the judicial process and entirely distinct from the merits of the case"; and the denial of the immunity was effectively unreviewable on appeal from a final judgment because the immunity is an immunity from the suit itself. The fact that Florida law described the immunity as an affirmative defense did not change the jurisdictional analysis given the purpose of the immunity. By contrast, the denial of the qualified immunity issue failed the collateral-order test; in particular, it did not conclusively decide the issues because material factual disputes remained; the immunity issue could not be "disentangled" from the merits; and, because the immunity provides a defense from liability, the denial could be adequately reviewed at the end of the suit. Further, the appeals court declined to exercise discretion under the doctrine of pendent appellate jurisdiction to review the qualified immunity issue:

> Assuming without deciding that these two issues are sufficiently connected to allow the exercise of pendent appellate jurisdiction, we exercise our discretion to

> decline review of this issue. * * * Although both privileges apply only to statements that are related to a judicial proceeding, the qualified privilege also requires that the statements were made without express malice. As we have explained, that issue is closely related to the underlying merits of Grippa's defamation claim. Because the qualified litigation privilege turns on a merits-related issue that is unrelated to the absolute privilege analysis, we decline to extend pendent appellate jurisdiction.

The Tenth Circuit case has the added complication of the appeals court's reliance on the doctrine of the law-of-the-case to find that interlocutory appellate jurisdiction did not exist under the collateral order doctrine.

CCWB Asset Investments, LLC v. Milligan, 112 F.4th 171 (4th Cir. 2024).

The decision offers a very practical illustration of the collateral order doctrine involving the distribution of assets before the conclusion of a lawsuit. The SEC brought an enforcement action against the alleged operators of a Ponzi scheme. The district court froze defendants' assets and appointed a receiver, who proposed a plan to divide the assets among the swindled investors. The district court approved the plan, and the appeal challenged that decision. The order approving the distribution plan was not a final judgment because it did not end the litigation on the merits. However, the order concerning how to "divide the pie" came within the collateral order doctrine:

> The collateral order doctrine permits interlocutory review of a small class of collateral rulings: "only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." * * *
> Here, the district court's order satisfies these criteria. First, it conclusively determines the manner in which the Receivership Assets will be distributed. Second, it resolves an important question for injured investors that is separate from the merits question of whether Defendants committed securities fraud. And third, it would be unreviewable on appeal because the Receivership Assets "will be distributed, and likely unrecoverable, long before the action brought by the SEC is subject to appellate review." * * *

O'Connell v. United States Conference of Catholic Bishops, 134 F.4th 1243 (D.C. Cir. 2025).

A donor sued a faith-based entity for fraudulent solicitation of contributions. The district court denied the defendant's motion to dismiss, which was grounded on the church-autonomy doctrine grounded in the First Amendment, for lack of subject matter jurisdiction, explaining that the claim raised "a purely secular dispute that could be resolved according to neutral principles of law," and that "it could not and would not address purely religious questions, should they arise during litigation." Defendant appealed, and the D.C. Circuit held that it lacked jurisdiction under § 1291 and that the order was not appealable under the collateral order doctrine. The appeals court explained:

> The church autonomy doctrine protects against government interference in matters of faith, doctrine, and internal management. It may be raised as a defense in a civil suit, but it does not immunize religious organizations from civil actions. Pleading-stage denials of a church autonomy defense, such as the contested motion to dismiss in this case, do not satisfy the strict requirements of the collateral order doctrine. They are neither conclusive nor separate from the merits and, most importantly, they can be reviewed upon post-judgment appeal.
>
> Neither the Supreme Court nor any circuit has ever expanded the collateral order doctrine to categorically cover alleged denials of a church autonomy defense. This is hardly surprising. The limited scope of the collateral order doctrine reflects a healthy respect for the virtues of the final decision rule, which serves as an important safeguard against piecemeal and premature review. [Defendant's] claimed rights can be adequately addressed on appeal after the District Court issues a final decision and, therefore, are not eligible for collateral order appeal.

An Historical Footnote to the Basic Concept--Injunctions

Department of Education v. California, 604 U.S. ___, 145 S.Ct. 966 (2025).

Students no doubt will be familiar with this high-profile case brought by states challenging the termination of grants previously awarded by the Department of Education under two federally-funded programs. The district court of Massachusetts granted plaintiffs' motion for a TRO and required the Government to continue paying grant obligations. On appeal, the First

Circuit denied the Government's motion for stay. The Government appealed to the Supreme Court, applying to vacate the TRO and requesting an immediate administrative stay. We focus here on the threshold question of whether the TRO was an appealable preliminary injunction within the appellate jurisdiction granted by 28 U.S.C. § 1291(a)(1); the Supreme Court, per curiam, answered yes, stating without explanation or elaboration that the TRO "carries many of the hallmarks of a preliminary injunction." The Court then construed the application as seeking a stay pending appeal. Chief Justice Roberts would have denied the application; Justice Kagan dissented, emphasizing the "barebones briefing, no argument, and scarce time for reflection; Justice Jackson, joined by Justice Sotomayor, also dissented, emphasizing as an initial matter that the TRO was set to expire in three days and was likely to "become moot even earlier if the District Court rules on the preliminary injunction motion this week."

Space Exploration Technologies, Corp. v. National Labor Relations Board, 129 F.4th 906 (5th Cir. 2025).[15]

The dispute relates to "Space X's" firing of workers for distributing materials expressing workplace demands. The workers filed a complaint with the National Labor Relations Board (NLRB), which found merit to the claims and set down the matter for a hearing. Space X then sued the NLRB, challenging the constitutionality of the board's structure and seeking a stay, which the NLRB denied. The procedural history is complicated and involves competing motions to transfer venue between district courts in California and in Texas. Against this background, SpaceX moved multiple times for a preliminary injunction from the Southern District of Texas, and then appealed. The question was whether the district court had "effectively denied" its motion for a preliminary injunction by failing to rule on the motion by the day set by SpaceX, which would have allowed SpaceX not to attend a teleconference scheduled by the NLRB, and whether this delay supported appellate jurisdiction under § 1292(a)(1). The Fifth Circuit held that jurisdiction was not present. First, SpaceX failed to show that the order or inaction "might have a serious, perhaps irreparable, consequence":

[15] For disclosure, Helen Hershkoff and Adam Steinman have appeared as amici curiae in various stages of this action. See, e.g., In re Space Exploration Technologies, Corp., 99 F.4th 233 (5th Cir. 2024).

> To be sufficiently serious, the consequences must be "greater than the harm suffered by any litigant forced to wait until the termination of the [proceedings] before challenging interlocutory orders it considers erroneous." * * * "Neither delay nor increased cost of litigation alone will suffice." * * *
>
> * * *
>
> Here, SpaceX's sole conceivable injuries stem from participating in a teleconference in an unconstitutional administrative proceeding. These are likewise "not sufficiently serious to warrant interlocutory appeal."

The appeals court also rejected the argument that the district court had effectively denied the motion because it failed to decide it within SpaceX's proffered time line. To the contrary, district courts have wide discretion in managing their dockets, and their failure to rule on the motion for injunctive relief while the parties were battling over venue, and just a week of SpaceX's request for expedited consideration, did not count as effective denial.

(For a clear discussion in a complex case of when a district court's order refusing an injunction does not create § 1292 appellate jurisdiction, see Union Pacific R.R. Co. v. Illinois Mine Subsidence Insurance Fund, 138 F.4th 1045 (7th Cir. 2025) (district court's order refusing injunctive relief was not a "sufficiently definitive" denial but only a narrowing of relief insufficient to allow interlocutory appeal)).

BNP Paribas v. New Mexico State Investment Council, 2025 WL 1443654 (2d Cir. 2025).

