2017 Update

to

Civil Procedure

A Context and Practice Casebook

Gerald F. Hess

Theresa M. Beiner

Scott R. Bauries

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

Introduction

The purpose of the 2017 Update is to summarize significant developments in civil procedure from the beginning of 2015 through June 2017. The Update focuses on changes to the Federal Rules of Civil Procedure and relevant opinions of the United States Supreme Court. Where appropriate, this Update indicates places new material could be added to the text.

Chapter 2. Personal Jurisdiction

Add to page 67 after Exercise 2-11

Note on *Bristol-Myers Squibb Co. v. Superior Court* and "arising out of or relating to" the defendant's contact with the forum

In *Bristol-Myers Squibb Co. v. Superior Court*, -- U.S. – (June 19, 2017), the Supreme Court of the United States discussed what it means for a claim to "arise out of or relate" to the defendant's activities in the state in the context of a "mass action," an action in which a large number of plaintiffs sue without using a class action. A group of five hundred plus plaintiffs, some of whom lived in California but several hundred of whom lived in other states, sued Bristol-Myers Squibb in California state court alleging a variety of tort claims related to using the drug Plavix. Bristol-Myers Squibb challenged the state court's jurisdiction, arguing that the court did not have jurisdiction over the nonresident plaintiffs' claims because they did not arise out of or relate to the company's activities in the state. The Supreme Court of California ruled that the state court did have jurisdiction over the case, using a "sliding scale approach" to specific jurisdiction, whereby "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." Slip op. at 3 (quoting 1 Cal. 5th 783, 806 (2016)). According to the California Supreme Court, this standard was met because the claims of the California plaintiffs were similar to those of the out-of-state plaintiffs.

The Supreme Court disagreed with this approach to specific jurisdiction, reasoning that such a "sliding scale" approach "resembles a loose and spurious form of general jurisdiction." Slip op. at 7. Specific jurisdiction, instead, requires a link between the state and the nonresidents' claims. Here, no such link existed. The Court emphasized that personal jurisdiction implicates federalism and sovereignty concerns as well as fairness to the defendant. As the Court explained, "What is needed – and what is missing here – is a connection between the forum and the specific claim at issue." Slip op. at 8. The Court distinguished *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), a defamation case in which a nonresident

plaintiff sued in the courts of New Hampshire based on an article published there as well as throughout the United States. The Court argued that in *Keeton*, the Court reasoned that "'[f]alse statements of fact harm both the subject of the falsehood and the readers of the statement,'" which distinguished the case from Bristol-Myers Squibb, in which there was no harm committed in California or to California residents based on the nonresidents' claims. Slip op. at 9 (quoting *Keeton*, 465 U.S. at 776). The Court reserved judgment on whether the Fifth Amendment imposes a similar restriction on the exercise of federal court jurisdiction. Slip op. at 12.

Justice Sotomayor, as is becoming her habit in personal jurisdiction cases, dissented, arguing that Bristol-Myers Squibb's advertising and distribution of the drug involved in the lawsuit was nationwide and consistent across the United States. Slip op. at 2 (Sotomayor, J., dissenting). The claims of the California plaintiffs and nonresidents plaintiffs therefore were "materially identical." *Id.* at 3. Disagreeing with the majority's emphasis on federalism, Justice Sotomayor instead emphasized "fair play and substantial justice," considerations coming out of *International Shoe*. Justice Sotomayor argued that this case makes it difficult for plaintiffs to bring one lawsuit involving the same claims when they are from multiple states. This is often a more efficient form of litigation for cases involving small claims. What values are served by breaking up this litigation, forcing groups of plaintiffs to sue in different states when the cases involve the same fact pattern and similar, if not identical, claims against the same defendant?

Add at page 76 after *Daimler AG v. Bauman*

Exercise 2-12(a): *Daimler* Applied – BNSF Railway Co. v. Tyrrell

The Supreme Court of the United States recently had the opportunity to apply *Daimler* to a United States-based corporation. As you read *BNSF Railway Co. v. Tyrrell*, answer the following questions.

1. What is Montana's long arm statute? Do BNSF's activities in Montana fall within the statute?
2. Why is this not a case of specific jurisdiction?
3. How did the Montana Supreme Court try to distinguish *Daimler*? Why was it not successful in doing so?
4. Where does this case leave corporate consent to jurisdiction? Is this still a viable option for a state wishing to assert jurisdiction over out of state corporations that do business in that state?
5. Justice Sotomayor dissents in part in the case. Why does she disagree with the majority?

BNSF Railway Co. v. Tyrrell

__ U.S. __ (May 30, 2017)

Ginsburg, J.

The two cases we decide today arise under the Federal Employers' Liability Act (FELA), 35 Stat. 65, as amended, 45 U.S.C. § 51 et seq., which makes railroads liable in money damages to their employees for on-the-job injuries. Both suits were pursued in Montana state courts although the injured workers did not reside in Montana, nor were they injured there. The defendant railroad, BNSF Railway Company (BNSF), although "doing business" in Montana when the litigation commenced, was not incorporated in Montana, nor did it maintain its principal place of business in that State.

