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We are delighted to announce that Professor Robin J. Effron of Brooklyn Law School is joining us as a co-author of this book. We are happy to be working with her and appreciate her joining us.

This Memorandum Update is provided for professors and students using the third edition of the book. Page numbers in this Memorandum are to that edition of the casebook.

The only new principal case is *Ford Motor Company v. Montana Eighth Judicial District,* 141 S. Ct. 1017 (March 25, 2021), which, obviously, is of major importance in personal jurisdiction.

Permission is hereby granted to distribute copies of this Update Memorandum free of charge to students using the book in their class.

Thank you for adopting our casebook. As always, we welcome any feedback, questions, or suggestions you may have about the book.

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Federal Rules of Civil Procedure

There are no amendments to the Federal Rules scheduled to go into effect in 2021. There are proposed amendments, likely to go into effect in 2022, to Rule 7.1 and Rule 12. The proposed change to Rule 7.1 requires disclosure, in diversity of citizenship cases, of the citizenship of every individual or entity whose citizenship is attributed to that party in a pending case. It also requires a disclosure statement from a nongovernmental corporation that seeks to intervene into a case.

The proposed amendment to Rule 12 would extend to 60 days the time for response when an action is brought against a federal officer or employee in her individual capacity.

Chapter 1: Territorial (Personal) Jurisdiction

A. Introduction

2. Specific Jurisdiction/Stream of Commerce

At page 15, before Section 3. General Jurisdiction, please add:

Ford Motor Company v. Montana Eighth Judicial District Court
Supreme Court of the United States
141 S. Ct. 1017 (2021)

JUSTICE KAGAN delivered the opinion of the Court, [joined by CHIEF JUSTICE ROBERTS, and BY JUSTICES BREYER, SOTOMAYOR, and KAVANAUGH.].

In each of these two cases, a state court held that it had jurisdiction over Ford Motor Company in a products liability suit stemming from a car accident. The accident happened in the State where suit was brought. The victim was one of the State's residents. And Ford did substantial business in the State—among other things, advertising, selling, and servicing the model of vehicle the suit claims is defective. Still, Ford contends that jurisdiction is improper because the particular car involved in the crash was not first sold in the forum State, nor was it designed or manufactured there. We reject that argument. When a company like Ford serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit.

I

Ford is a global auto company. It is incorporated in Delaware and headquartered in Michigan. But its business is everywhere. Ford markets, sells, and services its products across the United States and overseas. In this country alone, the company annually distributes over 2.5 million new cars, trucks, and SUVs to over 3,200 licensed dealerships. See App. 70, 100. Ford also encourages a resale market for its products: Almost all its dealerships buy and sell used Fords, as well as selling new ones. To enhance its brand and increase its sales, Ford engages in wide-ranging promotional activities, including television, print, online, and direct-mail advertisements. No matter where you live, you've seen them: "Have you driven a Ford lately?" or "Built Ford Tough." Ford also ensures that consumers can keep their vehicles running long past the date of sale. The company provides original parts to auto supply stores and repair shops across the country. (Goes another slogan: "Keep your Ford a Ford.") And Ford's own network of dealers offers an array of maintenance and repair services, thus fostering an ongoing relationship between Ford and its customers.

Accidents involving two of Ford's vehicles—a 1996 Explorer and a 1994 Crown Victoria—are at the heart of the suits before us. One case comes from Montana. Markkaya Gullett was driving her Explorer near her home in the State when the tread separated from a rear tire. The vehicle spun out, rolled into a ditch, and came to rest upside down. Gullett died at the scene of the crash. The representative of her estate sued Ford in Montana state court, bringing claims for a design defect, failure to warn, and negligence. The second case comes from Minnesota. Adam Bandemer was a passenger in his friend's Crown Victoria, traveling on a rural road in the State to a favorite ice-fishing spot. When his friend rear-ended a snowplow, this car too landed in a ditch.

Bandemer's air bag failed to deploy, and he suffered serious brain damage. He sued Ford in Minnesota state court, asserting products-liability, negligence, and breach-of-warranty claims.

Ford moved to dismiss the two suits for lack of personal jurisdiction, on basically identical grounds. According to Ford, the state court (whether in Montana or Minnesota) had jurisdiction only if the company's conduct in the State had given rise to the plaintiff 's claims. And that causal link existed, Ford continued, only if the company had designed, manufactured, or—most likely—sold in the State the particular vehicle involved in the accident. In neither suit could the plaintiff make that showing. Ford had designed the Explorer and Crown Victoria in Michigan, and it had manufactured the cars in (respectively) Kentucky and Canada. Still more, the company had originally sold the cars at issue outside the forum States—the Explorer in Washington, the Crown Victoria in North Dakota. Only later resales and relocations by consumers had brought the vehicles to Montana and Minnesota. That meant, in Ford's view, that the courts of those States could not decide the suits.

Both the Montana and the Minnesota Supreme Courts (affirming lower court decisions) rejected Ford's argument. . . .

We granted certiorari to consider if Ford is subject to jurisdiction in these cases. . . . We hold that it is.

