# COMPLEX LITIGATION

**Third Edition**

**2022 UPDATE MEMORANDUM**

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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 two amendments to the Federal Rules scheduled to go into effect on December 1, 2022. The amendment 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 second set of changes regard amendments to the Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g).

The amendments may be viewed at:
https://www.supremecourt.gov/orders/courtorders/frcv22_b8dg.pdf

# Chapter 1: Territorial (Personal) Jurisdiction

## A. Introduction

## 2. Specific Jurisdiction/Stream of Commerce

At page 15, please add Note 4:

4. At the cutting edge of specific personal jurisdiction is the question whether such jurisdiction can be exercised on the basis of pre-litigation cease and desist communications between the plaintiff and the defendant in a patent infringement context. In *Apple, Inc. v. Zipit Wireless, Inc*., 30 F.4th 1368 (Fed. Cir. 2022), Apple in due course sued Zipit for a declaratory judgment that Apple was not infringing on Zipit patents. Venue was properly laid in the Northern District of California, where Apple has its headquarters. Personal jurisdiction was asserted on the basis of a series of letters, emails, phone calls, and a meeting, originally initiated by Zipit, on the subject of Apple's alleged infringement and a possible settlement. *Id.* at 1372.The district court dismissed the eventual litigation on the basis of "a bright-line rule that patent infringement notice letters and related communications can never form the basis for personal jurisdiction." *Id*. at 1368. But the Ninth Circuit reversed, saying that there is no such bright-line rule, and that all of the facts and circumstances should be considered in assessing fair play and substantial justice. Id. at 1378-79.

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. In this version of *Ford*, we have omitted some materials. One of the omissions is footnote 4 of the majority opinion, which says that *Ford* should be viewed differently from cases in which there are only "isolated or sporadic transactions." The Court also says that it is not considering internet transactions, "which may raise doctrinal questions of their own."

2. Do you agree with Justice Alito's statement 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 emphasize that the plaintiffs in *Ford* were residents of the respective forum states and that they were injured in the forum. Would the Court have reached the same outcome if either (or both) of those facts was not true?

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 issues relating to consent. Footnote 3 in Justice Gorsuch's concurrence comments that it is "unclear" today what remains of consent theory.

7. The Ninth Circuit in *LNS Enterprises LLC v. Continental Motors, Inc.,* 22 F.4th 852 (9th Cir. 2022) concluded that the term "relates to" as used in *Ford* applies when the defendant has "deliberately extend[ed] its business into a forum." *Id.* at 861-62. The Ninth Circuit emphasized that a key feature in *Ford* was that the company had deliberately and systematically sold and serviced in the forum *the very vehicle type* involved in the accident. This was not true in LNS, said the Circuit, because the defendants submitted materials disclaiming those circumstances in that airplane accident case.

8. *Ford* is generating a good deal of scholarly attention. Professor Rhodes uses the decision as a lens through which to view the Roberts Court's fundamental transformation of personal jurisdiction doctrine. That transformation included the "new era" restriction of general jurisdiction, which required the Court to intervene to clarify the possibility that companies might be amenable to jurisdiction on tort claims in states other than those in which they are "at home" or to which they marketed the product that allegedly injured the plaintiff. Charles W. (Rocky) Rhodes, The Roberts Court's Jurisdictional Revolution within Ford's Frame, 51 Stetson L. Rev. 157 (2022). See also Scott Dodson, Personal Jurisdiction, Comparativism, and Ford, 51 Stetson L. Rev. 187 (2022) and Linda Sandstrom Simard, Charles W. (Rocky) Rhodes & Cassandra Burke Robertson, Ford Motor Co.: The Murky Doctrine of Personal Jurisdiction, 5 Am. Const. Soc'y Sup. Ct. Rev. 119 (2021).

Professor Borchers argues that concurring opinions by Justice Gorsuch (joined by Justice Thomas) and Justice Alito may signal that those jurists – and perhaps others – are contemplating a paradigm shift away from the *International Shoe* regime. In particular, he asserts that the requirement of purposeful contact is not rooted in history. Moreover, jurisdictional due process is an awkward fit for substantive due process and should be based in the "fair procedures" branch of due process jurisprudence. Patrick J. Borchers, Ford Motor Co. v. Montana Eighth Judicial District Court and "Corporate Tag" Jurisdiction in the Pennoyer Era, 72 Case W. Rsrv. L. Rev. 45 (2021).