The question on appeal was whether a class action settlement from 2016 barred later-filed claims by various investment funds against BNP Paribas. The appeals court held that § 1291 jurisdiction was not present to review the district court's decision about the preclusive effect of the prior judgment. The appeals court read the district court's order as merely interpreting an earlier settlement agreement, and, in such a situation, the dismissal order "is generally not final unless it is accompanied by a finding of contempt and sanctions. * * * Here, the district court's order merely enforced the parties' settlement agreement and its accompanying injunctions 'by directing compliance therewith,'" and so was not a final decision.

U.S. Securities and Exchange Commission v. Young, 121 F.4th 70 (10th Cir. 2024).

The dispute involved a pending SEC enforcement action against defendant and others alleging a fraudulent investment scheme. The parties stipulated to a preliminary injunction that froze the defendant's assets. In April 2020, Young and his spouse moved to release some of their frozen assets. The district court denied the motion. In November 2020, they again moved to unfreeze some of their assets. The district court against denied the motion and, on appeal, the Tenth Circuit affirmed. On that appeal, defendants argued that the district court applied an incorrect legal standard; that because the funds sought were to pay counsel, the denial of the motion violated defendant's Fifth Amendment right to counsel; and that the district court erred by failing to account for a recent Supreme Court decision holding that the SEC lacks authority to obtain a prejudgment asset freeze. The Tenth Circuit found that they had forfeited those arguments in the district court and waived them on appeal by failing to argue plain error. In March 2023, Young and his spouse against moved to unfreeze, making the same arguments as in their first appeal. The district court denied the motion based on law of the case and because defendants improperly requested reconsideration. Defendants appealed, and as a matter of first impression, the Tenth Circuit held that it lacked interlocutory appellate jurisdiction over the "successive motion," defining that term to mean "a motion that raises the same issues or issues that could have been raised in a prior motion." As they appeals court explained, § 1292 jurisdiction exists over a district court's denial of successive motions to modify a preliminary injunction only upon a showing of a change in circumstances, evidence, or law since the prior motion. Moreover, the appellant must show a "close nexus between the change in circumstances, evidence or law and the issues raised on appeal." This approach was considered consistent with prior Tenth Circuit caselaw according § 1292 a narrow construction, recognizing that it provides only a limited exception to the final judgment rule.

The Notice and Time to Appeal

Osborne v. Belton, 131 F.4th 262 (5th Cir. 2025).

The decision interprets Federal Rule of Appellate Procedure 3(c)(5), which was added in 2021, holding that "if a party designates a post-judgment order in his notice of appeal, any orders disposing of post-judgment motions between the time of the underlying judgment and the specific post-judgment order designated in the notice of appeal should be construed as being included in the notice of appeal." The dispute involved disability discrimination and retaliation claims under the Fair Housing Act and Louisiana law. The district court granted the plaintiff-tenants' motion for summary judgment, and the defendant-landlord moved for relief from the judgment under Rule 60(b), which the district court denied. Defendant then moved for reconsideration under Rule 59 of the denial of the Rule 60(b) motion, and the district court denied that motion, too. On appeal, defendant failed to show an abuse of discretion in denying the Rule 60(b) motion, and the Fifth Circuit affirmed. But first the appeals court addressed whether the three discrete district court opinions, involving Rules 56, 59, and 60, were within the scope of the notice of appeal, and it concluded they were. "In the context of this case, this means that Belton's notice of appeal, which designates that he is appealing the district court's order denying his Rule 59(e) motion, should be read to also encompass the underlying grant of summary judgment, which is the final judgment in this case." As to the order denying the Rule 60(b) motion, although it was issued after the Rule 56 motion and denial of the Rule 59 motion, it too, was encompassed by the notice of appeal.

> We conclude that any order disposing of a post-judgment motion prior to the specific post-judgment order designated in the notice of appeal should also be construed as included in the notice of appeal. Federal Rule of Appellate Procedure 3(c)(5) was added to "reduce the unintended loss of appellate rights" caused by courts that applied the *expressio unius* principle to notices of appeal that mentioned only a post-judgment motion and thereby reviewed only the specific post-judgment order listed. * * * It remedied this problem by adding to this provision a mirror image of the merger rule, which teaches that "an appeal from a final judgment permits review of all rulings that led up to the judgment." * * * While the general merger rule looks backward from the final judgment, encompassing all interlocutory orders, Federal Rule of Appellate Procedure 3(c)(5) looks forward from the final judgment, encompassing all post-judgment orders up to and including the order designated in the notice of appeal.
>
> Moreover, Federal Rule of Appellate Procedure 3(c)(6) states that an "appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited" and that "[w]ithout such an express statement, specific designations do not limit the scope of the notice of appeal."

> This intimates that the default rule is that related orders are within the scope of the notice of appeal.
>
> Finally, we "treat[ ] notices of appeal relatively liberally 'where the intent to appeal an unmentioned or mislabeled ruling is apparent and there is no prejudice to the adverse party.' " * * *

The Fifth Circuit also held that the notice of appeal was untimely as to the grant of summary judgment, but timely as to the denial of the Rule 60 and Rule 59 motions.

> Thirty days passed after the entry of summary judgment, and Belton filed no notice of appeal. Although Belton filed a Rule 60(b) motion in the district court within the time allowed, Federal Rule of Appellate Procedure 4(a)(4)(A)'s exception to the general 30-day rule for filing a notice of appeal does not apply. This is because, to reset the notice of appeal deadline via a Rule 60(b) motion, the Rule 60(b) motion must be filed "within the time allowed for filing a motion under Rule 59"—i.e., 28 days after entry of the judgment. *See* Fed. R. App. P. 4(a)(4)(A)(vi). Here, Belton filed his Rule 60(b) motion 355 days after entry of the judgment, meaning that the notice of appeal deadline for the summary judgment order was not reset. * * *
>
> The notice of appeal was timely, however, as to the order denying the Rule 60(b) motion. The 30-day shot clock to file a notice of appeal of this order began at the time the order was filed. But this clock resets if the party files another post-judgment motion challenging it within the time allowed by that rule. *See* Fed. R. App. P. 4(a)(4)(A). Here, because Belton moved under Rule 59(e) for reconsideration of the order denying his Rule 60(b) motion within the appropriate time to file a Rule 59(e) motion—i.e., within 28 days of entry of the order—the 30-day shot clock for appealing the district court's order denying the Rule 60(b) reset. It began to run anew on the day the district court ruled on the Rule 59(e) motion. Because Belton filed his notice of appeal within 30 days of the district court's ruling on his Rule 59(e) motion, his notice of appeal of the order denying his Rule 60(b) motion is timely.
>
> Finally, the notice of appeal was also timely as to the order denying Belton's Rule 59(e) motion because it was filed within 30 days of that order's entry.* * *

But a third threshold question remained: whether the decisions timely appealed are reviewable under § 1291:

> An order denying a Rule 60(b) motion is such a "final decision." * * * An order denying a Rule 59(e) motion, however, is not treated the same way. When a party

> appeals an order denying a Rule 59(e) motion, "the ruling on the Rule 59(e) motion merges with the prior determination, so that the reviewing court takes up only one judgment." * * * "The court thus addresses any attack on the Rule 59(e) ruling as part of its review of the underlying decision." * * *
> In this case, it is thus appropriate for us to review only the order denying Belton's Rule 60(b) motion. The Rule 60(b) motion is a "final decision" of the district court. Because the underlying judgment attacked by Belton's Rule 59(e) motion is the district court's order denying the Rule 60(b) motion, the order deciding the Rule 59(e) motion merges with it.

On the merits, the appeals court held that the district court did not abuse its discretion in denying relief.

Holley v. Combs, 134 F.4th 142 (4th Cir. 2025).