* * *

I

In March 2011, respondent Robert Nelson, a North Dakota resident, brought a FELA suit against BNSF in a Montana state court to recover damages for knee injuries Nelson allegedly sustained while working for BNSF as a fuel-truck driver. In May 2014, respondent Kelli Tyrrell, appointed in South Dakota as the administrator of her husband Brent Tyrrell's estate, similarly sued BNSF under FELA in a Montana state court. Brent Tyrrell, his widow alleged, had developed a fatal kidney cancer from his exposure to carcinogenic chemicals while working for BNSF. Neither plaintiff alleged injuries arising from or related to work performed in Montana; indeed, neither Nelson nor Brent Tyrrell appears ever to have worked for BNSF in Montana.

BNSF is incorporated in Delaware and has its principal place of business in Texas. It operates railroad lines in 28 States. BNSF has 2,061 miles of railroad track in Montana (about 6% of its total track mileage of 32,500), employs some 2,100 workers there (less than 5% of its total work force of 43,000), generates less than 10% of its total revenue in the State, and maintains only one of its 24 automotive facilities in Montana (4%). Contending that it is not "at home" in Montana, as required for the exercise of general personal jurisdiction under *Daimler AG v. Bauman*, 571 U.S. ——, ——, 134 S. Ct. 746, 754 (2014) (internal quotation marks omitted), BNSF moved to dismiss both suits for lack of personal jurisdiction. Its motion was granted in Nelson's case and denied in Tyrrell's.

After consolidating the two cases, the Montana Supreme Court held that Montana courts could exercise general personal jurisdiction over BNSF. Section 56 [of the FELA], the court determined, authorizes state courts to exercise personal jurisdiction over railroads "doing business" in the State. In addition, the court

observed, Montana law provides for the exercise of general jurisdiction over "[a]ll persons found within" the State. 383 Mont. 417, 427, 373 P.3d, at 8 (2016) (quoting Mont. Rule Civ. Proc. 4(b)(1) (2015)). In view of the railroad's many employees and miles of track in Montana, the court concluded, BNSF is both "doing business" and "found within" the State, such that both FELA and Montana law authorized the exercise of personal jurisdiction. 383 Mont. at 426, 428, 373 P.3d, at 7–8 (internal quotation marks omitted). The due process limits articulated in *Daimler*, the court added, did not control, because *Daimler* did not involve a FELA claim or a railroad defendant.

* * *

We granted certiorari to resolve whether § 56 [of the FELA] authorizes state courts to exercise personal jurisdiction over railroads doing business in their States but not incorporated or headquartered there, and whether the Montana courts' exercise of personal jurisdiction in these cases comports with due process. [The Court concluded that §56 of the FELA did not provide authority for the assertion of personal jurisdiction over the railroad, and therefore could not form a basis for the Montana courts' exercise of jurisdiction in these cases.]

* * *

III

Because FELA does not authorize state courts to exercise personal jurisdiction over a railroad solely on the ground that the railroad does some business in their States, the Montana courts' assertion of personal jurisdiction over BNSF here must rest on Mont. Rule Civ. Proc. 4(b)(1), the State's provision for the exercise of personal jurisdiction over "persons found" in Montana. BNSF does not contest that it is "found within" Montana as the State's courts comprehend that rule. We therefore inquire whether the Montana courts' exercise of personal jurisdiction under Montana law comports with the Due Process Clause of the Fourteenth Amendment.

In *International Shoe*, this Court explained that a state court may exercise personal jurisdiction over an out-of-state defendant who has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " 326 U.S. at 316. Elaborating on this guide, we have distinguished between specific or case-linked jurisdiction and general or all-purpose jurisdiction. *See, e.g., Daimler*, 571 U.S. at ——, 134 S. Ct. at 754; *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, nn. 8, 9 (1984). Because neither Nelson nor Tyrrell alleges any injury from

work in or related to Montana, only the propriety of general jurisdiction is at issue here.

Goodyear and *Daimler* clarified that "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Daimler*, 571 U.S. at ——, 134 S. Ct. at 754 (quoting *Goodyear*, 564 U.S. at 919). The "paradigm" forums in which a corporate defendant is "at home," we explained, are the corporation's place of incorporation and its principal place of business. *Daimler*, 571 U.S. at ——, 134 S. Ct. at 760; *Goodyear*, 564 U.S. at 924. The exercise of general jurisdiction is not limited to these forums; in an "exceptional case," a corporate defendant's operations in another forum "may be so substantial and of such a nature as to render the corporation at home in that State." *Daimler*, 571 U.S. at ——, n. 19, 134 S. Ct. at 761, n. 19. We suggested that *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), exemplified such a case. *Daimler*, 571 U.S. at ——, n. 19, 134 S. Ct. at 761, n. 19. In *Perkins*, war had forced the defendant corporation's owner to temporarily relocate the enterprise from the Philippines to Ohio. 342 U.S. at 447–448. Because Ohio then became "the center of the corporation's wartime activities," *Daimler*, 571 U.S. at ——, n. 8, 134 S. Ct. at 756, n. 8, suit was proper there, *Perkins*, 342 U.S. at 448.