Professor Borchers, joined by Professors Arthur and Freer, hails Ford as a welcome return to serious consideration of the fairness prong of personal jurisdiction analysis. The authors explore various questions left open by Ford, including the possibility that it has introduced a sliding scale approach to relatedness depending upon the level of contact between the defendant and the forum. Ford Motor Company v. Montana Eighth Judicial District: Some Answers, Lots of Questions, 71 Emory L.J. Online 1 (2021).

There is a symposium on the "new era" of personal jurisdiction, which commenced in 2011, at 73 Alabama L. Rev. 483 et seq. (2022), featuring articles by (1) Gardiner, Cookman, Bradt, Clopton & Rave, (2) Solum & Crema, (3) Lahav, (4) Freer, (5) Cook & D'Entrement, and (6) Wirtes & Rue.

**B. Consent or Waiver as a Basis for Jurisdiction**

At page 26, just before the first full paragraph of text, please add:

The Supreme Court granted certiorari in Mallory v. Norfolk Southern Railway Co., 266 A.3d 542 (Pa. 2021) to review the question of the constitutionality of a state's business registration statute that deems such registration to be a foreign corporation's consent to general personal jurisdiction in the forum. In *Mallory*, a Virginia resident sued the Norfolk Southern in Pennsylvania under the Federal Employer's Liability Act for alleged asbestos injuries developed while the plaintiff worked for the railroad in Ohio and Virginia. Plaintiff claimed no harmful asbestos exposures in Pennsylvania. The railroad argued there was no personal jurisdiction in Pennsylvania because "the case did not arise in Pennsylvania, it was not otherwise 'at home' in Pennsylvania, and it did not consent to jurisdiction by registering to do business in Pennsylvania." Id. at 551.

In *Mallory*, the relevant state statute said in part that, "The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of [general personal jurisdiction] . . . (2) Corporations. (i) . . . qualification as a foreign corporation under the laws of this Commonwealth." *Id.* at 552. The Pennsylvania Supreme Court ruled that Pennsylvania's business registration statute violated due process in two respects. First, the statute provided for the exercise of general jurisdiction over a foreign corporation in the absence of such affiliations within the state that "are so continuous and systematic as to render the foreign corporation essentially at home in Pennsylvania*." Id.* at 547. Second, compliance with the statute by a foreign corporation "does not constitute voluntary consent to general personal jurisdiction." *Id.*

The Pennsylvania Court rejected the Georgia Supreme Court's reasoning in *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81 (Ga. 2021). In that case, the Georgia court held that businesses are on notice corporate registration in Georgia constitutes consent to general jurisdiction, which obviates the need for a traditional due process analysis.

Oral argument in the Supreme Court in *Mallory* is set for October 11, 2022.

# 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.

In a recent article, the author argues that the traditional justification for diversity jurisdiction – a fear of local bias in state courts – understates the value of this branch of federal jurisdiction. He argues that diversity jurisdiction is part of a carefully constructed constitutional plan intended to promote the free flow of commerce and a national identity. Efforts to abolish diversity jurisdiction in the last half of the twentieth century overlooked this broader vision and the elaborate legal culture that has emerged with state and federal courts applying state law. Richard D. Freer, The Political Reality of Diversity Jurisdiction, 94 S. Cal. L. Rev. 1083 (2021).

### 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).

**B. Expansion of Jurisdiction Through Grants Based Upon Minimal Diversity**
**4. Class Action Fairness Act**
**b. Jurisdictional Provisions and Exceptions**

At page 131, before the paragraph starting "Third . . .," please add:

The purpose of this latter provision is to ensure that class actions concerning similar allegations as a pending federal class case are not remanded to state court. The second and subsequent cases should remain in federal court, where coordination for pretrial purposes can be ordered under Multidistrict Litigation, which is addressed in the Casebook starting at page 172. See Davenport v. Lockwood, Andrews & Newman, Inc., 854 F.3d 905, 910 (6th Cir. 2017)(purpose is "enabling class actions to be consolidated to promote judicial efficiency"). In Schutte v. Ciox Health, LLC, 28 F.4th 850, 860-61 (7th Cir. 2022), the court held that classes involving the same underlying factual events satisfied the provision – notwithstanding that they asserted different legal claims arising from those facts. Moreover, the classes need not be filed by the same representative or involve the same class membership. Because the case before the court was brought "on behalf of the same or other persons" and involved "the same or similar factual allegations" as a pending federal class action, remand under the "local controversy" carve-out to federal jurisdiction did not apply and the case, removed from state court, would not be remanded. Id. at 862-63.