Federal law limits litigation by persons who are incarcerated. In particular, 28 U.S.C. § 1915(g) bars prisoners from the in forma pauperis filing of civil suits after three dismissals for frivolousness. In this case, a state prisoner who had three prior strikes filed a pro se § 1983 complaint alleging that defendant-officials retaliated against him for filing a grievance and subjected him to inhumane treatment (including transporting him to a dental appointment in a dog cage). The district court dismissed the complaint for failing to pay the filing fee; plaintiff argued he was entitled to a statutory exception for litigants who are in "imminent danger of serious injury." After the district court's dismissal, plaintiff moved for reconsideration, the district court denied the motion, and plaintiff appealed.

On appeal, jurisdiction was present under § 1291, and the merits question concerned whether plaintiff had plausibly pleaded that he was in imminent danger of serious injury when he filed his complaint. To reach that question, the appeals court had to decide a threshold issue about what the notice of appeal encompassed. Plaintiff filed that notice pro se and sought review only of the denial of the motion for reconsideration. On appeal, he was represented by counsel, and his attorneys asked the court "to construe his appeal to target the district court's initial decision to deny him permission to proceed without prepaying the filing fee (also called 'in forma pauperis' status). We will do so, as the substance of his informal briefing addressed the initial dismissal, and courts are instructed to 'liberally construe[ ]' the filings of pro se litigants, 'however inartfully pleaded'" [citing Erickson v. Parus, p. 645; Compact, p. 418; Rules

Supplement, Part IX]. Further, the appeals court stated it would consider "the arguments and documentation [plaintiff] submitted in his opposition to be incorporated in his complaint," but not material submitted in the motion for reconsideration (because it was filed after the complaint).

Blackwell v. Nocerini, 123 F.4th 479 (6th Cir. 2024).

The case illustrates the rule that a motion to dismiss a § 1983 First Amendment retaliation claim on qualified immunity was a final appealable order under the collateral order doctrine. In this case, however, defendant did not take an immediate appeal.

> Rather, they took a detour by first filing a motion for reconsideration. They asked the district court to reconsider its denial of their motion to dismiss under Local Rule 7.1(h)(2)(A) of the Eastern District of Michigan's Local Rules. And they appealed only after the court denied this motion. Does this second order denying their motion to reconsider the rejection of their qualified-immunity defense *itself* count as a collateral order that they may appeal? Some courts have answered "no" to this question and refused to allow immediate appeals of denials of motions for reconsideration even when the underlying order denied qualified immunity. * * * But we need not resolve this question here. The City Officials' notice of appeal clarified that they sought to appeal only the order denying their *motion to dismiss*—not the order denying their *motion for reconsideration*.

Further the defendant-officials did not file their appeal within 30 days of the order, and, as the appeals court emphasized, under Bowles v. Russell (Casebook, p. 1242; Compact, p. 816), the Supreme Court "has treated this statutory time limit as a restriction on the jurisdiction of appellate courts." Nevertheless, the appeals court found the appeal to be timely treating the motion to reconsider as a motion to alter or amend a judgment that delayed the running of the 30-day clock for filing an appeal. And although defendants filed their motion under Michigan Local Rule 7.1(h)(2)(A) and not Rule 59, the circuit traditionally has treated motions under the local rule as analogous to Rule 59 motions. The problem, however, was that in 2021, the Eastern District of Michigan amended its Local Rule 7.1 to provide that parties seeking reconsideration of final orders or judgments must move under Rule 59(e) or Rule 60(b) and that equivalent relief will not be granted under the local rule. In the appeals court's view, this amendment did not change the jurisdictional result in this case because the order denying defendants' motion to

dismiss was not a final order under Local Rule 7.1:

> Rather, we read the word "final" in this local rule (unlike the word "final" in § 1291) consistent with its ordinary meaning to cover only an order completing the case. The order on appeal here did not end the case; it allowed the case to proceed past the pleadings. Local Rule 7.1(h)(2)(A) thus allowed the City Officials to move for reconsideration of this non-final order. And we will continue to treat a *properly filed* motion under this local rule like any other "time tolling" motion for reconsideration. * * * For non-final orders that a party may appeal under the collateral-order doctrine, these motions delay the running of the 30-day clock until the district court disposes of them. * * *

Questions about appellate standing likely are beyond the scope of the 1L course. We include the following case because of its relation to class certification and its treatment of procedural violations for Article III purposes.

Lewis v. Becerra, 111 F.4th 65 (D.C. Cir. 2024).

Two individuals brought a putative class action against the U.S. Department for Health and Human Services to obtain reimbursement for the cost of certain medical equipment. They won on the merits, but the district court denied class certification, and plaintiffs appealed that denial. The D.C. Circuit held that the parties lacked Article III standing to bring the appeal because they did not allege that the Rule 23 denial caused them a concrete and individual harm and that "the mere desire to serve as a class representative" does not suffice.

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

Claim and Defense Preclusion

Robinson v. Postmaster Gen., 2025 WL 48235 (6th Cir. 2025).

Robinson worked for the Post Office and filed two separate lawsuits in federal court asserting Title VII claims. The district court dismissed the second lawsuit as barred by the first under claim preclusion, and the Sixth Circuit affirmed. The question on appeal was whether the claims in the second action arose out of the same transaction or occurrence as those in the first action; the Sixth Circuit emphasized that the test is not whether the claims shared an identity of legal theories.

Lawsuit #1 was filed in 2019 and alleged that he had been denied 30 job promotions as part of defendant's continuing course of discriminatory conduct. In discovery, plaintiff submitted a spreadsheet of defendant's adverse job actions and listed its 2018 rejection of his application to work in Pittsburgh. The district court dismissed the action with prejudice in 2021. Lawsuit #2 challenged only the Pittsburgh adverse action. Robinson argued that the mention of the 2018 rejection in the spreadsheet was not relevant to the 2019 case and that he objected to the discovery request. The court found that "'mere statement' that a request for production 'is overly broad, burdensome, oppressive and irrelevant' is 'not adequate to voice a successful objection.'" On this record, the appeals court held that "both lawsuits arose out of the same set of operative facts" and rejected plaintiff's argument that he could not have joined this claim in the first suit because the agency exhaustion period had not yet elapsed, emphasizing that plaintiff could have sought leave to amend the complaint in the first action once the agency had completed its process.

Watkins v. Genesh, 135 F.4th 1224 (10th Cir. 2025).

The decision likewise shows the claim-preclusive perils of pursuing litigation on two fronts, the administrative and the judicial, when the claims arise from the same transactions or occurrences. In this case, a Black woman alleged that she was subject to "appalling" physical and sexual harassment by defendant's manager and was illegally terminated in 2015. In 2016 she filed an employment discrimination charge against the employer with the Kansas Human Rights Commission (KHRC) and the EEOC, claiming that defendant "discriminated and retaliated against her in violation of Title VII of the Civil Rights Act of 1964." She began work elsewhere, and believed that in 2018 her former employer had contacted her current employer as retaliation. In 2019, she filed a second charge with the EEOC against the former employer covering the

2015 termination and the 2018 communication. That same year, she sued the former employer in federal court, alleging race discrimination under 42 U.S.C. § 1981. The district court granted defendant's motion to dismiss under Rule 12(b)(6). The decision included a footnote referring to the pending charges before the KHRC and EEOC, and stated that "[o]nce the KHRC/EEOC's proceedings conclude, [plaintiff] can file her claims for sexual discrimination and/or harassment under Title VII." In 2021, the EEOC issued two "right to sue" letters for the 2016 and 2019 charges, and in 2022 plaintiff filed a second lawsuit, alleging discrimination and retaliation claims under Title VII, Kansas law, and § 1981. Defendant moved to dismiss the action as claim-precluded; plaintiff voluntarily dismissed the § 1981 claim; and the district court dismissed the 2022 complaint as untimely (for failing to file the action within 90 days of receiving the 2021 right to sue letter). On appeal, the Tenth Circuit affirmed on a different ground: that the claims were claim-precluded. The appeals court boiled the case down to a simple chronology:

> (1) Filed an EEOC charge accusing their employer of violating Title VII;
>
> (2) Sued their employer for conduct arising from the employment relationship, without raising a Title VII claim, while their EEOC charge remained pending;
>
> (3) Obtained a final judgment on the merits in their non-Title VII suit before the EEOC issued a right-to-sue letter for their Title VII charge; and
>
> (4) Sued their employer under Title VII for conduct arising from the same employment relationship once a right-to-sue letter issued.