II

A

The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant. . . .

A state court may exercise general jurisdiction only when a defendant is "essentially at home" in the State. General jurisdiction, as its name implies, extends to "any and all claims" brought against a defendant. Those claims need not relate to the forum State or the defendant's activity there; they may concern events and conduct anywhere in the world. But that breadth imposes a correlative limit: Only a select "set of affiliations with a forum" will expose a defendant to such sweeping jurisdiction. *Daimler AG v. Bauman*, 571 U. S. 117, 137 (2014). In what we have called the "paradigm" case, an individual is subject to general jurisdiction in her place of domicile. Id. And the "equivalent" forums for a corporation are its place of incorporation and principal place of business. Id. So general jurisdiction over Ford (as all parties agree) attaches in Delaware and Michigan—not in Montana and Minnesota.

Specific jurisdiction is different: It covers defendants less intimately connected with a State, but only as to a narrower class of claims. The contacts needed for this kind of jurisdiction often go by the name "purposeful availment." *Burger King Corp. v. Rudzewicz*, 471 U. S. 462, 475 (1985). The defendant, we have said, must take "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U. S. 235, 253(1958). The contacts must be the defendant's own choice and not "random, isolated, or fortuitous." *Keeton v. Hustler Magazine, Inc*., 465 U. S. 770, 774 (1984). They must show that the

defendant deliberately "reached out beyond" its home—by, for example, "exploi[ting] a market" in the forum State or entering a contractual relationship centered there. *Walden v.Fiore*, 571 U. S. 277, 285 (2014) Yet even then—because the defendant is not "at home"—the forum State may exercise jurisdiction in only certain cases. The plaintiff 's claims, we have often stated, "must arise out of or relate to the defendant's contacts" with the forum. [citing *Bristol-Myers Squibb Co. V. Superior Court of Cal., San Francisco Cty*, 582 U. S., at ___ (2017).] Or put just a bit differently, "there must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.'" *Bristol-Myers*, 582 U. S. at ___−___.

These rules derive from and reflect two sets of values— treating defendants fairly and protecting "interstate federalism." *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286,293 (1980). . . .

B

Ford contends that our jurisdictional rules prevent Montana's and Minnesota's courts from deciding these two suits. In making that argument, Ford does not contest that it does substantial business in Montana and Minnesota — that it actively seeks to serve the market for automobiles --- and related products in those States. Or to put that concession in more doctrinal terms, Ford agrees that it has "purposefully avail[ed] itself of the privilege of conducting activities" in both places. Ford's claim is instead that those activities do not sufficiently connect to the suits, even though the resident-plaintiffs allege that Ford cars malfunctioned in the forum States. In Ford's view, the needed link must be causal in nature: Jurisdiction attaches "only if the defendant's forum conduct gave rise to the plaintiff 's claims." And that rule reduces, Ford thinks, to locating specific jurisdiction in the State where Ford sold the car in question, or else the States where Ford designed and manufactured the vehicle. On that view, the place of accident and injury is immaterial. So (Ford says) Montana's and Minnesota's courts have no power over these cases.

But Ford's causation-only approach finds no support in this Court's requirement of a "connection" between a plaintiff 's suit and a defendant's activities. *Bristol-Myers*, 582 U. S., at___. That rule indeed serves to narrow the class of claims over which a state court may exercise specific jurisdiction. But not quite so far as Ford wants. None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do. As just noted, our most common formulation of the rule demands that the suit "arise out of or relate to the defendant's contacts with the forum." Id. at __. The first half of that standard asks about causation; but the back half, after the "or," contemplates that some relationships will support jurisdiction without a causal showing. That does not mean anything goes. In the sphere of specific jurisdiction, the phrase "relate to" incorporates real limits, as it must to adequately protect defendants foreign to a forum. But again, we have never framed the specific jurisdiction inquiry as always requiring proof of causation—i.e., proof that the plaintiff 's claim came about because of the defendant's in-state conduct. See also *Bristol-Myers*, 582 U. S., at ___, (asking whether there is "an affiliation between the forum and the underlying controversy," without demanding that the inquiry focus on cause). So the case is not over even if, as Ford argues, a causal test would put jurisdiction in only the States of first sale, manufacture, and design. A different State's courts may yet have jurisdiction, because of another "activity [or] occurrence" involving the defendant

that takes place in the State.

. . .

To see why Ford is subject to jurisdiction in these cases . . . , consider first the business that the company regularly conducts in Montana and Minnesota. Small wonder that Ford has here conceded "purposeful availment" of the two States' markets. By every means imaginable—among them, billboards, TV and radio spots, print ads, and direct mail— Ford urges Montanans and Minnesotans to buy its vehicles, including (at all relevant times) Explorers and Crown Victorias. Ford cars—again including those two models—are available for sale, whether new or used, throughout the States, at 36 dealerships in Montana and 84 in Minnesota. And apart from sales, Ford works hard to foster ongoing connections to its cars' owners. The company's dealers in Montana and Minnesota (as elsewhere) regularly maintain and repair Ford cars, including those whose warranties have long since expired. And the company distributes replacement parts both to its own dealers and to independent auto shops in the two States. Those activities, too, make Ford money. And by making it easier to own a Ford, they encourage Montanans and Minnesotans to become lifelong Ford drivers.