At page 145, before "Note on Burden of Proof on Removal," please add:

5. In determining whether a CAFA carve-out is satisfied, a court may consider the plaintiff's class definition. In Railey v. Sunset Food Market, Inc., 16 F.4th 234 (7th Cir. 2021), the class definition limited to class members who were citizens of the forum state. Accordingly, the district court properly remanded the case to state court under the "home state" exception.

In contrast, the district court erred by remanding the case in Simring v. GreenSky, LLC, 29 F.4th 1262 (11th Cir. 2022). The Eleventh Circuit explained there are two ways in which plaintiffs can establish that the requisite percentage of class members are citizens of the forum: (1) by limiting the class definition to such citizens or (2) providing evidence of the class members' state or residence and of their intent to make that state their domicile. As to the first option, plaintiffs' class definition failed to limit members to citizenship in the forum; references elsewhere in the complaint to "Florida senior citizens" would not suffice. As to the second, plaintiffs failed to present evidence as to the citizenship of the class members.

# Chapter 3: Coordination and Consolidation of Overlapping Litigation

## A. Overlapping Federal Cases

### 4. Multidistrict Litigation (MDL) Under § 1407

At the end of text on page 176, please add:

4. On April 8, 2022, the JPML ordered that no additional plaintiffs may be added to the massive opioid MDL. The MDL proceedings have advanced to point, with discovery largely complete, that adding new cases would not be efficient. The opioid litigation is enormous, with thousands of individual and state, local, and tribal governments asserting a variety of claims against manufacturers of the drugs. Many cases assert cutting-edge theories of liability based upon public nuisance law. Several "bellwether" trials have been held and more are scheduled. The goal of these trials in a targeted number of cases is to set a range of outcomes which can guide settlement negotiations for the bulk of the cases. In February 2022, most of the local governments asserting claims agreed to settle, with a fund of around $30 billion established by pharmaceutical defendants and their insurers.

The MDL against 3M concerning alleged defects in its military-issued earplugs, causing hearing loss is the largest MDL in history, with over 270,000 claims pending. In it, too, bellwether trials are hoped to guide massive settlements of most claims. Interestingly, however, the results of the trials are inconsistent. Of the first ten, the plaintiffs won five and 3M won five. Those trials are continuing.

## 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

[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.

stage. *Sali v. Corona Reg. Med. Ctr.*, 909 F.3d 996, 1000 (9th Cir. 2018). Formal evidentiary 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 398, please add the following at the end of Note 3:

In Santiago v. City of Chicago, 19 F.4th 1010 (7th Cir. 2021), the district court abused its discretion in granting certification under Rule 23(b)(3). The court failed to undertake the "rigorous analysis" required at the certification stage. Among other things, the court failed to analyze the individual elements of the asserted claims, which is fundamental to assessing whether common questions predominate. Because the court of appeals lacked sufficient information to determine whether the certification requirements were satisfied, it vacated the order and remanded for further proceedings.

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

In June 2021, the Court decided *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System,* 141 S. Ct. 1951 (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**

**2. Interlocutory Appeal of the Certification Decision**

At page 409, please add the following at the end of Note 4:

In Laudato v. EQT Corp., 23 F.4th 256 (3d Cir. 2022), the district judge granted plaintiff's motion to certify a class action but rejected the proposed class definition. Defendants sought appellate review under Rule 23(f). Notwithstanding that the district judge did not define the class (and did not appoint class counsel, among other things), the Third Circuit upheld appellate review. It adopted "a more liberal" standard regarding scope of review under Rule 23(f) than some other courts. Though the district court omitted several of the components of a typical certification order, it did grant certification and thereby triggered Rule 23(f). Appellate review was proper because the order exerted substantial pressure on Defendant to settle the case and the case presented an opportunity for the court of appeals to develop the law on certification.

**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 (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 Wolff, *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").