The Montana Supreme Court distinguished *Daimler* on the ground that we did not there confront "a FELA claim or a railroad defendant." 383 Mont. at 424, 373 P.3d at 6. The Fourteenth Amendment due process constraint described in *Daimler*, however, applies to all state-court assertions of general jurisdiction over nonresident defendants; the constraint does not vary with the type of claim asserted or business enterprise sued.

BNSF, we repeat, is not incorporated in Montana and does not maintain its principal place of business there. Nor is BNSF so heavily engaged in activity in Montana "as to render [it] essentially at home" in that State. *See Daimler*, 571 U.S. at ——, 134 S. Ct. at 761 (internal quotation marks omitted). As earlier noted, BNSF has over 2,000 miles of railroad track and more than 2,000 employees in Montana. But, as we observed in *Daimler*, "the general jurisdiction inquiry does not focus solely on the magnitude of the defendant's in-state contacts." *Id.* at ——, n. 20, 134 S. Ct. at 762, n. 20 (internal quotation marks and alterations omitted). Rather, the inquiry "calls for an appraisal of a corporation's activities in their entirety"; "[a] corporation that operates in many places can scarcely be deemed at home in all of them." *Id.* In short, the business BNSF does in Montana is sufficient to subject the railroad to specific personal jurisdiction in that State on claims related to the business it does in Montana. But in-state business, we clarified in *Daimler* and *Goodyear*, does not suffice to permit the assertion of general

jurisdiction over claims like Nelson's and Tyrrell's that are unrelated to any activity occurring in Montana.

IV

Nelson and Tyrrell present a further argument—that BNSF has consented to personal jurisdiction in Montana. The Montana Supreme Court did not address this contention, so we do not reach it.

For the reasons stated, the judgment of the Montana Supreme Court is reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Sotomayor, J., concurring in part and dissenting in part.

. . . I continue to disagree with the path the Court struck in *Daimler AG v. Bauman*, 571 U.S. ——, 134 S. Ct. 746 (2014), which limits general jurisdiction over a corporate defendant only to those States where it is "'essentially at home,'" *id.* at ——, 134 S. Ct. at 761. And even if the Court insists on adhering to that standard, I dissent from its decision to apply it here in the first instance rather than remanding to the Montana Supreme Court for it to conduct what should be a fact-intensive analysis under the proper legal framework. Accordingly, I join Parts I and II of the Court's opinion, but dissent from Part III and the judgment.

The Court would do well to adhere more faithfully to the direction from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), which instructed that general jurisdiction is proper when a corporation's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Id.* at 318. Under *International Shoe*, in other words, courts were to ask whether the benefits a defendant attained in the forum State warranted the burdens associated with general personal jurisdiction. *See id.* at 317–318. The majority itself acknowledges that *International Shoe* should govern, describing the question as whether a defendant's affiliations with a State are sufficiently "'continuous and systematic'" to warrant the exercise of general jurisdiction there. Ante, at ——. If only its analysis today reflected that directive. Instead, the majority opinion goes on to reaffirm the restrictive "at home" test set out in *Daimler*—a test that, as I have explained, has no home in our precedents and creates serious inequities. *See* 571 U.S. at —— – ——, 134 S. Ct. at 767–773 (Sotomayor, J., concurring in judgment).

The majority's approach grants a jurisdictional windfall to large multistate or multinational corporations that operate across many jurisdictions. Under its

reasoning, it is virtually inconceivable that such corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation. Foreign businesses with principal places of business outside the United States may never be subject to general jurisdiction in this country even though they have continuous and systematic contacts within the United States. *See id*. at ——— – ———, 134 S. Ct. at 759–760. What was once a holistic, nuanced contacts analysis backed by considerations of fairness and reasonableness has now effectively been replaced by the rote identification of a corporation's principal place of business or place of incorporation. The result? It is individual plaintiffs, harmed by the actions of a farflung foreign corporation, who will bear the brunt of the majority's approach and be forced to sue in distant jurisdictions with which they have no contacts or connection.

* * *

I respectfully concur in part and dissent in part.

Chapter 3. Notice and Opportunity to Be Heard

Rule 4 was amended in 2015 and 2016. The time limit for service of the summons and a copy of the complaint (Rule 4(m)) was reduced from 120 to 90 days after the complaint is filed. The time limit does not apply to service in a foreign country. Note that the 90 day time limit also applies to relation back of amendments under Rule 15(c), which references Rule 4(m). Finally, after the abrogation of Rule 84 and the list of official forms, the forms related to waiver of service under Rule 4(d) are now included directly in Rule 4.