From this perspective, the first and second lawsuits arose from the same transaction—"her employment relationship' . . . [a]nd . . . [plaintiff's] 2019 and 2022 suits concerned an identical cause of action for claim preclusion purposes." Acknowledging that even where the elements of claim preclusion are met, the bar will not attach if the party resisting preclusion did not have a full and fair opportunity to litigate the claim in the prior suit, the court found no such defect in this case but that plaintiff had failed to pursue her options; although she filed the § 1981 action before receiving a right-to-sue letter, she could have requested a right-to-sue letter 180 days after filing her charge with the EEOC and then amended her complaint to add Title VII claims, or filed her § 1981 claim, sought a stay pending completion of the EEOC investigation, and then amended her complaint to add her Title VII claims upon receipt of her right-to-sue letter. As to plaintiff's reliance on the district court's footnote that purported to preserve her Title VII claim,

the appeals court found it an "extraordinary contention that a district court can prospectively strip a final judgment on the merits of preclusive effect with respect to certain future claim."

(For a similar fact pattern, applying Louisiana preclusion law, see *Muse v. Louisiana*, 2024 WL 4457457 (5th Cir. 2024).)

Markley v. U.S. Bank National Association, ___ F.4th ___, 2025 WL 1739390 (10th Cir. 2025).

The decision is clearly written and discusses concepts that are core to the 1L course, including the limits to party autonomy and the relation of jurisdictional dismissal to preclusion, The fact pattern also is accessible and easy to follow, as are the underlying issues of subject matter jurisdiction. Markley sued his former employer, U.S. Bank, in federal court for wrongful termination under state law and discrimination under the federal Age Discrimination in Employment Act. Markley asserted federal question jurisdiction. The district court resolved the federal claim in the defendant's favor and declined to exercise supplemental jurisdiction over the state law claim, which it dismissed without prejudice. Plaintiff appealed the dismissal of the federal claim to the Tenth Circuit, but did not appeal the state claim. Instead, he refiled the state claim in state court; defendant then removed the state claim to federal court on the basis of diversity jurisdiction (which existed at the time of the filing of the first lawsuit). The district court granted defendant's motion to dismiss on claim preclusion grounds, and the Tenth Circuit affirmed. "If a party could have litigated a claim in a prior lawsuit by asserting diversity jurisdiction but fails to do so, that claim is precluded if the prior lawsuit arose from the same operative facts and reached a final judgment on the merits." The fact that plaintiff was "not required to assert diversity jurisdiction to press his state-law claim after it was dismissed without prejudice" was, in the appeal court's view, "beside the point":

> Of course, no party is *required* to assert diversity jurisdiction simply because it exists. Rather, the relevant question under claim preclusion is whether the plaintiff *could have litigated* the contested claim in a prior lawsuit. * * * *That* is why Markley's failure to assert diversity jurisdiction matters. If Markley had asserted diversity jurisdiction, he could have had his state law claim heard. He did not do so. Because he "neglected to assert the existence of diversity jurisdiction in his

> prior action in order to pursue his [state law] claim[ ], both the strict test of and the policy behind the res judicata doctrine bars the present action."

The appeals court acknowledged that a dismissal without prejudice, particularly on jurisdictional grounds, is generally not considered final and on the merits. But, as the Tenth Circuit emphasized, "that point does not control here."

> For claim preclusion purposes, the question is whether there was a dismissal without prejudice as to the *cause of action* rather than the individual claim. * * * So, for example, if a plaintiff sued in federal court but voluntarily dismissed his entire lawsuit before the court addressed the merits of the case, that dismissal would be without prejudice. * * *
>
> The same would be true if the court dismissed the entire lawsuit without prejudice. * * * The plaintiff could refile the same lawsuit. In both scenarios, claim preclusion would not apply because the entire cause of action was dismissed without prejudice.
>
> But that is not Markley's case. The district court did not dismiss the entire case of *Markley I* without prejudice. Rather, the district court resolved Markley's federal claim on the merits, and then rendered a final judgment on the cause of action after Markley chose not to litigate (or appeal) his state law claim. That judgment was "final" for claim preclusion purposes since "the court clearly intended to terminate all proceedings as to the claims or parties involved[,] and no attempt to appeal was thwarted by a ruling that judgment had been entered improperly." * * * That judgment was also "on the merits," because it rested on the district court's resolution of the federal claim, which arose from the same cause of action as the state law claim. Even though the state law claim was dismissed without prejudice, the relevant fact is that when the district court closed *Markley I*, "there was a summary judgment on his federal claim[ ] which provides the 'traditional basis for the operation of res judicata.' " * * *
>
> In other words, the district court's final judgment in *Markley I* included a judgment on the merits for one of the claims asserted, and because that claim arose from the same operative facts as the state law claim, the final judgment on the federal claim is enough for claim preclusion. Markley was thus barred from raising any claim arising from his termination at US Bank in a later lawsuit, which is what *Markley II* was. * * *

Barlow v. Town of Colorado City, 2025 WL 1404944 (9th Cir. 2025).

Can claim preclusion bar a claim based on events that had not yet happened at the time of the first lawsuit? The Ninth Circuit answers no. Plaintiff Barlow was employed as a police officer in a Utah town that bordered Arizona, and he needed certification from both states. Utah certified him, but Arizona rejected his application based on a prior sale of marijuana. Plaintiff unsuccessfully challenged the decision in Arizona state court. The Utah employer then fired him. At that point, Barlow filed a new law suit alleging wrongful termination and religious discrimination based on his membership in the Fundamentalist Church of the Latter-Day Saints. The district court dismissed Barlow's claims as claim precluded by the Arizona judgment, and the Ninth Circuit reversed: "The district court erred by ruling that claim preclusion barred Barlow's complaint because Barlow's termination occurred after he had filed the prior actions."

Issue Preclusion

Actually Litigated

Delgado v. Midland Credit Management, Inc., 131 F.4th 896 (8th Cir. 2025).

The facts are compact and easy to follow, and the case could generate useful discussion about what the actually-litigated prong of collateral estoppel requires. A debt collector sued a consumer in Minnesota state court attempting to collect on outstanding credit card debt. That action resulted in a default judgment against the consumer. The consumer then sued the debt collector in Minnesota federal court alleging the company did not own the debt when it filed its state court action and so violated the Fair Debt Collection Practices Act. Defendant moved for judgment on the pleadings. On appeal, the Eighth Circuit, looking to Minnesota law, held that the default judgment precluded the consumer on the issue of whether the debt collector did not own the debt, and that it would not work an injustice to apply collateral estoppel.

The consumer opposed issue preclusion on the ground that she had not participated in the state court decision and so the question of debt-ownership was not "distinctly contested and directly determined" in the prior action. The appeals court found that under Minnesota case law from 1936, a default judgment is a "final determination of the facts essential to its existence" and is "conclusive upon the parties." Moreover, ownership of the debt was essential because under

Minnesota law a default judgment could not be entered without establishing the "chain of assignment" to the original creditor. The court then rejected the consumer's argument that she was not given a full and fair opportunity to be heard in the prior state action—that action had no significant procedural limitations, the consumer received notice of the action, she had the incentive to litigate the issue, and effective litigation was not limited by the relationship of the parties. Finally, the court considered whether the default judgment was a "final judgment on the merits," and acknowledged that there was "hardly any Minnesota law on the subject." Rather than decide the question wholesale, the court found that the judgment was a merits determination because it had to resolve the question of chain of title: "Submitting evidence [on chain of assignment] may be a procedural requirement, but evaluating what it 'establish[es],' as the statute requires * * * is a merits determination comparable to what happens at summary judgment. It was * * * a substantive issue that was 'essential to' the default judgment's 'existence.'" Finally, although plaintiff appeared pro se in the state action, the appeals court saw no inequity in making her "live with" her decision not to appear.