## H. The Bankruptcy "Alternative" to Class Litigation

At page 461 please add:

Johnson & Johnson (JNJ) pioneered a controversial maneuver, now called the "Texas two-step," to limit its potential liability in cases asserting the presence of asbestos in some of its baby powder products. The Texas Business Organizations Code permits a corporation to create a new company, to which it transfers its present and future tort liability. The process of spinning off the new entity to hold liabilities is known as a "divisive merger" or sometimes a "reverse merger." That is the first step in the Texas two-step. The second step is that the newly created entity files for bankruptcy under Chapter 11 of the Bankruptcy Code, which triggers the automatic stay over all pending tort actions. As a result, (1) the almost 40,000 tort claims pending against JNJ are processed in bankruptcy court and (2) (arguably) only the assets transferred into the new entity are subject to recovery. JNJ transferred a fund of $2 billion as an asset of the new entity, which is far smaller than JNJ's assets and smaller than liability already imposed in a case that went to trial. In many states, practices of this sort could be prohibited as fraudulent transfers, but it is permitted under Texas law.

Judge Kaplan of the Bankruptcy Court for the District of New Jersey approved this practice, holding that "the filing of a chapter 11 case with the express aim of addressing the present and future liabilities associated with ongoing global personal injury claims to preserve corporate value is unquestionably a proper purpose under the Bankruptcy Code." *In re LTL Mgmt., LLC*, 637 B.R. 396, 407-08 (Bankr. D. N.J. 2022). That ruling is on appeal to the Third Circuit.

**Chapter 8: Discovery**
**B. The Discovery Process in Complex Litigation**
**5. Traditional Discovery Techniquest in Complex Cases**

At p. 513, add the following paragraph before Section 8.B.2 Document Depositories:

A proposed Amendment to Rule 7.1 which may cause parties to undertake additional jurisdictional discovery is planned to go into effect in December 2022. The proposed amendment would require additional disclosures by nongovernmental corporations seeking to intervene in any case. The amendment would also require additional disclosures by parties or intervenors in actions in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a). Such entities would be required to disclose the name and citizenship of every individual or entity whose citizenship is attributed to that party at the time the action is filed. The proposed amendment is intended to ensure that diversity jurisdiction actually exists in an action that is based on diversity jurisdiction in order to reduce waste created by a delayed discovery. REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, Rules Appendix 1-4 (Mar. 2021).

At pages 521- 22, add as a new sentence to the last paragraph in Chapter 8 on Discovery:

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

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.

Proposed New Rule 87 and the proposed Amendment to Rule 72(b)(1) which are planned to go into effect in December 2023, may impact the discovery process. The proposal of New Rule 87 was prompted by COVID-19 and is intended to address extraordinary circumstances that substantially impede a court's ability to effectively adhere to the Fed. R. Civ. P. While new Rule 87 would not explicitly extend to discovery, it allows a court to grant additional time to file a Rule 59(b) motion for a new trial and a Rule 60(b) motion for relief from a final judgment, order, or proceeding, all of which may be based on newly discovered evidence. This would indirectly allow parties additional time to discover new evidence to support their Rule 59(b) or Rule 60(b) motions. Regarding the change to Rule 72(b)(1), currently, the rule requires the clerk to mail a copy of the judge's recommended disposition to each party. The proposed Amendment to Rule 72(b)(1) would allow the clerk to serve a copy of the judge's recommended disposition by any of the methods

listed in Rule 5(b). JUD. CONF. COMM. ON RULES OF PRAC. & PROC., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 44-55 (Aug. 2021).

Though the spread of COVID-19 has created a tension between health and safety concerns and discovery rules, courts have found that the pandemic is no excuse to end-run discovery requirements. In *Espinosa v. Luthercare*, No. 2019-CV-02130, slip op. (Pa. Ct. Com. Pl. Lebanon Co. July 28, 2021), a deponent requested to wear a mask during his deposition due to fear of contracting COVID-19. The trial court considered whether the request should be granted, or whether the deposing lawyer's need to assess the witness's facial expressions during the deposition to sufficiently evaluate the authenticity of the witness's statements was of more importance. Ultimately, the court found that the ability to assess a witness' facial expressions during testimony is essential, and that the deponent had to forego wearing a mask. However, the deponent was allowed to record his deposition in an isolated room with an unstaffed camera. Josephine M. Bahn, *Court Orders Party Deponent to Be Unmasked*, AMERICAN BAR ASSOCIATION (ABA) (Feb. 11, 2022), https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2022/court-orders-party-deponent-to-be-unmasked/.