Now turn to how all this Montana- and Minnesota-based conduct relates to the claims in these cases, brought by state residents in Montana's and Minnesota's courts. Each plaintiff's suit, of course, arises from a car accident in one of those States. In each complaint, the resident-plaintiff alleges that a defective Ford vehicle—an Explorer in one, a Crown Victoria in the other—caused the crash and resulting harm. And as just described, Ford had advertised, sold, and serviced those two car models in both States for many years. (Contrast a case, which we do not address, in which Ford marketed the models in only a different State or region.) In other words, Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States. So there is a strong "relationship among the defendant, the forum, and the litigation"—the "essential foundation" of specific jurisdiction. . . .

The only complication here, pressed by Ford, is that the company sold the specific cars involved in these crashes outside the forum States, with consumers later selling them to the States' residents. Because that is so, Ford argues, the plaintiffs' claims "would be precisely the same if Ford had never done anything in Montana and Minnesota." . . ..

But in any event, that assumption is far from clear. For the owners of these cars might never have bought them, and so these suits might never have arisen, except for Ford's contacts with their home States. Those contacts might turn any resident of Montana or Minnesota into a Ford owner—even when he buys his car from out of state. He may make that purchase because he saw ads for the car in local media. And he may take into account a raft of Ford's in-state activities designed to make driving a Ford convenient there: that Ford dealers stand ready to service the car; that other auto shops have ample supplies of Ford parts; and that Ford fosters an active resale market for its old models. . . .

For related reasons, allowing jurisdiction in these cases treats Ford fairly, as this Court's precedents explain. In conducting so much business in Montana and Minnesota, Ford "enjoys the benefits and protection of [their] laws"— the enforcement of contracts, the defense of property,

the resulting formation of effective markets. . . .

Finally, principles of "interstate federalism" support jurisdiction over these suits in Montana and Minnesota. Those States have significant interests at stake— "providing [their] residents with a convenient forum for redressing injuries inflicted by out-of-state actors," as well as enforcing their own safety regulations. . . .

C

Ford mainly relies for its rule on two of our recent decisions—*Bristol-Myers* and *Walden*. But those precedents stand for nothing like the principle Ford derives from them. . . .

We found jurisdiction improper in *Bristol-Myers* because the forum State, and the defendant's activities there, lacked any connection to the plaintiffs' claims. See 582 U. S., at ___ ("What is needed—and what is missing here—is a connection between the forum and the specific claims at issue"). The plaintiffs, the Court explained, were not residents of California. They had not been prescribed Plavix in California. They had not ingested Plavix in California. And they had not sustained their injuries in California. . . .

In *Walden*, only the plaintiffs had any contacts with the State of Nevada; the defendant-officer had never taken any act to "form[ ] a contact" of his own. 571 U. S., at 290. The officer had "never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada." . . .

JUSTICE ALITO, concurring in the judgment.

. . .

Ford has long had a heavy presence in Minnesota and Montana. It spends billions on national advertising. It has many franchises in both States. Ford dealers in Minnesota and Montana sell and service Ford vehicles, and Ford ships replacement parts to both States. In entertaining these suits, Minnesota and Montana courts have not reached out and grabbed suits in which they "have little legitimate interest." *Bristol Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, 582 U. S. ___, ___ (2017). *Their* residents, while riding in vehicles purchased within their borders, were killed or injured in accidents on *their* roads. . . .

. . .

[We] merely follow what we said in *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286,297–298 (1980), which was essentially this: If a car manufacturer makes substantial efforts to sell vehicles in States A and B (and other States), and a defect in a vehicle first sold in State A causes injuries in an accident in State B, the manufacturer can be sued in State B. That rule decides these cases. . . .

. . .

My only quibble is with the new gloss that the Court puts on our case law. Several of our opinions have said that a plaintiff 's claims "'must arise out of or relate to the defendant's contacts'" with the forum. The Court parses this phrase "as though we were dealing with language of a statute," *Reiter v. Sonotone Corp.*, 442 U. S. 330, 341 (1979), and because this phrase is cast in the disjunctive, the Court recognizes a new category of cases in which personal jurisdiction is permitted: those in which the claims do not "arise out of " (i.e., are not caused by) the defendant's contacts but nevertheless sufficiently "relate to" those contacts in some undefined way.

This innovation is unnecessary and, in my view, unwise. To say that the Constitution does not require the kind of proof of causation that Ford would demand—what the majority describes as a "strict causal relationship"— is not to say that no causal link of any kind is needed. And here, there is a sufficient link. . . .

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring in the judgment.

. . .

Until now, many lower courts have proceeded on the premise that specific jurisdiction requires two things. First, the defendant must "purposefully avail" itself of the chance to do business in a State. Second, the plaintiff 's suit must "arise out of or relate to" the defendant's in-state activities. Typically, courts have read this second phrase as a unit requiring at least a but-for causal link between the defendant's local activities and the plaintiff 's injuries. . . .