Defining and Characterizing the Issue

McCluskey v. Lopez, 2024 WL 5182876 (2d Cir. 2024).

Plaintiff is a recipient of government assistance under the Supplemental Nutrition Assistance Program ("SNAP"). In 2012 and 2017, he unsuccessfully challenged the refusal by the Nassau County Department of Social Services (DSS) to increase the amount of his SNAP benefits. He then filed a second lawsuit challenging the denial of benefits in 2019, 2021, 2022, and 2023. The district court dismissed on claim preclusion. On appeal, the Second Circuit quickly concluded that claims arising from the 2012 and 2017 applications, but not the later applications, were claim precluded. It also held that it was error for the district court to find that plaintiff was issue precluded from contending in the second lawsuit that DSS "has a custom or practice that violates federal law," a conclusion it reached, according to the appeals court, by misreading the holding of a prior judgment. The prior judgment evaluated state regulations dealing with treatment of medical expenses for purposes of calculating SNAP benefits; the current lawsuit challenged Nassau County regulations. As the Second Circuit concluded, it was

error "to conclude that just because we ruled that the state regulations comply" with federal law, the county's "alleged official policies, which are distinct from the State's policy, do too." That issue has never been adjudicated on the merits, and the appeals court remanded.

Kroy IP Holdings, LLC v. Groupon, 127 F.4th 1376 (Fed. Cir. 2025).

Among other issues, the appeal illustrates how evidentiary burdens of proof affect determinations of collateral estoppel. Although aspects of the patent dispute (including the mechanism of inter partes review) likely are beyond the 1L course, students will be familiar with Groupon, the defendant, and appreciate the importance of a patent that relates to providing incentive programs over a computer network. The appeal boiled down to a

> distinct question of Federal Circuit collateral estoppel law: whether a prior final written decision of the [Patent Trial and Appeal] that certain patent claims are unpatentable precludes a patentee from asserting other claims from the same patent, even assuming the asserted claims are immaterially different from the unpatentable claims for purposes of invalidity. Kroy argues that collateral estoppel should not apply because an [inter partes review] proceeding requires a lower burden of proof to prove unpatentability than the burden of proof in district court for invalidity. * * * We agree with Kroy and hold that collateral estoppel does not apply.

In this case, to apply collateral estoppel "would deprive patent owners of their property right without first requiring proof of patent invalidity that satisfies the statutorily-prescribed clear and convincing standard."

Intersystem Preclusion

State-Federal Preclusion

9000 Airport L.L.C. v. Hager, 2025 WL 1024951 (5th Cir. 2025).

This per curiam opinion addresses the privity requirement of claim preclusion in the context of inter-system preclusion; illustrates the federal court making an "*Erie* guess" on an

unanswered question of state law; and raises questions about the scope of virtual representation as rejected in Taylor v. Sturgell (Casebook, p. 1349; Compact, p. 893).

9000 Airport, plaintiff, is an "adult nightclub" that challenged the constitutionality of the Texas Sexually Oriented Business Fee Act. On appeal from the district court's preliminary injunction of the act, defendant argued that claim preclusion barred the suit. The act had been challenged in many prior lawsuits. One of those suits had been brought by the Texas Entertainment Association (TEA) in Texas state court, and the Texas Supreme Court rejected TEA's First Amendment argument. The first element of claim preclusion, a final judgment, was clearly met. As to privity, the record showed that 9000 Airport, a limited liability company, was not "explicitly a TEA member":

> However, 9000 Airport itself is a part of the "Bucks Wild" chain of seven adult nightclubs, all of which are explicit TEA members, aside from 9000 Airport. 9000 Airport has two co-owners—Curtis Wise and Kevin Richardson. Wise has an ownership interest in six other Bucks Wild clubs, and Richardson has an ownership interest in two. Wise and Richardson thus share ownership in two other Bucks Wild clubs, both of which are TEA members.

The appeals court held plaintiff was in privity with other Bucks Wild clubs owned by Wise and Richardson, finding that the parties shared "an identity of interests in the basic legal right" and "interconnectedness." Texas law did not precisely answer the question, and the appeals court instead constructed an argument based on available Texas precedent, federal case law, and the decision of state supreme court that treated an LLC as a corporation, with the entity in privity with its owners and members.

Judge Douglas dissented, arguing that the majority expanded "the principle of res judicata by concatenating several novel legal conclusions," likely violated plaintiff's Fourteenth Amendment due process rights, and failed to cite any state support for applying its novel "preclusion by association representation," which, even under federal law has not been found to exist "without a *direct* membership connection among the plaintiff." As the dissent put it,

> The majority expands the doctrine of res judicata not once, not twice, but *three times* to reach their desired conclusion. To summarize: the majority establishes privity by jumping from 9000 Airport to its members (the first novel proposition), then from its members to their other business holdings (the second novel proposition), and then from those business holdings to an association they are

> affiliated with (the third novel proposition). This is one step—or several steps—too many.

Further, the dissent argued that preclusion was foreclosed by the Supreme Court's disapproval of virtual representation in Taylor v. Sturgell: "9000 Airport cannot be 'adequately represented' by an association to which it does not belong. * * * Indeed, the stated purpose of the TEA is to 'protect the financial interest of *its members*.'" Further, 9000 Airport could not have participated in the prior lawsuit because it did not exist at the time of the litigation. And although plaintiff's managing members own adult clubs that are members of the TEA, "this is not the type of 'substantive legal relationship" that the Supreme Court "envisioned" for privity.

Washington v. Pellegrini, 125 F.4th 118 (4th Cir. 2025).

The appeal raised the question of the preclusive effect of a state court decision granting a writ of actual innocence to a person convicted of murder in his later § 1983 suit filed in federal court alleging that the police officers who investigated the murder injured him by fabricating testimony and other misconduct in violation of his constitutional and other rights. The timeline is as follows:

> 1987: state conviction for murder in Maryland state court based on eye witness testimony
> 1996: witness recanted testimony
> 1999: Maryland state court denied post-conviction relief finding recantation not credible
> 2016: another Maryland state court granted post-conviction relief finding recantation credible because recantation remained intact for 20 years
> 2019: § 1983 suit filed in federal court against police officers who investigated the murder

Under § 1738, the preclusive effect of the state court judgment was determined by the law of rendering state, in this case Maryland. Under Maryland law, preclusive effect is not given to determinations that are inconsistent with another determination of the same issue. Maryland

law also states that collateral estoppel is an equitable doctrine to be applied to serve judicial economy and fairness

The district court held that plaintiff was issue precluded from relying on the witness's recantation because another state court had initially found the recantation to be incredible. The Fourth Circuit rejected this application of defensive non-mutual collateral estoppel. In particular, the later finding of credibility barred the preclusive effect of the earlier determination of incredibility:

> The Post-Conviction Decision and the Innocence Decision are inconsistent with respect to the credibility of Robinson's recantation. Accordingly, per the Restatement (Second) of Judgments § 29, which again Maryland courts have adopted, Appellees may not rely on the determination by the Post-Conviction Decision court that Robinson's recantation was incredible. Consequently, Robinson's original testimony did not provide probable cause to arrest and prosecute Appellant.