Water Splash v Menon, -- U.S. --, 2017 WL 2216933 (2017) (international service of process)

Water Splash sued its employee, Menon, in state court in Texas, asserting claims for unfair competition, conversion, and tortious interference with business relations. Menon resided in Canada. After obtaining permission from the Texas court, Water Splash served process on Menon by mail. After Menon did not answer or appear, the Texas court issued a default judgment for Water Splash. Menon moved for relief from judgment on the grounds that the Hague Service Convention did not allow service of process by mail.

The Court held that the Hague Service Convention allows service of process by mail if two condition are met: (1) the receiving country does not object to service by mail and (2) service by mail is authorized by otherwise applicable law (Texas law in this instance).

Chapter 4. Subject Matter Jurisdiction

Add the following to page 26, after the second full paragraph on that page.

Like situations in which a court lacks personal jurisdiction, a court need not give full faith and credit to the judgment of a court that did not have subject matter jurisdiction to render the judgment. The Supreme Court of the United States recently addressed the full faith credit given to another state's decision in the context of a same-sex couple adoption in *V.L. v. E.L.*, -- U.S. --, 136 S. Ct. 1017 (March 7, 2016)(per curiam). Two women were in a relationship raising three children together. One of the women gave birth to the children. A Georgia state court granted the adoption of the non-birth mother while recognizing the birth mother's continued parental rights. The couple separated while living in Alabama, and the non-birth mother sued in Alabama state court for custody and visitation rights. The Alabama court refused to give full faith and credit to the Georgia court's adoption decision, holding that the Georgia court did not have subject matter jurisdiction to grant an adoption while still recognizing the other parent's parental rights. The Supreme Court disagreed, reasoning that the Georgia code explicitly gave the state's superior courts jurisdiction over adoption matters. Noting that there is a distinction between the subject matter jurisdiction of the courts and the underlying merits of the case, the Court reasoned that if the particular element of Georgia's adoption law found lacking by the Alabama court was considered jurisdictional, all the elements necessary to adopt would become jurisdictional. As the Court explained, "[t]his result would comport neither with Georgia law nor with common sense." 136 S.Ct. at 1021. Thus, it is important to make sure any challenge to subject matter jurisdiction actually is based on the power of the court – not the merits of the underlying cause of action.

Add the following before Exercise 4-6 on page 140.

Note on *Americold Realty Trust v. Conagra Foods, Inc.*

In *Americold Realty Trust v. Conagra Foods, Inc.*, -- U.S. --, 136 S. Ct. 1012 (March 7, 2016), the Supreme Court of the United States considered for purposes of diversity jurisdiction the citizenship of a real estate investment trust formed under Maryland law. The entity involved was not incorporated, but instead was an "'unincorporated business trust or association' in which property is held and managed 'for the benefit and profit of any person who may become a shareholder'" under Maryland law. *Id*. at 1016 (quoting Md. Corp. & Assn. Code Ann. §§ 8-101(c), 9-102 (2014)). The Court reasoned that the shareholders of such an entity are in the same position as partners in a limited partnership for purposes of diversity. Thus, courts should consider the citizenship of the shareholders for purposes of determining whether the requirements of diversity jurisdiction are met. In doing so,

the Court rejected treating the citizenship of the entity, though it is called a "trust" under state law, like it treats the citizenship of a trustee who sues on behalf of a trust. When a trustee sues on behalf of a trust, only the trustee's citizenship is considered for purposes of diversity – not the citizenship of the beneficiaries of the trust or those who contributed to the trust. The Court distinguished situations in which the entity itself sued from those in which the trustee sued on behalf of a trust. Noting that many entities are called "trusts" that are not set up as traditional trusts, the Court reasoned that where the entity itself sues, its shareholder's citizenship is relevant for diversity. The Court also rejected treating the entity like a corporation, because Congress was explicit in the diversity statute with respect to the citizenship of corporations. There is no explicit statutory language for entities such as this.

Chapter 5. Venue and Forum Non Conveniens

On page 192, Section 4, after "Section 1400 concerns venue in patent and copyright cases," add the following:

In *TC Heartland LLC v. Kraft Foods Group Brands LLC*, -- U.S. --, 2017 WL 2216934 (May 22, 2017), the Supreme Court of the United States made clear that the amendments to 28 U.S.C. § 1391 that extend the residence of corporations for venue purposes to places in which a court can exercise personal jurisdiction over a corporation does not modify the patent venue statute, 28 U.S.C. § 1400(b). The patent venue statute lays venue "in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b).). Unlike Section 1391, a domestic corporation defendant "resides" only in its state of incorporation for purposes of venue in cases involving patent infringement.