Now, though, the Court pivots away from this understanding. Focusing on the phrase "arise out of or relate to" that so often appears in our cases, the majority asks us to parse those words "as though we were dealing with language of a statute." *Reiter v. Sonotone Corp.*, 442 U. S. 330,341 (1979). In particular, the majority zeros in on the disjunctive conjunction "or," and proceeds to build its entire opinion around that linguistic feature. . . .

Where this leaves us is far from clear. For a case to "relate to" the defendant's forum contacts, the majority says, it is enough if an "affiliation" or "relationship" or "connection" exists between them. But what does this assortment of nouns mean? Loosed from any causation standard, we are left to guess. The majority promises that its new test "does not mean anything goes," but that hardly tells us what does. . . .

[But] the parties have not pointed to anything in the Constitution's original meaning or its history that might allow Ford to evade answering the plaintiffs' claims in Montana or Minnesota courts. No one seriously questions that the company, seeking to do business, entered those jurisdictions through the front door. And I cannot see why, when faced with the process server, it should be allowed to escape out the back. . . .

[JUSTICE BARRETT did not participate.]

Notes and Questions

1. There are a number of citations, footnotes, and other materials that have not been included in the above excerpt from the opinion. One of those is footnote 4 in the majority opinion which says that the Ford cases should be viewed differently from those where there are only "isolated or sporadic transactions," and which also says that the Court is not in the Ford cases considering internet transactions "which may raise doctrinal questions of their own."

2. Do you agree with the statement in Justice Alito's concurring opinion that the Court is only following what it already said in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980)?

3. The opinions mention several times that the plaintiffs in each of the Ford cases are residents of the respective forum states. Do you think that the Court would have reached the same conclusion if all of the facts relating to Ford were the same, and the facts relating to the accident locations were the same, but each of the plaintiffs was a non-resident of the respective forum states?

4. Is the majority opinion correct in saying that, for specific personal jurisdiction, the plaintiffs' claims need only "relate to" the defendant's contact with the forum state, and need not "arise out of" that contact in a but-for causal sense? By so concluding, is the majority blending aspects of the general jurisdiction "continuous and systematic contacts" test into the specific jurisdiction "minimum contacts" test? The authors of the concurring opinions seem to be concerned about the limits of such a blending.

5. To what extent do you think the Court was searching for a practical result, and bending personal jurisdiction doctrine to get to the result that seemed to make common sense?

6. Notice that the opinions do not address directly any issues relating to consent. Footnote 3 in Justice Gorsuch's concurrence comments that it is "unclear" today what remains of consent theory.

Chapter 2: Subject Matter Jurisdiction

B. The Two Major Types of Federal Subject Matter Jurisdiction

2. Diversity of Citizenship Jurisdiction

At page 82, before subsection a., please add:

Historically, diversity jurisdiction under § 1332(a)(1) accounted for between 20 and 25 percent of the federal civil docket. In 2001, only 19.5 percent of civil cases filed in federal court were based upon diversity jurisdiction. The percentage of diversity cases has increased in recent years, possibly because of Congress's refusal to increase the amount-in-controversy requirement for diversity jurisdiction. For fiscal year 2020, 470,581 civil cases were commenced in the federal district courts. Of these, 284,603 (60.4 percent) invoked diversity of citizenship jurisdiction. *See* uscourts.gov, Statistics, Table C-2. Both numbers are aberrational; the number of cases filed increased a stunning 58 percent from the previous year, which is attributable almost entirely to over 200,000 product liability cases in Florida concerning allegedly defective earplugs provided to military personnel. More typical are the numbers from 2019: 286,289 cases filed, of which 94,206 (32.9 percent) invoked diversity jurisdiction. These numbers are higher than the historical average.

3. The Defendant's Prerogative: Removal Jurisdiction

At page 88, before section C, please add:

Recent years have brought increased invocation of what has become known as "snap" removal of diversity cases. The instate defendant rule limitation on removal of diversity cases applies only if one of the defendants who has been joined *and served with process* is a citizen of the state in which the case is pending. Suppose that D-1 and D-2 have been named as co-defendants but have not yet been served with process. They learn about the case through the state court's online judicial portal and file notice of removal in federal court. Literally, the instate defendant rule does not apply. After all, D-2 is an instate defendant, but she was not *served* with process. Can D-1 effect removal in this situation? Three courts of appeals have concluded that the answer is yes. *Texas Brine Co. v. Am. Arbitration Ass'n*, 955 F.3d 482, 487 (5th Cir. 2020); *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 704–07 (2d Cir. 2019); *Encompass Ins. Co. v. Stone Mansion Restaurant Inc*., 902 F.3d 147, 153 (3d Cir. 2018). If the practice is to be ended, it seems likely that Congress will be required to act. *See generally* Arthur Hellman et al., *Neutralizing the Stratagem of "Snap Removal": A Proposed Amendment to the Judicial Code*, 9 THE FED. COURTS L. REV. 103 (2016) (discussing divergent judicial approaches to "snap" removal and proposing legislation to address them conflict).