Moreover, the appeals court held that invoking non-mutual issue preclusion to bar litigation of plaintiff's misconduct claim would be "incompatible with the equitable principles" that underlie the doctrine. The issue of police misconduct was never litigated in a civil case. The police officers were invoking a prior judgment to which they were not a party; the doctrine of non-mutual issue preclusion is to incentivize plaintiffs to join all defendants in F1. (citing *Parklane,* Casebook, p. 1334; Compact, p. 884). However, joinder of the officers was not possible in a post-conviction collateral attack on a criminal conviction; to apply collateral estoppel would be a "perverse inversion" of both judicial economy and equity:

> Applying collateral estoppel in this case would impose an unfair and inequitable result that is inconsistent with the doctrine. Precluding Appellant from litigating his colorable claims for relief would bar him from taking even a single bite of the apple regarding Appellees' alleged misconduct. That misconduct has never been litigated in a civil case. And in the criminal corollary, the State of Maryland granted Appellant a writ of actual innocence and dismissed all charges against him. Restated, under the district court's decision, Appellant would be barred from ever obtaining a civil remedy for colorable claims premised upon convictions and a custodial sentence that the state has overturned. If we follow the state's lead and assume that Appellant has suffered an injury, then we must acknowledge that, per the district court's view, he is also left without any means of recourse for that harm, pursuant to the application of an equitable doctrine.

(To similar effect, see Salter v. City of Detroit, 133 F.4th 527 (6th Cir. 2025) (holding that under Michigan law "a vacated criminal conviction and the interlocutory rulings supporting it have no preclusive effect")).

Federal-State Preclusion

Jensen v. United States Tennis Association, 2025 WL 707447 (9th Cir. 2025).

The decision offers an excellent discussion of *Semtek* (Casebook, p. 1373; Compact, p. 904) and when the running of a state statute of limitation bars a later federal diversity suit on the same claim. The facts of the case are troubling and involve allegations that beginning in 2010, a tennis coach began sexually abusing Jensen, a young female player, at tournaments held in Nevada, Alabama, Missouri, Kansas, and Arizona.

In 2020, Jensen sued the United States Tennis Association (USTA) in Missouri state court for negligence. USTA removed to federal court and transferred to the District of Kansas. Applying Missouri state law, the Kansas federal court granted summary judgment for USTA holding the suit was time barred. In 2022, Jensen again sued USTA for negligence, this time in Arizona state court against USTA. Under Arizona law, the negligence suit was not time barred. USTA removed to federal court, and the district court granted USTA's motion to dismiss on grounds of claim preclusion, holding that under Missouri law the dismissal of first complaint was a final adjudication on the merits.

The Ninth Circuit agreed that Missouri law governed the preclusive effect of the Missouri judgment. But it disagreed on whether the dismissal was an adjudication on the merits that barred the second suit. The appeals court observed that the Supreme Court in *Semtek*

> explained that the "traditional rule" for claim preclusion is that "expiration of the applicable statute of limitations merely bars the remedy and does not extinguish the substantive right, so that dismissal on that ground does not have claim-preclusive effect in other jurisdictions with longer, unexpired limitations periods." * * * Under the rule, states do not enforce their own statutes of limitations extraterritorially, so a statute of limitations dismissal "simply means that the cause of action cannot be heard in the jurisdiction of dismissal .... [I]t says nothing about a suit in the second jurisdiction." * * *

> By holding that dismissal of Jensen's first lawsuit in Missouri precludes Jensen's second lawsuit in Arizona, the district court effectively concluded that Missouri does not follow the "traditional rule" discussed in *Semtek.* This was a mistake. * * *
>
> The district court reached its conclusion by relying on Missouri appellate court decisions stating that the dismissal of an action based upon the running of the statute of limitations "is a final adjudication on the merits for purposes of res judicata." * * * Implicit in the court's reasoning was the premise that all judgments denominated "on the merits" are entitled to claim-preclusive effect, but "[t]hat premise is not necessarily valid." * * * For instance, the Missouri decisions cited by the district court precluded a subsequent lawsuit *in Missouri* but said nothing about precluding a subsequent lawsuit in another jurisdiction. * * * It follows that Missouri decisions denominating statute of limitations dismissals as being "on the merits" do not extinguish the plaintiff's substantive claim in all jurisdictions. * * *
>
> Our inquiry, however, does not end here, for it is the substance of the dismissal—as opposed to whether it was technically with or without prejudice—that governs whether a dismissal should have claim-preclusive effect. That is, claim preclusion will ordinarily depend on whether the court ruled on the substance of the plaintiff's claims as opposed to dismissing them based on some procedural bar. * * * We further note that "Missouri cases discussing claim preclusion generally follow the Restatement of Judgments," * * * and the Restatement follows the traditional rule insofar it is "concerned primarily with the effect of a judgment in the state in which it is rendered," Restatement (Second) Judgments § 19, cmt. f.
>
> Ultimately, as a federal court sitting in diversity, we must be cautious about pushing state law "to new frontiers," * * * especially where our decision "would be to broaden the [state's] law beyond the point where any other court has yet ventured," * * *. Not one Missouri court has held that dismissing a claim in Missouri state court on statute of limitations grounds precludes asserting the claim in another state with "longer, unexpired limitations periods." * * * Holding that Missouri has abandoned the traditional rule would therefore "broaden the law" in Missouri. We decline to do so.

Ndungu v. AG United States, 126 F.4th 150 (3d Cir. 2025).

The appeal raised in part the application of administrative claim preclusion to immigration deportation proceedings. The case is clear and the issue is topical, but the questions of immigration law are technical and likely beyond the 1L compass.

Chapter 18. Alternative Dispute Resolution

This section highlights cases involving arbitration that touch on and can reinforce topics basic to 1L Procedure course, including parties, subject matter jurisdiction, discovery, choice of law, scope of judicial authority, and costs and fees

Arbitration

Parties

Luna v. Tug Hill Operating, LLC, 2025 WL 1806875 (4th Cir. 2025).

The appeal raised the question of who counts as a party to an arbitration agreement in the case of a single-member limited liability company—is the party the LLC's sole member or the LLC as an entity? The court answered the question "by looking to the text of the agreement," and held that "the LLC, and not its sole member," entered the contract and was the party bound by the arbitration agreement.

Luna sued defendant for Fair Labor Standards Act violations. Defendant moved to transfer venue or to compel arbitration, arguing it was a third-party beneficiary of a contract under which Luna had agreed to submit employment disputes to arbitration. Luna countered that he did not personally enter into that contract; rather his LLC, was the party. The district court held that defendant could not use an arbitration provision (or a forum selection clause) in a contract with Luna's LLC to dismiss or transfer a suit brought individually, and the Fourth Circuit agreed. Looking to Texas law, the appeals court found that an agent who signs a contract on behalf of a disclosed principal is not party to the contract and generally is not liable under it. That rule applied here, as supported by the agreement's signature page and the text of the agreement showing that Luna was the LLC's authorized representative and not the party bound by the agreement.

Federal Jurisdiction

Tesla Motors, Inc. v. Balan, 134 F.4th 558 (9th Cir. 2025).

The appeal involves whether the district court may exercise subject matter jurisdiction to confirm a zero-dollar arbitration award. If nothing else, the cast of characters should interest 1L students; the decision reinforces the basic rules of diversity jurisdiction and the well-pleaded complaint rule as applied to arbitration.

Balan, an automotive design engineer, sued Tesla, her employer, and Elon Musk for defamation in federal court. Tesla moved to compel arbitration under a mandatory clause in Balan's employment contract. After many procedural skirmishes, the arbitrator issued an award in favor of Tesla and Musk. Those parties then petitioned the Northern District of California to confirm the award, which the court granted. On appeal, the Ninth Circuit held that the district court lacked both diversity jurisdiction and federal question jurisdiction over the action. The FAA did not independently provide federal question jurisdiction, and its applicable provisions did not authorize a jurisdictional "look through" approach. Rather, "the facts establishing a jurisdictional basis must be present on the face of the application or petition to confirm an arbitration award." As to diversity jurisdiction, the petition must establish that the amount in controversy exceeds $75,000, but it did not. As the appeals court explained, "Appellees went to the district court to confirm a zero-dollar award dismissing Balan's libel claims. On its face, a petition to confirm a zero-dollar award cannot support the amount in controversy requirement." Moreover, the appeals court rejected Tesla's effort to recharacterize the nature of the FAA case (to one in which a "look-through" approach would apply).