Chapter 7. Pleading

Note on Rule 84 and the Forms

In December 2015, the Federal Rules of Civil Procedure were amended to delete Rule 84, which had provided that the Forms following the Rules would suffice to illustrate the Rules' requirements. Most relevant here, there had been a great deal of tension between Form 11 (formally Form 9), the basic civil complaint form, and the *Twombly-Iqbal* line of decisions. Form 11 (which Rule 84 had endorsed) seemed to require only basic factual allegations to ground a claim, such as the time and place of the alleged injury, and the Form clearly allowed circumstances of the mind, such as negligence, to be alleged "conclusorily." Of course, both *Twombly* and

Iqbal eschew pleading a state of mind by simply using the adverbial form of that state of mind (e.g., "maliciously"), but the complaint in Form 11, a basic negligence complaint, contained no factual grounding for negligence other than the word "negligently."

This tension caused some to argue that the *Twombly* and *Iqbal* decisions were lawless—judicial amendments of Rule 84 and Form 11 that failed to comply with the Rules Enabling Act and its strict notice-and-comment procedures. In 2015, the Rules Committee, the Court, and Congress remedied this inconsistency simply by deleting Rule 84 and abrogating the Forms.

Chapter 8. Aggregating Claims and Parties

Class Actions

Tyson Foods v Bouaphakeo, 136 S.Ct. 1036, 577 U.S. __ (2016), involved both a "collective action" under the Fair Labor Standards Act (the "FLSA") and a traditional Rule 23 class action. The FLSA has its own class action procedures distinct from the procedures outlined in Rule 23, but both require some identity between the claims of the class members (typicality and commonality in Rule 23(a)). As Justice Kennedy states in the majority opinion, "For purposes of this case then, if certification of respondents' class action under the Federal Rules was proper, certification of the collective action was proper as well." *Id.* at 1045. In reading *Wal-Mart v. Dukes*, we learned that the Court now applies a stringent test of commonality to assess whether a class can form, and that the Court is particularly skeptical where parties and their counsel seek to extrapolate harms from a few selected members to the class as a whole.

Nevertheless, in *Tyson Foods*, the Court retroactively approved the certification of a class challenging non-payment of wages for "donning and doffing" (i.e., putting on and taking off) job-required safety attire. Important to our understanding of the limitations of *Wal-Mart*, the Court allowed the class to form in part based on a "representative claims" theory, whereby the time spent donning and doffing the required clothing was determined based on a sample of workers, whose times were averaged and then applied class-wide based on their job classifications. In other words, at first glance, it appears that *Tyson Foods* allowed exactly what *Wal-Mart* prohibited.

However, the strictly "mathematical" nature of the extrapolation is likely what made the difference between *Tyson Foods* and *Wal-Mart*. The *Wal-Mart* case involved the extrapolation of discriminatory behavior and decision making from a relatively (given the size of the class) small number of reported instances in a relatively (again, given the size of the class) small number of Wal Mart and Sam's

Club stores to the entire company. In *Tyson Foods*, all that was extrapolated was the average time workers spent putting on a taking off protective clothing—the compensability of that time was stipulated. In any event, after *Tyson Foods*, it is clear that, even under *Wal-Mart*, plaintiffs can succeed at certifying class actions based on representative claims evidence if they choose carefully what they extrapolate.

Chapter 9. Discovery

Several changes were made to the Federal Rules of Civil Procedure discovery rules shortly after this book was published. What follows are additions relevant to the December 1, 2015 changes.

Replace the second paragraph of section 3(a) on page 417 with the following:

Rule 26(b)(1) sets out the general scope of discovery in civil cases. Read Rule 26(b)(1). The rule provides for the discovery of nonprivileged information "that is relevant to any party's claim or defense." This rule was revised in 2015 to include language indicating that the discovery be "proportional to the needs of the case." It then provides a list of considerations in making this determination, including "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs it likely benefit." The advisory committee notes to the 2015 amendments explain that the proportionality addition to Rule 26(b)(1) was intended to "restore" these factors "to their original place in defining the scope of discovery." Advisory Committee notes to 2105 amendments. The notes also indicate that the proportionality additions were in part a response to e-discovery, which has increased the cost of discovery. The advisory committee notes contemplate the dynamic nature of e-discovery, explaining that "[c]ourts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available." The advisory committee also explained that the proportionality change is not intended to allow a party opposing discovery to refuse requests by making blanket objections that the discovery requested is not "proportional."

The amended rule eliminates any reference to the phrase that information is discoverable if it is "reasonably calculated to lead to the discovery of admissible evidence." The advisory committee notes indicate that this phrase had been incorrectly used to define the scope of discovery and could swallow other limitations. The new rule leaves intact the provision that the information sought need not be

admissible in evidence in court.[1] Issues of admissibility are covered by the Federal Rules of Evidence, which are the subject of evidence courses. Federal Rule of Evidence 401 states that evidence is relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401.

On page 418, in the Relevance textbox, the definition of "relevant" should be eliminated.

Add to page 462, before section e on Physical and Mental Examinations.