The Florida Supreme Court recently has codified the "apex doctrine" by creating an amendment to the Florida Rules of Civil Procedure. The apex doctrine is intended to protect high-level corporate and governmental officers from depositions utilized as abusive discovery tactics when they have no pertinent knowledge of facts relevant to a lawsuit. The doctrine requires the party attempting to depose a high-level officer show that the deposition would support the lawsuit and is not for an unethical purpose. Many courts at both the federal and state level have adopted the apex doctrine by grounding it in existing procedural rules or have applied the doctrine when establishing situations in which the deposition of high-level officers is appropriate. However, the Florida rule marks the first time the apex doctrine has been codified as a stand-alone rule. Mark A. Behrens & Christopher E. Appel, *Florida Supreme Court Leads on Apex Doctrine*, AMERICAN BAR ASSOCIATION (ABA) (Mar. 9, 2022), https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2021-22/winter/florida-supreme-court-leads-apex-doctrine/.

Fed. R. Civ. P. 30(e) allows deponents to make "changes in form or substance" to their sworn testimony following the deposition, giving rise to the opportunity to use an errata sheet to fix unfavorable statements. However, federal courts differ on the interpretation of Rule 30(e)'s phrase "in form or substance." Some courts interpret the phrase to allow only the correction of transcription errors or typographical errors, while other courts allow the deponent to make substantive changes to their testimony. Further, where some courts allow deponents to make substantive changes without limitations, others require that such substantive changes be accompanied by sufficient justification for the alteration. In any case, if counsel finds that a witness's errata sheet contains substantive revisions, counsel can reopen the deposition and examine the witness regarding the changes. Further, counsel's communications with the deponent regarding the testimony alterations are not protected by attorney-client privilege. Thus, use of the errata sheet to alter testimony is a perilous tactic that can damage a witness's credibility. Brian A. Zemil, *All Things Errata*, AMERICAN BAR ASSOCIATION (ABA) (Apr. 19, 2022), https://www.americanbar.org/groups/litigation/publications/litigation-news/civil-procedure/all-things-errata/.

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/.

**6. Electronic Discovery**

At page 540, following Note 2, add as a new paragraph before Note 3.

While *Zubulake I* provides that accessibility is a significant factor in determining whether cost-shifting is appropriate, recent cases show that courts increasingly fail to follow that criterion. *See Lawson v. Spirit AeroSystems, Inc.*, No. 18-1100-EFM-ADM, 2020 WL 3288058, at *8-10 (D. Kan. June 18, 2020), *aff'd*, No. 18-1100-EFM, 2020 WL 6939752 (D. Kan. Nov. 24, 2020), *appeal dismissed*, No. 21-3219, 2021 WL 8651002 (10th Cir. Dec. 20, 2021) (declaring that cost-shifting does not rely on the accessibility of the data). *See also* Andrew M. Pardieck, *The Shifting Sands of Cost Shifting*, 69 CLEV. ST. L. REV. 349 (2021) (stating that many courts shift costs when they think it is "fair," eschewing the accessibility criterion in *Zubulake I* and instead performing an overall analysis of the burden of production and ESI volume and expense).

At page 545, replace the links on page 545.

The links to the e-discovery pages can be found at:

https://www.ded.uscourts.gov/default-standard-discovery
https://ksd.uscourts.gov/index.php/rules/
https://www.mdd.uscourts.gov/news/release-suggested-protocol-discovery-electronically-stored-information-2007-08-02t000000

At page 547, please add:

The Federal District of Delaware no longer provides for an e-discovery liaison or retention coordinators.

At page 551, before the page break and discussion on Rule 26(f), please add

In 2018, Ariz. R. Civ. P. 45.2 went into effect, authorizing certain pre-suit evidence preservation orders of ESI. Currently, there is no analogous Federal Civil Procedure Rule. For a discussion on the potential value of a similar rule authorizing pre-suit evidence preservation orders, see Jeffrey A. Parness & Jessica Theodoratos, *Expanding Pre-Suit Discovery Production and Preservation Orders*, 2019 MICH. ST. L. REV. 651 (2019).