Wilson v. Kemper Corporate Services, Inc., 134 F.4th 339 (5th Cir. 2025).

The appeal involves questions of removal, post-removal joinder, diversity jurisdiction, and remand in the context of an insurer's alleged refusal of a policyholder's claim for coverage. The insurer won at arbitration and the district court confirmed the arbitral award. The policy holder then appealed and vacated and remanded, finding that the district court erroneously denied the insured's motion to remand because a non-diverse defendant was properly joined post-removal.

As a threshold matter, the appeals court held that it was no error for the district court to consider an affidavit that was outside the complaint to determine whether post-removal joinder was proper.

> In "limited circumstances," when it "appears that the plaintiff has misstated or omitted discrete facts that would determine the propriety of joinder," the district court may pierce the pleadings and perform "a more detailed factual analysis." * * * This kind of "summary inquiry 'is appropriate only to identify the presence of discrete and undisputed facts that would preclude [the] plaintiff's recovery against the instate defendant.' " * * * In her affidavit, Maria Wilson admits that she did not read the Policy. And this discrete, undisputed fact bears on "the chances of [her] claim against the in-state defendant alleged to be improperly joined." * * *. Under Mississippi law, which governs this dispute, the "duty to read" doctrine imputes knowledge of an insurance policy to the insured and, in certain circumstances, bars negligence claims against insurance agents like Robin Wilson. * * * Because Maria Wilson's failure to read the policy could reasonably affect the success of her negligence claim against Robin Wilson, the district court did not abuse its discretion by considering the affidavit in its analysis of joinder. * * *

Then, looking to Mississippi law, the appeals court held that the district court erred in its application of that state's negligence law. In particular, plaintiff's failure to read the policy (she was illiterate) did not under Mississippi law bar her negligence claim, and so the joinder was proper, and the policy did not unambiguously exclude her claim. Moreover, the removal statute is to be "strictly construed, and any doubt about the propriety of removal must be resolved in favor of remand." The appeals court then concluded that the district court lacked jurisdiction, because the joinder of a non-diverse defendant destroyed complete diversity.

Wheatfall v. HEB Grocery Company, L.P., 2025 WL 1703637 (5th Cir. 2025).

The appeal brings together issues that are familiar to 1L students: the district court dismissed an action to vacate an arbitral award for improper service of process, but the appeals court vacated and remanded, finding that the district court lacked subject matter jurisdiction. In particular, the appeal addresses the standard for determining when a district court may exercise § 1331 jurisdiction to vacate an arbitration award in light of *Badgerow v. Walters*, 596 U.S. 1, 8, 142 S. Ct. 1310, 1316 (2022). The decision includes a helpful synthesis of the applicable rules:

> The Federal Arbitration Act ("FAA") "authorizes parties to arbitration agreements to file specified actions in federal court," including, as is the case here, "applications to ... vacate ... arbitral awards" under Sections 9 through 11. * * * This authorization alone, however, is "not an independent source of jurisdiction." * * * "[A]n applicant seeking ... to vacate an arbitral award under Section 10 [of

> the FAA] must identify a grant of jurisdiction, apart from Section 10 itself, conferring access to a federal forum." * * * Because Sections 9 and 10 lack the "look-through instruction" found in Section 4, *Badgerow* expressly rejected the theory of federal question jurisdiction on which the district court relied. * * * To establish federal question jurisdiction, then, "an obvious place" to look "is the face of the application itself."
>
> None of the claims on the face of Wheatfall's application provides an independent basis for federal question jurisdiction. The first two claims, that the arbitrator displayed partiality and exceeded his powers, derive directly from Section 10 and cannot establish jurisdiction under *Badgerow.* * * * Wheatfall's third claim alleges that the arbitrator "display[ed] manifest disregard of the law." Under both the Supreme Court's and this court's precedent, "manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA," and thus cannot establish federal question jurisdiction. * * *

(For another case involving subject matter jurisdiction over a federal action challenging the enforceability of an arbitral award, see **Green v. Bank of America Merrill Lynch, 2025 WL 1378193 (2d Cir. 2025).**)

Choice of Law

Adler v. Gruma Corporation, 135 F.4th 55 (3d Cir. 2025).

The appeal raises a host of issues, including the exemption under the Federal Arbitration Act (FAA) for workers engaged in interstate commerce; delegation of authority under an agreement to decide whether an FAA exemption applies; and the effect of choice of law decisions on arbitrability determinations. Adler distributes Gruma's food products to grocery stores in New Jersey. Gruma terminated the relationship, and Adler sued in federal court. The district court dismissed the action, concluding that under the parties' agreement, Texas law governed and the case should proceed to arbitration. The appeals court held that the FAA did not apply to the agreement. Notwithstanding the agreement's delegation clause, the court had power to decide the exemption question—it was an "antecedent" statutory question that needed to be decided before the court addressed enforcing a delegation clause. As to which state law governed the dispute, the appeals court agreed with the district court that the agreement selected Texas law, and considered whether the New Jersey court under its choice-of-law rules should have rejected

that provision. The decision sets out "guideposts" for the district court to consider on remand. Finally, the appeals court found no error in the district court's sua sponte reading of the agreement's delegation clause; arguments about party waiver were irrelevant ("While a party can waive a contractual right to arbitrate, * * * this rule does not speak to the propriety of a court's interpreting contractual language for itself.").

Scope of Arbitral and Judicial Authority

NALCO Company LLC v. Bonday, ___ F.4th ___, 2025 WL 1903042 (11h Cir. 2025).

The appeal addresses the question of the scope of an arbitrator's authority, in this case, to award damages on a statutory violation that the claimant did not formally submit to arbitration in a proceeding in which the claimant appears pro se. A strong dissent poses the question as the standard for vacating an arbitration award.

Bonday, pro se, filed an arbitration demand against NALCO, his former employer, alleging it violated its severance pay plan by demoting him without offering him a payout. NALCO countered that a court needed to determine the scope of the arbitration agreement before the proceeding could go forward. However, before judicial determination, the arbitrator concluded that the severance pay request fell outside the scope of the arbitration agreement and awarded nothing on that claim, but, because the severance plan was formed under the Employee Retirement Income Security Act of 1974 (ERISA), there was a "possible" ERISA claim, and awarded $129,465.50 for discriminating against the former employee under ERISA.

The district court vacated the award on two grounds: she exceeded her authority by ruling on the scope of the agreement, a question that was reserved for judicial determination; and she awarded relief on a claim not raised in the demand for arbitration. The Eleventh Circuit affirmed on the second ground, and did not reach the first issue, but in a footnote expressed doubt. The majority emphasized that the claimant had never submitted the claim, and that precedent supported vacatur on this ground; that his pro se status, although it supported "leniency" in construing the pleadings, "'liberally construe' doesn't mean to make up"; and the claimant could have but did not amend the pleading to include the ERISA claim.

Judge Tjoflat dissented. First, he argued that it was error to vacate the award based on a standard derived from Federal Rule 12(b)(6), rather than under Section 10 of the Federal Arbitration Act; vacatur imposed a "heavy burden" on the movant, and the "sole question" before the court was whether the arbitrator "(even arguably) interpreted" the agreement, not whether she was right or wrong.