Note on Implications of 2015 Amendments

The 2015 amendments to the discovery rules contemplate that e-discovery has added increased cost and complexity to the discovery process. In addition to the added proportionality language of Rule 26(b)(1) noted earlier in this chapter, Rule 26(c)(1)(B), governing protective orders, states that the court may issue a protective order "specifying . . . the allocation of expenses." This contemplates that the court may shift the costs of discovery to the requesting party. However, the advisory committee notes state that this change does not "imply that cost-shifting should become a common practice." Instead, the default is still that the responding party bears the costs. In addition to this change, Rule 34 was also amended in several respects that partly respond to problems with e-discovery. The Rule allows a requesting party to specify the form in which they wish to receive electronically stored information, but permits the responding parties to object to the requested form of producing electronically stored information and provide another form instead. Fed. R. Civ. Pro. 34(b)(2)(D).

Rule 34 also was amended to eliminate boilerplate objections to document requests, with the addition of language that objections must "state with specificity the grounds for objecting" as well as "whether any responsive materials are being withheld." Fed. R. Civ. Pro. 34(b)(2)(B) & (C). The advisory committee notes explain that the amendments were "aimed at reducing the potential to impose unreasonable burdens by objections to request to produce." In addition, the rule now states that "production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response." Fed. R. Civ. Pro. 26(b)(2)(B). Rule 26 and 34 were amended to permit the serving of Rule 34 requests prior to the Rule 26(f) discovery conference, although responses to such an early request must be provided within thirty days after the first Rule 26(f) conference. Fed. R. Civ. Pro. 26(d)(2), 34(b)(2)(A).

[1] The 2015 amendment to Rule 26(b)(1) eliminated language permitting the court to order, for good cause, discovery of matter "relevant to the subject matter involved in the action." The advisory committee notes indicate that it was eliminated in part because it was rarely used.

Add to page 470, after the second full paragraph on that page.

Rule 37 was amended in 2015 to add a uniform standard for failure to preserve electronically stored information. The advisory committee notes to the new rule explain that there were "significantly different standards for imposing sanctions" in situations where a party failed to preserve electronically stored information. Rule 37(e) provides that if electronically stored information is lost that a party failed to preserve "in the anticipation or conduct of litigation" and it cannot be restored or replaced, the court "may order measures no greater than necessary to cure the prejudice" resulting from the loss. Alternatively, if the court finds that the party acted "with the intent to deprive another party of the information's use in litigation," it may "presume the lost information was unfavorable to the party" who failed to preserve it, "instruct the jury that it may or must presume the information was unfavorable to the party," or "dismiss the action or enter a default judgment." Fed. R. Civ. Pro. 37(e)(2). The advisory committee notes to this rule explain that the rule contemplates "reasonable" steps to preserve this evidence; "it does not call for perfection." It is also noteworthy that Rule 26(f)(3)(C), concerning discovery plans, includes a requirement that the parties include their views and proposals on the preservation of electronically stored information. Thus, the parties likely will address preservation issues early in the litigation.

Chapter 11. Trial and Post-Trial

To page 584 add a "Note on *Baston* Challenges."

In *Foster v Chatman*, 136 S.Ct. 1737 (2016), the Court *Batson* in a *habeas* petition in a capital murder case. Foster was convicted of capital murder and sentenced to death in a Georgia Court. During jury selection, the State used peremptory challenges to strike all four black prospective jurors. Foster argued at trial and at a post-conviction state habeas proceeding that the State's peremptory challenges were racially motivated, in violation of *Batson v. Kentucky*. The trial court rejected Foster's argument and the Georgia Supreme Court affirmed.

The Supreme Court reiterated the three step *Batson* process: (1) the defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; (2) if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror; and (3) the trial court must determine whether the defendant has shown purposeful discrimination. The parties agreed that the first two steps were met. After closely examining the extensive racially-neutral justifications the State articulated for striking two of the jurors, the Court held that the evidence showed the State was motivated in substantial part by race when exercising its peremptory challenges.

Add to the end of Note 3 on page 593:

The Court recently decided two cases involving Federal Rule of Evidence 606 and juror misconduct

In *Warger v Shauers*, -- U.S. --, 135 S. Ct. 521 (2014), Warger sued Shauers in federal court for negligence arising out of a motor vehicle accident. After the jury returned a verdict for Shauers, one of the jurors contacted Warger's counsel, claiming that the jury foreperson had revealed during jury deliberations that her daughter had been at fault in a fatal motor vehicle accident, and that a lawsuit would have ruined her daughter's life. Based on an affidavit from the juror, Warger moved for a new trial, arguing that the juror had deliberately lied during *voir dire*. The District Court denied Warger's motion, holding that Rule 606(b) barred the affidavit. The Eighth Circuit affirmed. The Supreme Court affirmed, holding that Rule 606(b)(1), which bars evidence "about any statement made during the jury's deliberations" barred the affidavit, and that the exception for "extraneous prejudicial information" did not apply.

