COMPLEX LITIGATION

Third Edition

2020 UPDATE MEMORANDUM

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There have been a few recent developments of significance since the publication of the Third Edition in 2019. The authors describe below these updates as of June 1, 2020.

Chapter 1, **Territorial (Personal) Jurisdiction**, Section 2A, at page 15, please add new Note 4:

Bristol-Myers Squibb did not address personal jurisdiction in the context of a federal class action. There were no federal law claims in the case. There was no alleged class. The action was not filed in federal court. So, in *Mussat v IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020), a federal class action case, the Seventh Circuit held that there was no need to assess whether each class member's claim satisfied the requirements set out in the *BMS* decision. So long as the named class representative's claims were sufficiently related to the defendant's conduct in the forum, the class action might proceed.

Chapter 1, **Territorial (Personal) Jurisdiction**, Section 2A, at page 15, please add new Note 5:

Two cases are currently pending before the U. S. Supreme Court on the subject of the due process limits of personal jurisdiction. Those cases are *Ford Motor Co. v. Montana 8th Judicial District Court*, 443 P.3d 407 (Mont. 2019), *cert. granted*, 140 S. Ct. 917 (2020), and *Bandemer* v. *Ford Motor Co.*, 931 N.W.2d 744 (Minn. 2019), *cert. granted*, 140 S. Ct. 916 (2020). The cases are briefed and oral argument was expected in the October 2019 term. But the Court reset oral argument for the October 2020 term. The issue in the cases is whether, for the exercise of specific personal jurisdiction to satisfy due process, the plaintiff's *injuries have to have been caused* by the defendant's specific contacts with the forum state.

The Montana case involves a car accident in that state. But the relevant vehicle was not designed, manufactured, or first sold by Ford in Montana. Ford argued that there was no sufficient link between Ford's Montana contacts and the relevant products liability claims to justify the exercise of specific personal jurisdiction.

The Montana Supreme Court rejected Ford's argument. First, said the Court, the Montana long-arm statute allows the exercise of jurisdiction "as to any claim for relief arising from . . . the commission of any act resulting in the accrual of a tort action in Montana." Next, said the Court, Ford delivers its vehicles "into the stream of commerce with the expectation that Montana consumers will purchase them." 443 P.3d at 414. And Ford does something more by advertising in Montana, registering to do business in Montana, having employees in Montana, etc. The plaintiff's use of a Ford Explorer in Montana "is tied to Ford's activities of selling, maintaining, and repairing vehicles in

Montana." *Id.* at 416. So "Ford could have reasonably foreseen the Explorer – a product specifically built to travel – being used in Montana." *Id.* Thus, said the Court, Ford would have to present "a compelling case that jurisdiction would be unreasonable," *Id.* at 418, and failed to do so.

The Minnesota case is similar in nature. There was a car accident in the state. The airbag on the passenger side allegedly failed to deploy and the passenger was injured. Ford argued that there could not be specific personal jurisdiction over it in Minnesota on the passenger's products liability claims because the car involved in the accident was not designed, manufactured, or originally sold in the state.

The majority of the court (over a vigorous dissent) ruled that because Ford sold cars, advertised, employed workers, and had real property in Minnesota, Ford's contacts with the state created enough of a relationship between the plaintiff's claims and Ford to justify personal jurisdiction.

The Supreme Court's ultimate ruling in these cases may finally bring clarity to the stream of commerce debate discussed in the *Asahi* and *McIntyre* decisions.

Chapter 2, **Subject Matter Jurisdiction**, Section B3, at page 86, please add to the end of the second full paragraph:

The Supreme Court has emphasized that the general removal statutes permit removal only by the "defendant or defendants" joined as such in the case. Accordingly, a third party, joined as an additional party on a counterclaim under Rule 13(h), may not remove a case from state to federal court. *Home Depot U.S.A., Inc v. Jackson*, 139 S. Ct. 1743, 1747-51 (2019).

Chapter 4, **Choice of Law Issues in Complex Litigation**, Section D3, at page 267, please add to the end of Note 2:

The Supreme Court emphasized the need for a unique federal interest to justify federal common law in *Rodriguez v FDIC*, 140 S. Ct. 713, 717-18 (2020). The issue was which of competing entities would receive a large federal corporate tax refund. The Court rejected the longstanding use of federal common law by lower federal courts in this situation. Though the federal government has an interest in how it receives tax revenue and in the delivery of a refund to a corporate group, there is no federal interest in how that refund is allocated among group members. The matter is governed by state law.

Chapter 6, **Aggregate Litigation**, Section F2, at page 450, please add to the end of Note 4:

In *Bristol-Myers Squibb Co. v. Superior Court,* 137 S. Ct 1773 (2017), the Supreme Court required that an individual plaintiff's claim be related to the defendant's contact with the forum to support specific personal jurisdiction. We discussed *Bristol-Myers* at pages 14-15. *Bristol-Myers* did not address personal jurisdiction in the context of a federal class action. There were no federal law claims in the case. There was no alleged class. The action was not filed in federal court. So, in *Mussat v IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020), a federal class action case, the Seventh Circuit held that there was no need to assess whether each class member's claim satisfied the requirements set out in the *BMS* decision. So long as the named class representative's claims were sufficiently related to the defendant's conduct in the forum, the class action might proceed. Is that holding consistent with the Court's characterization of class members in *Phillips Petroleum*?