> Ignoring the burden of proof the Supreme Court has placed on movants for § 10 vacatur, without considering the AAA Rules the Arbitration Agreement required the arbitrator to apply, and without fully considering this Court's and the Supreme Court's precedent, the District Court granted Nalco's motion and vacated the arbitrator's award. It did so in part by relying on a case * * * that is inapplicable to the present dispute.
> The District Court handed down a lawless decision. It has no foundation in the law—in any law, anywhere but in Nalco's lawyers' imagination. Today, the Majority does the unthinkable. It affirms a trial court decision that cannot stand because it was handed down in defiance of the law. It requires no subtle analysis to say that this Court cannot do that. I dissent. To quote Justice Alito, "I am stunned."[16] (footnote in original)

Second, the dissent argued that vacatur was not warranted under the correct standard.

> The Majority insists that Bonday never raised the ERISA issue himself, so he could not have submitted it for arbitration, but that reasoning is wrong twice over. First, regardless of whether the Majority would have done the same, the arbitrator construed Bonday's Demand to include the ERISA claim. In other words, Bonday *did* raise the claim as early as his initial Demand, yet the Majority insists he should have done so *again*. And second, the Majority completely ignores the fact that Bonday *did* present evidence of both age discrimination and the ERISA violation at the hearing that Nalco refused to attend. It is hard to imagine how Bonday could have presented a fuller case, yet the Majority insists he never submitted the claim.

A major theme in the dissent is a criticism of the majority's reliance on judicial standards to assess the arbitrator's action, and not the rules of arbitration:

> The AAA Rules establish procedures that are foreign to our own Federal Rules of Civil Procedure, but they are the rules that the parties have contracted to use, and the FAA mandates that we treat them accordingly. Notably, the Majority does not

[16] Dep't of State v. AIDS Vaccine Advoc. Coal., ___ U.S. ____, 145 S. Ct. 753, 753, 221 L.Ed.2d 409 (2025) (Alito, J., dissenting from denial of application to vacate order).

> engage with these rules at all. Rather, it explicitly invites comparisons to how *courts* conduct their business.
>
> * * *
>
> Arbitration is not a second-tier courtroom; it is a forum shaped by the parties' own choices and designed to avoid the rigidities of judicial procedure. The Majority's approach does the opposite, wrapping arbitration in procedural red tape that the FAA was meant to cut. Nalco got the arbitration it signed up for. It should not be allowed to back out now. I dissent.

Lamonaco v. Experian Information Solutions, ___ F.4th ___, 2025 WL 1831283 (11th Cir. 2025).

The appeal addresses threshold questions about the existence of an arbitration agreement and whether the agreement delegated question of waiver to the arbitrator. The district court denied a motion to compel, and the Eleventh Circuit reversed. A consumer sued Experian for violating the Fair Credit Reporting Act by failing to implement reasonable procedures to ensure credit report accuracy and for failing to conduct a proper reinvestigation of her credit history after she reported that a $26,922 auto loan had erroneously been included in in his file. Experian answered the complaint, and provided initial disclosures under Federal Rule 26. Three months later it moved to compel arbitration. In support of the existence of an arbitration agreement, it submitted a declaration from a corporate officer of defendant's affiliate setting out the Terms of Use to which plaintiff had assented when she clicked "submit" to enroll in defendant's program. The district court agreed with plaintiff that defendant had not carried its burden to show the existence of an agreement, and that in any event it had waived arbitrability by delaying in raising the issue after participating in the judicial proceeding. The appeals court reversed.

Looking to Florida law, the appeals court found that Experian showed by a preponderance of the evidence that in this click-wrap content, "the relevant terms were reasonably presented and * * * the user took clear, affirmative steps to accept them":

> A declaration that sets forth specific facts based on personal knowledge, describes the enrollment process, and appends the operative contract is competent evidence sufficient to satisfy Experian's initial burden. *Cf.* 28 U.S.C. § 1746 (permitting unsworn declarations to substitute for affidavits if made under penalty of perjury).

> Williams's declaration and supporting exhibits made it "more likely than not" that Lamonaco agreed to the Terms of Use. * * * And where, as here, the opposing party offers no factual rebuttal, the FAA and Florida contract law require no more to compel arbitration.

Finding an agreement, the Eleventh Circuit then held it was error for the district court to decide the question of waiver—the agreement delegated determination of that question to the arbitrator, not to the court—so that the default rule making waiver presumptively a question for the court to decide did not apply.

Heckman v. Live Nation Entertainment, Inc., 120 F.4th 670 (9th Cir. 2024), petition for cert. docketed by, Live Nation Entertainment, Inc. v. Heckman (U.S. No. 24-1145 2025).

Heckman involved an antitrust suit by ticket purchasers against Live Nation Entertainment, "the largest concert promoter for major entertainment venues in the United States, and Ticketmaster, "the largest primary ticket seller for live events at major concert venues (the two companies merged in 2010). Defendants moved to compel arbitration. The online ticket purchase agreement on the Ticketmaster website included an agreement to comply with the company's Terms of Use, and those terms, as described by the Ninth Circuit, provided "that any claim arising out of the ticket purchase, as well as any prior ticket purchase, will be decided by an arbitrator employed by a newly created entity, New Era ADR ('New Era'), using novel and unusual procedures." The district court denied the motion to compel, and the Ninth Circuit affirmed, finding that the delegation clause and the arbitration agreement as a whole are unconscionable and unenforceable under California law. The appeals court further held that the Federal Arbitration Act (FAA) did not preempt the application of California unconscionability law. Finally, as an alternative ground, the appeals court held that the FAA "does not preempt California's prohibition of class action waivers contained in contracts of adhesion in large-scale small-stakes consumer cases."

Dunn v. Global Trust Management, 2024 WL 4379966 (11th Cir. 2024).

The decision involves a dispute about an arbitration provision that delegates the "gateway" question of arbitrability to the arbitrator, rather than to the judge, and chooses tribal law as the governing law for decisions. The district court denied a motion to compel, but the Eleventh Circuit reversed, disagreeing, among other things, with the lower court's conclusion that the agreement's delegation provision was unenforceable and that the agreement's choice of tribal law rendered the agreement unconscionable. The case involved consumer loan agreements; when the lender sought to collect, the consumers sued in federal court alleging violations of the Federal Debt Collection Practices Act and that the loan agreements were unenforceable because they charged interest rates that exceed interest caps under Florida law. The Eleventh Circuit found that the parties had agreed to delegate all questions pertaining to the enforceability of their arbitration agreements to an arbitrator, and held that tribal law could be read in conjunction with the Federal Arbitration Act.

Fees

Wallrich v. Samsung Electronics America, Inc., 106 F.4th 609 (7th Cir. 2024).

Hoeg v. Samsung Electronics America, Inc., 2024 WL 3593896 (7th Cir. 2024).

This pair of cases deals with the situation in which the "weaker" party to the agreement—e.g., the consumer, the debtor, and so forth—seeks arbitration, and does so bundled together with hundreds or even thousands of other claimants, invoking agreements that require the opposing party to pay up-front fees that could cost thousands of dollars. When the opposing party refuses to pay the fees, the consumer then seeks to compel arbitration; in both cases, the Seventh Circuit denied the consumer's motion to compel arbitration.

In *Wallrich,* consumers filed 50,000 individual arbitration claims against Samsung for improper use of biometric data. Samsung refused to pay its share of arbitration filing fees (which amounted to about $4 million), and the American Arbitration Association's procedural rules allowed it to terminate the arbitration on that basis. In *Hoeg*, consumers brought the same substantive claims against Samsung, and Samsung again declined to pay its arbitration fees. However, the American Arbitration Association contemplated that the consumers could mediate

their claims, and allowed the consumers to refile their arbitration demands if mediation failed. The court did not decide if this factual distinction changed the analysis, suggesting that it made the district court's order compelling arbitration premature, but concluding that the order to compel was improper under each scenario. Like in *Wallrich,* this decision highlighted the court's reluctance to compel Samsung to arbitrate and pay the AAA's administrative fees.

APPENDIX

Thirteenth Comprehensive Edition Errata

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

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

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

Thirteenth Compact Edition Errata

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