In *Pena-Rodriguez v Colorado*, -- U.S. --, 137 S. Ct. 855 (2017), the Court found a Constitutional exception to Federal Rule of Evidence 606. After a Colorado jury convicted Peña–Rodriguez of harassment and unlawful sexual contact, two jurors told defense counsel that, during deliberations, a juror had expressed anti-Hispanic bias toward the defendant and the defendant's alibi witness. Defense counsel obtained affidavits from the two jurors describing a number of biased statements made by the other juror. The trial court acknowledged the juror's bias but denied the defendant's motion for a new trial on the ground that Colorado Rule of Evidence 606(b) barred the affidavits as to statements made during jury deliberations. The Court reversed, holding that when a juror makes a clear statement indicating that the juror relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment permits the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Add to the end of subsection (6) on page 599:

The Court applied Rule 60(b)(6) in *Buck v Davis*, 137 S.Ct. 759 (2017). Buck was convicted of capital murder in a Texas court. Under Texas law, the jury was permitted to impose a death sentence only if it found that Buck was likely to commit acts of violence in the future. Buck's attorney called a psychologist whose report stated that Buck was statistically more likely to act violently because he is black. Buck contended that his attorney's introduction of this evidence violated his Sixth Amendment right to the effective assistance of counsel.

Buck sought federal habeas relief, which was denied. Following two Supreme Court cases involving ineffective assistance of counsel, Buck sought to reopen his habeas case under Federal Rule of Civil Procedure 60(b)(6) in part based on the introduction of expert testimony linking Buck's race to violence. The District Court denied Buck's 60(b) motion on the grounds that any mention of race during sentencing was *de minimis*, and, therefore, Buck had failed to demonstrate extraordinary circumstances.

The Court held that the district court's denial of Buck's Rule 60(b)(6) motion was an abuse of discretion. To determine whether "extraordinary circumstances" were present, the trial court can consider "the risk of injustice to the parties" and "the risk of undermining the public's confidence in the judicial process." The Court found that there is a reasonable probability that Buck was sentenced to death in part because of his race, which supports 60(b)(6) relief.

Chapter 12. Appeal

Teva Pharmaceuticals USA v Sandoz, -- U.S. --, 135 S. Ct. 831 (2015) (standard of review)

In a patent infringement lawsuit, the trial court considered conflicting expert testimony and found that the patent at issue was valid. The Federal Circuit applied a *de novo* standard of review and found that the patent was invalid.

The Court decided how Federal Rule of Civil Procedure 52(a) applied in patent cases, holding that the appellate court should apply the "clearly erroneous" standard of review to the trial court's subsidiary fact finding and the *de novo* standard to the trial court's ultimate construction of the patent claim.

McLane Co. v EEOC, 137 S.Ct. 1159 (2017) (standard of review)

The Equal Employment Opportunity Commission (EEOC) brought action against McLane, seeking to enforce a subpoena that it issued in connection with its investigation of an employee's gender discrimination claim under Title VII. The district court issued an order granting in part and denying in part EEOC's enforcement request. The Ninth Circuit, applying a *de novo* standard of review, reversed in part.

The Court held that the district court's decision was to be reviewed for abuse of discretion, rather than *de novo*.

Chapter 13. Preclusion

Add to page 648 following *Lisboa v. City of Cleveland Heights*.

Note on *Whole Woman's Health v. Hellerstedt*

In *Whole Woman's Health v. Hellerstedt*, -- U.S. --, 136 S. Ct. 2292 (June 27, 2016) (Breyer, J.), the Supreme Court of the United States addressed what constitutes the same claim for purposes of preclusion in the context of repeated challenges to restrictions on abortion providers imposed by the State of Texas. The providers challenged two aspects of the law – a requirement that abortion providers have admitting privileges at a hospital located no more than thirty miles from the facility and a requirement that the facility satisfy the minimum requirements for an ambulatory surgical center. The first lawsuit only involved the admitting privileges requirement. The Court permitted abortion providers to bring a second lawsuit seeking declaratory and injunctive relief from the Texas statutes and their implementing rules even though many of the same providers had lost in the Fifth Circuit in an earlier lawsuit that involved a facial challenge to the admitting privileges law before it was implemented. In the second lawsuit, the plaintiffs brought as-applied challenges to the admitting privileges and surgical center requirements.

In examining the admitting privileges requirement, the Court explained that claim preclusion only applies to the "very same claim." Relying on the Restatement (Second) of Judgments, which "notes that development of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim," the Court permitted a second suit on this aspect of the law. 136 S. Ct. at 2305. The Court also highlighted Restatement language stating that in cases in which "'important human values – such as the lawfulness of continuing personal disability or restraint – are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.'" 136 S. Ct. at 2305 (quoting Restatement (Second) of Judgments § 24, comment f (1980)). The Court further explained, "[h]ere, petitioners bring an as-applied challenge to the requirement *after its enforcement* – and after a large number of clinics have in fact closed. The postenforcement consequences of [the Texas law] were unknowable before it went into effect. . . . And the Court of Appeals in this case properly decided that new evidence presented by petitioner had given rise to a new claim and that petitioners' as-applied challenges are not precluded." *Id.* at 2306 (emphasis in the original). The Court also held that the challenge to the surgical center requirement that was not challenged in the first lawsuit was likewise not precluded, reasoning that challenges to different portions of a statute can give rise to differing claims for preclusion purposes and that there were good reasons for the plaintiffs to wait to challenge the surgical center requirement.