D. Expansion of Jurisdiction Through Statutory Grants Based Upon Minimal Diversity

2. Interpleader

At page 109, before subsection 3, please add:

See Kristen DeWilde, Comment, *Catch Rule 22: When Interpleader Actions Violate Statutory and Constitutional Diversity Jurisdiction Requirements,* 168 U. PA. L. REV. 467, 487-504 (2020) (arguing that Article III requires diversity among the claimants, rather than between the stakeholder and the claimants, in interpleader cases in which the stakeholder does not claim to own the property).

Chapter 3: Coordination and Consolidation of Overlapping Litigation

C. Overlapping Litigation in Federal and State Courts

1. Anti-Suit Injunctions Issued by the Federal Court

At page 193, after the discussion of *Smith v. Bayer Corp.*, please add:

The Eighth Circuit in *In re: Bair Hugger Forced Air Warming Devices Product Liability Litigation,* 999 F.3d 534 (2021) addressed the third exception to the Anti-Injunction Act. A federal district court, sitting in Minnesota and presiding over a multidistrict litigation, had issued a permanent injunction against a plaintiff's parallel Texas state court action. The plaintiff and the defendant had previously agreed to dismiss with prejudice the similar claims the plaintiff had been pursuing against the defendant in the federal court MDL proceedings. The defendant then later argued that the Texas state court action was barred by claim preclusion, and asked the federal MDL court to prevent the state court action from continuing. The federal MDL court concluded that the Texas state court action was an attempt to "relitigate" the dismissed federal action, and issued an injunction under the third exception to the Anti-Injunction Act to bar the Texas state court action.

The Eighth Circuit reversed, citing *Bayer*. Employing a multi-step analysis, the court first said that the "relitigation exception applies when a claim in state court 'previously was presented to and decided by the federal court.'" 999 F.3d at 537. So, asked the Eighth Circuit, how do we know when those prerequisites are present? And whose law controls whether they are present – federal or state?

In answer to the latter question, the Eighth Circuit decided to apply the federal common law of claim preclusion, but concluded that the federal common law in a diversity case tells the federal court to borrow state choice of law rules.

So now, asked the Eighth Circuit, should the federal MDL court in Minnesota apply the state choice of law rules of Minnesota, where the federal court was sitting, or should the court apply the state choice of law rules of Texas, where the plaintiff claimed his injury occurred? Normally, said the Eighth Circuit, the MDL court in Minnesota in a diversity case would apply its own state's, i.e. Minnesota's, choice of law principles. But in *Bair Hugger*, a standing order in the MDL proceedings required would-be plaintiffs to file their claims directly in Minnesota for efficiency purposes, and also stated that if a plaintiff's complaint recited that it would otherwise have been filed in a different court, the MDL court would apply the choice of law principles of the different court in selecting substantive law. The relevant plaintiff had recited in his MDL federal complaint that he would have filed in the Southern District of Texas but for the existence of the standing order. Texas was the state in which the plaintiff was allegedly injured. Accordingly, said the Eighth Circuit, the federal MDL court in Minnesota was obligated to treat the case as if it were transferred from the Southern District of Texas.

So, what claim preclusion principles would the federal court in the Southern District of Texas apply? That court, said the Eighth Circuit, would look to Texas choice of law principles to decide the substantive law to apply. Those principles would in turn direct the federal court sitting in Texas to apply Texas substantive law on claim preclusion. *Id.* at 539.

Citing Texas substantive case law then, the Eighth Circuit ultimately concluded that Texas would not consider the stipulation in the MDL case to be sufficient to trigger claim preclusion. Despite the "dismissal with prejudice" language, the stipulation did not resolve the federal claims on the merits. *Id*. at 540. The stipulation ended the federal claims for reasons that did not intend to dispose of the ultimate merits of plaintiff's claims. Indeed, the plaintiff and the defendant had been litigating the case in Texas state court for two years before the defendant even raised the "relitigation" issue. Thus, an injunction to bar "relitigation" of the claims under the third exception to the Anti-Injunction Act was error.

D. Overlapping Litigation in American and Foreign Courts

2. Dismissal or Stay for *Forum Non Conveniens*

At page 228, before section E, please add:

Note on "Boomerang" Litigation

In some cases, an American court's dismissal under *forum non conveniens* does not spell defeat for the plaintiff. Plaintiffs sometimes sue successfully in the foreign tribunal, which may lead to "boomerang" litigation, which consists of three steps. First, a foreign plaintiff sues an American defendant in an American court concerning an event in the foreign country. The American court dismisses for *forum non conveniens*. Second, the plaintiff sues the American in the foreign court and wins a substantial judgment. The plaintiff is unable to enforce the judgment in the foreign country, however, because the American defendant lacks substantial assets there. Third, the plaintiff sues in the United States, seeking to enforce the foreign judgment where the American defendant has assets.