Similarly, some authors propose that there should be laws authorizing pre-suit protective orders regarding information maintenance, preservation, and production. Such laws would allow parties to seek protection from post-suit discovery sanctions for failure to maintain information that they had no legal obligation to preserve at that time. These laws would be most relevant when potential adversaries serve information requests involving the alleged duty to preserve information. Like the previous article, this article derives its inspiration from Ariz. R. Civ. P. 45.2 that provides that a party in receipt of a pre-suit ESI preservation request may seek a pre-suit protective order which would immunize them from later discovery sanctions for failure to preserve ESI. Jeffrey A. Parness, *Presuit Civil Protective Orders on Discovery*, 38 GA. ST. U. L. REV. 455 (2022).

Even where revision of the Federal Rules of Civil Procedure is absent, courts continue to shape the rules to adapt to the evolving nature of discovery. There is a growing consensus by both courts and commentators that privacy is a "burden" under Rule 26(b)(1) and should be a part of the proportionality assessment in determining the scope of discovery. This represents a shift from earlier discussion of the proportionality element which primarily assessed economic factors. However, with the significant amount of private information gathered by electronic information systems, privacy rights and potential privacy breaches are a real concern in conducting e-discovery. Robert D. Keeling & Ray Mangum, *The Burden of Privacy in Discovery*, 20 SEDONA CONF. J. 415 (2019).

At page 552, before the Note on Metadata, please add

A recent article discusses the relationship between ESI and Rule 26(g)(1)(a), which requires counsel responding to a discovery request to certify that the disclosure is "complete and correct." Particularly, ethical standards, persuasive materials, and relevant case law all suggest that the duty to turn over required disclosures mandates that the disclosing party utilize all potentially applicable search terms to identify the relevant ESI for the requesting party. For example, in one case, the requesting party knew of only one code word used to refer to the defendant's allegedly illegal actions. The defendant only utilized that one code word and neglected to use the several other code words that the defendant knew were used to refer to the alleged actions. The defendant grounded this decision in the fact that the plaintiff never requested a search based on those terms. The court sanctioned the defendants under Rule 26(g) and Rule 37(b)(2)(C). Bled Aliu & Hon. Ronhald J. Hedges, *Abiding by Strict Search Terms During Discovery Can Have Consequences*, N.J. LAW., Dec. 2021, at 24.

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).

The emerging use of predictive coding systems (technology-assisted review or TAR) in conducting e-discovery presents unique challenges to the legal profession. One article discusses challenges such as the influence predictive coding has on the relationship and power dynamics between lawyers, vendors, and clients and the implications of use of the technology in regard to legal professional ethics requirements. Similarly, the article touches on the lack of industry-wide testing for efficacy of predictive coding systems, the need for additional education to ensure lawyers better understand predictive coding, and the need for the technology to be interpretable and configurable so that lawyers may more thoroughly evaluate and engage with the technology's reasoning and results. Daniel N. Kluttz & Deirdre K. Mulligan, *Automated Decision Support Technologies and the Legal Profession*, 34 BERKELEY TECH. L.J. 853 (2019).

**F. International Discovery**

**1. Obtaining Discovery Outside the United States to Support Litigation in an American Court**

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).

**2. Domestic Discovery in Aid of Foreign Proceedings**

At page 619, please add

In *IJK Palm LLC v. Anholt Servs. USA, Inc.*, 33 F.4th 669 (2d Cir. 2022), United States Court of Appeals for the Second Circuit distinguished the case at issue from *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). *Intel* made clear the broad reach of § 1782, while *IJK Palm* outlined the limitations of the statute.

In *IJK Palm*, IJK Palm LLC ("IJK"), invested in an investment fund, Palm Investment Partners ("PIP"), which held a minority stake in a Cayman Island oil company, United Oils Limited, SEZC ("UOL"). IJK was seeking to compel discovery from Connecticut residents under § 1782 for use in a foreign proceeding to support a planned derivative suit against UOL's CEO and directors. UOL had entered liquidation proceedings. Under Cayman law, only the court-appointed liquidator could sue the CEO and directors on UOL's behalf. However, IJK claimed there is an exception to this rule, and it would be able to bring suit on behalf of PIP, which would then sue on behalf of UOL as an "aggrieved shareholder." The Second Circuit denied IJK's request for discovery holding that the ability to offer documents or other materials to a party to a potential lawsuit fails to meet the §1782 requirement that such information be "for use" in a foreign proceeding. The requester must provide objective indicators that the proceeding for which the information would be used is within "reasonable contemplation." The court also stated that one does not qualify as an "interested person" solely due to their financial interest in a potential suit or the expected opportunity to give the requested materials to one party to a suit. The court further held that the movant must be able to show that it has the "practical ability" to insert such requested information into a foreign proceeding.