Add to page 658, at the end of the section on "A Valid Final Judgment."

The Supreme Court of the United States recently had the opportunity to opine on the issue preclusive effect of administrative judgments. In *B &B Hardware, Inc. v. Hargis Industries, Inc.*, -- U.S. --, 135 S. Ct. 1293 (March 24, 2015), the Court held that a federal court should could give issue preclusive effect to a decision by the Trademark Trial and Appeal Board ("TTAB") denying the registration of a trademark because it would cause confusion with an existing mark. The two actions, one in federal court, and one before the TTAB, were pending at the same time. The TTAB action came to a final decision prior to the federal district court ruling on the issue of likelihood of confusion. Justice Alito, for the majority, was clear that administrative decisions can have preclusive effect when an agency is acting in a judicial capacity, as provided for by Congress, so long as there is no evident indication of a statutory purpose to the contrary. *Id*. at 1303. Although the Eighth Circuit refused to give the TTAB's decision issue preclusive effect, reasoning that it used different factors to assess the likelihood of confusion than the TTAB, the Court opined that "'[m]inor variations in the application of what is in essence the same legal standard do not defeat preclusion.'" *Id*. at 1306 (quoting *Smith v. Bayer Corp.*, 564 U.S. --, 131 S. Ct. 2368, 2378 n.9).

Chapter 14. Alternatives to Litigation

DirecTV v. Imburgia, 577 U.S. --, 136 S. Ct. 463 (2015), involved a thorny question of contract interpretation and preemption under the FAA. In *Imburgia*, the company used a customer agreement containing a typical (for the industry) arbitration agreement, except that the agreement contained a severability clause stating that if "the law of your state" makes the arbitration agreement unenforceable, then the arbitration portion of the agreement is severed, and the remainder of the contract continues to be enforceable. At the time of the agreement's drafting, *Concepcion* had not yet been decided, and California law made arbitration agreements containing class action waivers unenforceable. In *Concepcion*, the Supreme Court decided that California's hostility to these sorts of agreements was preempted by the FAA, which requires equal treatment between arbitration agreements and all other types of contracts.

The *Imburgia* case arose in California state court after *Conception* had been decided, and the case there came down to a contract interpretation question: what does "the law of your state" mean? Does it mean the law as it reads on the books (which would include California's hostility to class action waivers, along with many other aspects of arbitration practice)? Or does it mean the valid and enforceable law of your state (which would not include these arbitration-hostile provisions of California law, which have been preempted by the FAA)? The California courts

held that the former was the intent of the drafters, and the Supreme Court reversed.

The Court held that a contract's language could not be interpreted by a state's courts to abrogate the preemption of federal law. Although the Court's opinion was couched in language suggesting that the contract "unambiguously" referred to "valid law," it is clear from the opinion that the Court was troubled by the prospect of a state's courts being able to use contract language to make an end run around the Court's arbitration preemption jurisprudence.

Decided near the end of the current Supreme Court term, *Kindred Nursing Centers Limited Partnership v. Clark*, Case No. 16-32 (Decided May 15, 2017), further solidified the Court's arbitration-friendly jurisprudence. The appeal involved a challenge to a Kentucky power-of-attorney court decision that required a clear statement of authority within the power-of-attorney itself to allow the power to be used on behalf of the entrustor to enter into an arbitration agreement (or, ostensibly, any agreement waiving important constitutional rights, as arbitration agreements do with the right to trial by jury). To seven justices, this decision presented a fairly clear violation of the Court's "no discrimination against arbitration" principle, and the Court accordingly rejected the respondent's argument based on it.

Interestingly, the Court majority did not credit the position of the Kentucky courts that allowing exercisers of powers of attorney to enter into arbitration agreements absent clear authorization would allow them to waive other constitutional rights, as well, such as religious and speech rights. The Court saw no evidence that any such thing had actually happened in Kentucky. The Court also identified examples of other ways in which exercisers of powers of attorney had been allowed to waive jury trial rights on behalf of their entrustors, such as by entering into settlement agreements. That the Kentucky courts had seen no problem with these uses of powers of attorney in the past suggested to the Court that the concern over important constitutional rights motivated the Kentucky jurisprudence less than mere hostility to arbitration. Ultimately, along with *DirecTV*, this case illustrates that recent Supreme Court majorities are skeptical of state courts trying to find creative ways around the Court's pro-arbitration decisions.