"Boomerang," then, refers to the fact that litigation that started in the U.S. ends up back in the U.S. This time, though, the case is not in American courts for litigation on the merits, but to enforce a foreign judgment. Suppose now the American defendant argues that the foreign judgment should not be enforced by the American court because the procedures in the foreign tribunal were not fair. In such a case, the same defendant who moved to dismiss under *forum non conveniens* by arguing that the foreign court would be adequate now claims that that court was inadequate. *See generally* Alexander F. Moss, Comment, *Bridging the Gap: Addressing the Doctrinal Disparity Between* Forum Non Conveniens *and Judgment Recognition Enforcement in Transnational Litigation,* 106 Geo. L.J. 209 (2017).

The issue of whether a foreign judgment is entitled to enforcement in an American court is beyond our scope. Suffice to say that the procedures followed in some cases litigated in foreign courts are so lacking in fundamental fairness as to preclude enforcement in this country. A well-known example is litigation against Chevron for alleged contamination of land in Ecuador. Plaintiffs won a judgment in that country of nearly $18,000,000,000. In 2018, the Permanent Court of Arbitration in The Hague concluded unanimously, however, that the Ecuadorean judgment was fraudulent and corrupt and "should not be recognized or enforced by the courts of other States." Among other things, according to its decision, the plaintiffs blackmailed an Ecuadorean judge and bribed experts. *See* Karen Nagarkatti and Gary McWilliams*, International tribunal rules in favor of Chevron in Ecuador Case*, REUTERS, Sept. 7, 2018, https://www.reuters.com/article/us-chevron-ecuador-idUSKCN1LN1WS. *See also* Patrick Radden Keefe, *Reversal of Fortune*, THE

NEW YORKER, Jan. 12, 2012, https://www.newyorker.com/magazine/2012/01/09/reversal-of-fortune-patrick-radden-keefe.

Chapter 6: Aggregate Litigation

C. The Class Action: Certification Under Rule 23(a) and Rule 23(b)

2. Rule 23(a): Prerequisites for All Class Actions

b. Implicit Requirement of a Class: Ascertainability and Manageability

At page 350, at the end of the first full paragraph of text (not counting Example #6), please add:
The First and Fourth Circuits agree with the Third Circuit in this regard. *In re Nexium Antitrust Litigation*, 777 F.3d 9, 19 (1st Cir. 2015); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358-359 (4th Cir. 2014).

At page 350, at the end of the second full paragraph of text (not counting Example #6), please add:
The Eleventh Circuit has joined this emerging majority. *Cherry v. Dometic Corp*., 986 F.3d 1296, 1303 (11th Cir. 2021) ("Our ascertainability precedents . . . do not mandate proof of administrative feasibility."). *See generally* Sasha Boutilier, Note, *Identifying Ascertainability: A Historical and Comparative Perspective,* 40 REV. LIT. 275 (2021).

c. The Four Express Requirements and the Need for Proof

At page 364, after Note 8, please add:

9. *Wal-Mart* established that Rule 23 requires evidentiary proof that the requirements Rule 23(a) and Rule 23(b) are satisfied. This requirement raised three issues with which lower courts have struggled. First, can the court assess evidence relevant to class certification even if that evidence will relate to the merits of the underlying dispute? We consider that question in the next subsection.

Second, the Court in *Wal-Mart* hinted that expert witness testimony considered on a class certification motion must be assessed for admissibility under the Federal Rule of Evidence, including *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 570 (1993).[1] Lower courts generally have treated this hint as a command, though there is some debate over whether a full *Daubert* or modified *Daubert* analysis is required at the certification stage. *Compare, e.g., American Honda Motor Co. v. Allen*, 600 F.3d 813, 815-816 (7th Cir. 2010)(pre-*Wal-Mart* decision holding that if an expert's opinion is "critical" to class certification, the court "must perform a full *Daubert* analysis") *with In re Zurn Pex Plumbing Prods. Liability Litigation*, 644 F.3d 604, 612-614 (8th Cir. 2011)(district court did not err in applying a "tailored" *Daubert* approach).

Third, outside the expert witness area, must the evidence considered at certification be vetted for admissibility under the Federal Rules of Evidence? In a case decided before *Wal-Mart*, the Fifth Circuit rejected the district court's reliance on internet printouts in granting class certification and held that rulings on certification must be based "on admissible evidence." *Unger v. Amedisys Inc.*, 401 F.3d 316, 325 (5th Cir. 2005). The Ninth Circuit reached the opposite conclusion in 2018 and held that it is error to reject "evidence that likely could have been presented in an admissible form at trial" merely because it was not in an admissible form at the certification stage. *Sali v. Corona Reg. Med. Ctr*., 909 F.3d 996, 1000 (9th Cir. 2018). Formal evidentiary

[1] 509 U.S. 579 (1993). *Daubert* set the standard for judging the reliability and relevance of expert testimony. Today, those standards are part of the analysis for admissibility of expert testimony under Federal Rule of Evidence 702.

objections, said the court, were relevant only to the weight that should be accorded the evidence in the certification motion.