Note also the related but different procedural issue addressed by the D.C. Circuit in *Molock v. Whole Foods Market Group,* 952 F.3d 293 (D.C. Cir. 2020). In *Molock*, a class of grocery store employees brought state law wage loss claims against Whole Foods. Whole Foods then moved to dismiss the claims of nonresident class members, citing *Bristol-Myers*. A majority of the circuit panel ruled that the defense motion was premature in that the class in the case had not yet been certified. Thus, said the panel majority, the class members were not actually parties yet, and thus there were no class member claims to dismiss under Federal Rule 12(b)(2). The dissenting panel member, however, would have applied *Bristol-Myers* to the case, and would have held "that class claims unrelated to Whole Foods' contacts with the District of Columbia cannot proceed."

Chapter 6, **Aggregate Litigation**, Section C2, at page 363, please add:

There is a need in Rule 23(b)(3) class litigation for the proposed class to be able to show an injury through common proof. Suppose, then, an antitrust case alleging a proposed class consisting of direct purchasers of a drug. The allegation is that the direct purchaser plaintiffs have overpaid for the drug. The further allegation is that the overpayments result from a patent litigation settlement in which the defendant drug manufacturers agreed to postpone the entry of a generic (and therefore presumably cheaper) form of the drug into the marketplace. In the class certification context, the proposed class maintains that they can show through common proof that direct purchasers on average overpaid for the branded drug in the absence of the generic substitute.

Suppose the defendants' defense in part, however, is that some of the direct purchasers never actually paid more for the drug than they would have paid even absent the

challenged settlement agreement. The defendants maintain that this is so because several of the plaintiffs often engaged in individual price negotiations for the drug, and because one of the defendants employed a preemptive price-lowering strategy during the postponement period.

These were the facts the Third Circuit encountered in the class certification context in *In re Lamictal Direct Purchaser Antitrust Litigation*, 957 F.3d 184 (3d Cir. 2020). In that case, the Third Circuit ruled that the district court abused its discretion in certifying the class based on proposed evidence of average pricing. To get class certification, said the Third Circuit, the class does not have to show that they actually suffered antitrust injury at the certification stage, but they do have to show preliminarily that antitrust injury would be "capable of common proof at trial by a preponderance of the evidence." 957 F. 3d at 191. The presence of individual negotiations and a preemptive pricing strategy meant that proof of average pricing was not an acceptable method of common proof, and the Third Circuit remanded class certification to the district court for reconsideration.

Chapter 6, **Aggregate Litigation**, Section D2, at pages 408-09, please add:

The Supreme Court ruled in *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019) that Rule 23(f) is mandatory and not subject to equitable tolling. The Rule allows a party to seek permission for review from the relevant court of appeals "within 14 days after [an order granting or denying class certification] is entered [period]."

Chapter 6, **Aggregate Litigation**, Section E5, at pages 434-35, please add:

In *Frank v. Gaos*, 139 S. Ct. 1041 (2019), the Supreme Court granted certiorari to review whether a settlement that gave money to class counsel and cy pres recipients but no money to class members was "fair, reasonable, and adequate." *Id.* at 1043. But the Court wound up dealing with a standing question. The Court said that a court cannot approve a class settlement without jurisdiction over the dispute, and that there can be no jurisdiction if no named plaintiff has standing. Then the Court determined that there had been no analysis in the case of the question whether any named plaintiff had actually alleged violations of the Stored Communications Act that were "sufficiently concrete and particularized to support standing." *Id.* at 1046.The Court remanded the case for further proceedings.

Chapter 6, **Aggregate Litigation**, Section G, at pages 455-56, and Chapter 9, **Streamlining Complex Cases**, Section E2, at pages 660-65, please add:

In *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), the Supreme Court ruled that an ambiguous agreement cannot serve as the basis for a ruling that parties have agreed to a class wide arbitration process. Class wide arbitration is a slower, less efficient process

than individual arbitration, said the Court. So consent to class wide arbitration should not be assumed in the face of ambiguous as opposed to clear agreement by the parties. *Id.* at 1415-16.

Chapter 8, **Discovery**, Section B5, at pages 521-22, please add:

After three years of study and comments, the Committee on civil rules has recommended for adoption, effective on December 1, 2020, the following changes.

In general, Rule 30(b)(6), which is directed at deposition notices and subpoenas, places a duty on all parties “to confer about matters for examination” in the action. Concerns were expressed and addressed in the new amendments about “overlong or ambiguously worded lists of matters for examination and inadequately prepared witnesses.” All parties and relevant nonparties will be required “to confer” before or promptly after notice or subpoena is served on matters for examination.

The purpose of the amendments is to “facilitate collaborative efforts to achieve the proportionality goals of the 2015 amendments to Rule 1 and 26(b)(1). Candid exchange is urged under the new amendments regarding purposes of discovery and “process” issues of timing and location, etc. Consistent with all the rules, conferral must be undertaken in good faith, but “agreement” by the parties is not required.

This duty to confer does not apply to a deposition under Rule 31(a)(4), as directed to an organization. Nor, do the amendments add a requirement for a numerical limitation on those issues which will be examined.

Chapter 10, **Preclusion**, Section A, at pages 701-03, please add:

In *Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.*, 140 S. Ct. 1589 (2020), the Supreme Court clarified how the doctrine of claim preclusion might apply to a defendant's defenses. The Second Circuit had ruled in this trademark infringement case that where a previous action between the same parties was adjudicated on the merits, and the defendant could have asserted a defense in the prior action, that defense could be barred in the second case. But the Supreme Court ruled that the two actions have to be the same. They have to share a common nucleus of operative fact. In the present circumstances, said the Court, the relevant two suits were actually "grounded on different conduct, involving different marks, occurring at different times." *Id.* at 1595, 1596. So whether the relevant defense was asserted in the first case or not, the decision in the first case did not bar use of the defense in the later case.

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