At page 620, please add

Following *Intel*, which stated that § 1782 provides "the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad," the Federal Circuit Courts split on what qualifies as a "foreign or international tribunal" under § 1782(a). The Supreme Court recently addressed this issue in *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022). In *Luxshare*, the Supreme Court consolidated two cases with differing facts. In the first case, Luxshare, Ltd. ("Luxshare"), a company based in Hong Kong purchased business units from ZF Automotive US, Inc., ("ZF") which is based in Michigan and is a subsidiary of a German corporation. Following the close of the purchase, Luxshare claimed that ZF had concealed information which caused Luxshare to overpay by hundreds of millions of dollars. In the contract, the parties agreed to submit all disputes to a private arbitral panel. Intending to initiate arbitration against ZF, Luxshare sought information from ZF and two of its senior officers by filing an application under § 1782 in the U.S. District Court for the Eastern District of Michigan. The District Court granted the request. ZF requested a stay which the United States Court of Appeals for the Sixth Circuit denied. *Luxshare, Ltd. v. ZF Auto. US, Inc.*, 15 F.4th 780 (6th Cir. 2021).

In the second case, a Russian investor invested in AB Bankas SNORAS ("Snoras"), a Lithuanian bank. Lithuania's central bank nationalized Snoras after determining Snoras was unable to meet its obligations. Simon Freakley, the CEO of a AlixPartners, LLP, a consulting firm based in New York, was then appointed as a temporary administrator. Thereafter, Lithuanian authorities began bankruptcy proceedings and found Snoras insolvent. A Russian corporation and the assignee of the Russian investor, the Fund for Protection of Investors' Rights in Foreign States ("the Fund"), commenced a proceeding against Lithuania under a bilateral treaty between Russia and Lithuania. In accordance with the treaty, that provides a choice of four forums in which to resolve disputes, the Fund chose to seek resolution through ad hoc arbitration. The Fund sought discovery from Freakley and AlixPartners by filing a §1782 application in the U.S. District Court for the Southern District of New York. The request was granted, and the Second Circuit affirmed.

*Fund for Prot. of Inv. Rts. in Foreign States Pursuant to 28 U.S.C. § 1782 for Ord. Granting Leave to Obtain Discovery for use in Foreign Proc. v. AlixPartners, LLP*, 5 F.4th 216 (2d Cir.).

The Supreme Court ultimately found that neither arbitral panel qualified as a "foreign or international tribunal" under § 1782. The Court held that, within the meaning of § 1782, "a 'foreign tribunal' is a tribunal imbued with governmental authority by one nation, and an 'international tribunal' is a tribunal imbued with governmental authority by multiple nations." The Court found support for its holding in the purpose of § 1782, which is to promote comity between the United States and foreign governments. The Court reasoned that employing district courts in aiding private entities in deciding private issues abroad would not serve such a purpose. The Court also noted that § 1782 provides significantly more extensive discovery than permitted under the Federal Arbitration Act. An interpretation of § 1782 that allows parties to seek discovery for private arbitration would create a misalignment between discovery in domestic and foreign arbitration, the Court reasoned.

The Court also found that the adjudicative mechanisms in both cases were not governmental or intergovernmental tribunals. In the *Luxshare* case, the Court found that the dispute was between private parties who assented in a private contract that a private dispute-resolution organization would arbitrate controversy that arose between them. No government had a hand in producing the panel or deciding its procedures. Though the law of the country in which the arbitration would take place would govern certain aspects of the arbitration, the Court did not find this sufficient to transform the adjudicatory mechanism into a governmental or intergovernmental tribunal. The Court, therefore, found it does not qualify as a foreign or international tribunal under § 1782.

In the second case, although a sovereign was a party on one side of the dispute, and the option to seek arbitration arose from international treaty instead of a private contract, the Court found that neither Lithuania nor Russia intended to confer governmental authority onto the adjudicative body. The Court concluded it does not qualify as a foreign or international tribunal under § 1782.

# 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).