In 2021, the Sixth Circuit sided with the Ninth Circuit in *In Lyngaas v. Ag*, 992 F.3d 412 (6th Cir. 2021). It emphasized that the nature of evidence required may shift through various stages of litigation. It upheld certification of a class based in part on summary report logs of faxes that had not been formally authenticated. Though such evidence would not be proper, for example, on summary judgment, a court dealing with class certification has greater evidentiary freedom. Because the plaintiff assured the district court that the summary logs could be authenticated for trial, they were properly considered in ruling on certification. Thus, at the certification stage one expects some evidentiary uncertainty.

Even with this emerging liberal view on non-expert evidence to be considered, we emphasize that class certification is addressed relatively early in the case. The requirement of *evidence* (not merely allegations) demonstrating that Rule 23 is satisfied and the likely requirement that expert testimony be qualified under *Daubert* clearly "front-load" the litigation, making the class certification motion more difficult and expensive.

3. Rule 23(b): The Types of Class Actions

c. Rule 23(b)(3): The "Damages" Class Action

At page 400, at the end of the second paragraph of text, please add:

See also Myriam Gilles & Gary Friedman, *The Issue Class Revolution*, 101 B.U. L. REV. 133 (2021)(suggesting that issue certification also be used to certify Rule 23(b)(2) classes to seek declaratory judgment concerning defendant's liability, with separate litigation to determine damages for individual class members).

At page 402, before the paragraph heading "Employment," please add:

On June 21, 2021, the Court decided *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System,* 141 S. Ct. 1951 (June 21, 2021). The Court made two principal points. First, defendants may rebut the presumption in *Basic* by showing, at the class certification stage, that the alleged misrepresentations were so generic that they could not have had an impact on the stock's price; this is true even though precisely the same evidence may be relevant to materiality, which is litigated in the merits phase of the litigation. Second, defendants bear the burden of persuasion, again at the certification stage, of proving by a preponderance of the evidence that the alleged misrepresentations did not affect the price of the company's stock. The decision is consistent with the trend discussed throughout these materials toward front-loading of litigation.

D. Issues in Class Litigation

3. Communicating with Class Members

At page 413, after note 6, please add:

The Eleventh Circuit held that the lawyer for a certified class does not owe a separate fiduciary duty to a representative of the class. Rather, the lawyer's duty is to the class itself. *Medical & Chiropractic Clinic, Inc. v. Oppenheim*, 981 F.3d 983, 990-93 (11th Cir. 2020).

6. Class Remedies

At page 424, footnote 27, please add the following at the end of the footnote:

In a *per curiam* decision, the Supreme Court remanded *Frank v. Gaos* to the court of appeals for determination of whether the class members had standing under Article III. 139 S. Ct. 1041, 1045-46 (2019).

At page 425, after the second line of text, please add:

When *cy pres* is used to distribute surplus funds after class members have been compensated, any compensatory goal of the law will have been satisfied. But what about the "*cy pres* only" class, in which class members receive no recovery and the entire common fund created by the litigation (less attorney's fees for the class lawyer) goes to a non-profit organization? (Moreover, the defendant is often given a voice in the decision-making of the non-profit organization.) In such cases, a compensatory goal is not satisfied (though the deterrent goal may be).

Many *cy pres* only cases involve violations of provisions, such as those of the Telephone Consumer Protection Act, which grant statutory damages for things like spam phone calls, unauthorized texts, and errors in credit reports. For such claims to invoke federal jurisdiction, the plaintiff must have "standing" under Article III of the Constitution, which requires that she suffer a concrete injury in fact. *See, e.g., Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016) (remanding for consideration of constitutional standing; this case is discussed at page 452 of the Casebook).

If the plaintiff lacks Article III standing, the dispute cannot constitute a "case" or "controversy" over which federal courts can exercise jurisdiction. Even if class members have standing, can a judgment or settlement that awards all relief to an organization (which clearly does not have standing because it suffered no harm) constitute a "case" or "controversy"? Professor Redish and others have argued that it does not. Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis,* 62 FLA. L. REV. 617, 634-638 (2010). On the other hand, Professor Bone has defended the practice. Robert G. Bone, *In Defense of the Cy-Pres-Only Class Action,* 24 LEWIS & CLARK L. REV. 571 (2020).

And even if class members have Article III standing, can a case that gives no remedy to class members be certified as a class action? Can a settlement on such terms be approved as fair and reasonable under Rule 23(e)? The Supreme Court has given no meaningful guidance in the area. Justice Thomas raised such issues in his dissent in *Frank v. Gaos,* discussed in footnote 27 on page 424. 139 S. Ct. at 1047 ("the lack of any benefit for the class rendered the settlement unfair and unreasonable under Rule 23(e).")(Thomas, J., dissenting).

TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (June 25, 2021), presented a similar issue. The plaintiff class alleged that a credit-reporting service violated the Fair Credit Reporting Act by including in their files a warning, based solely upon the consumers' names, that they were "potential match[es]" for a list of terrorists, drug traffickers, and others accused of serious felonies. The class consisted of 8,185 members, all of whom had this "potential match" notation in their files. However, only 1,853 of the members' files (with the offending notation) were provided to

third parties. The Court held that only these 1,853 class members had suffered the "concrete harm" required for standing under Article III. The 6,332 class members whose files (with the offending notation) were never provided to third parties lacked constitutional standing. Further, though all 8,185 members had received information from the credit-reporting service in an incorrect format, none of them had standing to pursue a claim based upon formatting. The information received was not incorrect in itself, and the fact that it was not formatted correctly, while possibly a violation of the statute, did not confer Article III standing. The case was decided wholly on Article III, and not Rule 23, grounds.

F. The Class Action: Jurisdiction and Related Issues

4. Statute of Limitations

At page 455, before section G, please add:

See generally Stephen B. Burbank & Tobias Barrington Wolfe, *Class Actions, Statutes of Limitations and Repose, and Federal Common Law,* 167 U. PA. L. REV. 1 (2018) (tolling under *American Pipe* is an instance of federal common law and not "equitable tolling").

Chapter 8: Discovery

Section B5, at pages 521- 22, add as a new sentence to the last paragraph in Chapter 8 on Discovery (2020 Update Memorandum).

Rule 30(b)(6) went into effect, without modification to the proposed amendments, at the end of 2020.

Section B5, at page 522, add as a new paragraph before Section B6 Electronic Discovery.

The world-wide pandemic of 2019 has increased the use of virtual, remote depositions. For a discussion of effectively making the most of virtual, remote depositions, *see* Mary E. Hershewe & Stephanie A Koltookian, *Tips and Traps for Making the Most of Remote Depositions*, AMERICAN BAR ASSOCIATION (ABA) (Nov. 5, 2020), https://www.americanbar.org/groups/litigation/committees/mass-torts/articles/2020/winter2021-tips-and-trips-for-making-the-most-of-remote-depositions/?q=&wt=json&start=0. The authors discuss issues relevant to the applicable local rules and regulations - Fed. R. Civ. P. 30(b)(4); they analyze strategically selecting a video platform with secured connections, the need to ensuring that witnesses can testify remotely, planning for the remote process and witness preparation for testimony.

Section B51, at 511-13, add the following note on page 513 before B51 Document Depositions.

For a discussion of the use of jurisdictional discovery (Fed. R. Civ. P. 26(b)(1)) by defendants, especially in mass tort litigation, early in the litigation to determine whether there is evidence to show that the plaintiff used the defendant's product and did so in a relevant jurisdiction subject to personal jurisdiction, *See* James M. Beck, *Jurisdictional Discovery for Defendants*, AMERICAN BAR ASSOCIATION (ABA) (Feb. 4, 2021), https://www.americanbar.org/groups/litigation/committees/mass-torts/articles/2021/spring2021-jurisdictional-discovery-for-defendants/.

Section B6, at page 563, before section C1.

Law review commentators are beginning to discuss the developing case law and the new rules associated with it. One article discusses how E-Discovery is changing the civil discovery process but also noting how they share common sense values with more traditional discovery, like prompt disclosure, professionalism, and limitations on vexatious and overbroad requests. There are calls for more explicit focus on Rule 26(a)(1), especially on efficiency and focused elimination of wasteful and privileged discovery requests. Encouragements are offered for early involvement in the case of IT professionals and greater reliance on Technology Assisted Review (TAR). *See* Matthewman, *Towards a New Paradigm for E- Discovery in Civil Litigation: A Judicial Perspective*, 71 FLA. L. REV. 1261 (2019).

In response to Magistrate Judge Matthewman's article, former Magistrate Judge Andrew Jay Peck agrees with the need for early use and involvement of IT professionals but argues that many lawyers already are doing this and that lawyers are also specializing in E -Discovery techniques and methodologies making the involvement of IT professionals superfluous. He urges TAR use but observes that there are now various issues facing its world-wide implementation. He reviews other questions within the realm of E- Discovery, including retention policies for more ephemeral documents like text messages, Slack messages, or Microsoft Teams messages. *See* Peck, *A View from The Bench and the Trench(es) in response to Judge Matthewman's New Paradigm for E Discovery: It's More Complicated*, 71 FLA.L. REV. 143 (2020). *But see* Hamilton, *Magistrate Judge Matthewman's New E- Discovery Paradigm and Solving the E -Discovery Paradox*, 71 FLA. L. REV. 150 (2020) (sharing a glowing endorsement of Judge Matthewman's new paradigm).

Section F1, at pages 612-618, add the following just before F2 Domestic Discovery.

For a discussion on how certain principles, such as attorney- client privilege and work product protection can be protected or challenged during international investigations and in pending cases in other countries *see* Francesca Fulchignoni*, Attorney Client-Privilege Challenges in International Investigations*, 47 LITIGATION (ABA) 9* (Jan. 6, 2021).

Chapter 10: Preclusion

A. Introduction

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. Regardless of whether the defense was asserted in the first case, the decision in the first case did not bar use of the defense in the latter case. For a more detailed analysis, *see* Richard Freer, *"Defense Preclusion": Exploring a Narrow Gap in Preclusion Law,* 40 REV. LITIG. 253 (2021).