Civil Procedure

Cases, Text, Notes, and Problems

Fourth Edition

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Contents

Table of Cases

[Principal cases are indicated in bold typeface.]

Chapter 2

Personal Jurisdiction and Related Matters

Section A. The "Territorial" Rules of Jurisdiction (Page 82)

3. The Operation of the Territorial Rules (Page 89)

Add a new Note 5 at p.96:

5. Waiver of personal jurisdiction can take place in the context of *counterclaims*. A plaintiff who commences a lawsuit in a forum "submit[s] itself to the jurisdiction of the court with respect to all the issues embraced in the suit, including those pertaining to the counterclaim of the defendants." *Leman v. Krentler-Arnold Hinge Last Co*., 284 U.S. 448, 451 (1932). Some courts extend this waiver and hold that a plaintiff impliedly consents to personal jurisdiction if the plaintiff is subsequently sued in a *different action* arising out of the same transaction or occurrence. However, a loose relationship between the two actions is not enough to result in an implied waiver of personal jurisdiction. *See, e.g*., *V&A Collection, LLC v. Guzzini Props. Ltd*., 46 F.4th 127, 132 (2d Cir. 2022) (after being denied its motion to intervene in art collector's New York state court action to quiet title in a painting, art investor commenced separate New York state court action against collector for conversion, based on collector's alleged interference with investor's 50% ownership of a different painting; no waiver under these circumstances because the relationship is "too loose" between the subject matter of the two actions; the first action involved different parties and an ownership dispute involving a different piece of artwork).

Section C. The Concepts of Specific and General "Minimum Contacts" (Page 114)

2. Specific Jurisdiction in "Stream of Commerce" Cases (Page 129)

Change text at p.164:

At the top of p.164, line 6 should read "that a single isolated sale is sufficient for jurisdiction." ("insufficient" should be "sufficient" in that sentence)

5. Specific Jurisdiction—The "Arising Out of or Related to" Requirement (Page 181)

Replace Note 6 on p. 193 with the following:

6. As widely anticipated, in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 140 S. Ct. 1017 (2021), the U.S. Supreme Court rejected Ford Motor Company's challenge to the two state courts' assertion of specific personal jurisdiction over it on products liability claims. In an 8-0 decision (with Justice Barrett not participating), Justice Kagan delivered the Court's opinion, which held that the due process test for specific personal jurisdiction did not depend on a strict causation-only approach that would ask where the vehicles were originally sold, or where they were designed and manufactured. In addition, the manufacturer's substantial business in the forum states supported specific personal jurisdiction under due process principles. Justice Kagan focused on the second half of the "arise out of or relate to" requirement. Whereas the "first half of that standard asks about causation" in some form (which the opinion did not specify), the second half "contemplates that some relationships will support jurisdiction without a causal showing." The Court concluded that where "Ford had systematically served a market in Montana and Minnesota for the very vehicle that the plaintiffs allege malfunctioned and injured them in those states," Ford's activities in these states were sufficiently "related to" the plaintiffs' claims to give rise to specific jurisdiction. *Id*. at 1028-32.

Concurring in the judgment, Justice Alito added that "these [two Ford] cases can and should be decided without any alteration or refinement of our case law on specific personal jurisdiction." However, Justice Alito criticized the "potentially boundless reach of 'relate to'" as an independent basis for jurisdiction, without a requirement of even a "rough causal connection." *Id*. at 1032-34.

Justice Gorsuch's concurring opinion, with whom Justice Thomas joined, echoed Justice Alito's criticism of the uncertainty resulting from treating "or relate to" as a distinct basis for jurisdiction. Justice Gorsuch parted ways with Justice Alito, however, by calling for a more fundamental rethinking of personal jurisdiction jurisprudence. Justice Gorsuch speculated that many of the difficulties in personal jurisdiction cases derived from the inherent challenge in figuring out where a corporate defendant may be deemed to be "present," and from an intuition that it would be unfair to subject an individual defendant to jurisdiction in a forum state on the same basis as a corporate defendant.

Justice Gorsuch's discussion bears repeating here:

> Before *International Shoe*, it seems due process was usually understood to guarantee that only a court of competent jurisdiction could deprive a defendant of his life, liberty, or property. In turn, a court's competency normally depended on the defendant's presence in, or consent to, the sovereign's jurisdiction. But once a plaintiff was able to "tag" the defendant with process in the jurisdiction, that State's courts were generally

thought competent to render judgment on any claim against the defendant, whether it involved events inside or outside the State.

International Shoe's emergence may be attributable to many influences, but at least part of the story seems to involve the rise of corporations and interstate trade. A corporation doing business in its State of incorporation is one thing; the old physical presence rules for individuals seem easily adaptable to them. But what happens when a corporation, created and able to operate thanks to the laws of one State, seeks the privilege of sending agents or products into another State?

Early on, many state courts held conduct like that renders an out-of-state corporation present in the second jurisdiction. And a present company could be sued for any claim, so long as the plaintiff served an employee doing corporate business within the second State. *E.g*., *Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer*, 197 U.S. 407, 413–15 (1905). Other States sought to obviate any potential question about corporate jurisdiction by requiring an out-of-state corporation to incorporate under their laws too, or at least designate an agent for service of process. Either way, the idea was to secure the out-of-state company's presence or consent to suit. *E.g*., *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95–96 (1917).

Unsurprisingly, corporations soon looked for ways around rules like these. No one, after all, has ever liked greeting the process server. For centuries, individuals facing imminent suit sought to avoid it by fleeing the court's territorial jurisdiction. But this tactic proved "too crude for the American business genius," and it held some obvious disadvantages. Corporations wanted to retain the privilege of sending their personnel and products to other jurisdictions where they lacked a charter to do business. At the same time, when confronted with lawsuits in the second forum, they sought to hide behind their foreign charters and deny their presence. Really, their strategy was to do business without being seen to do business.

Initially and routinely, state courts rejected ploys like these. But, in a series of decisions at the turn of the last century, this Court eventually provided a more receptive audience. On the one hand, the Court held that an out-of-state corporation often has a right to do business in another State unencumbered by that State's registration rules, thanks to the so-called Dormant Commerce Clause. *International Text-Book Co. v. Pigg*, 217 U.S. 91, 107–12 (1910). On the other hand, the Court began invoking the Due Process Clause to restrict the circumstances in which an out-of-state corporation could be deemed present. So, for example, the Court ruled that even an Oklahoma corporation purchasing a large portion of its merchandise in New York was not "doing business" there. *Rosenberg Bros. & Co. v. Curtis Brown Co*., 260 U.S. 516, 517–18 (1923). Perhaps advocates of this arrangement thought it promoted national economic growth. But critics questioned its fidelity to the Constitution and traditional jurisdictional principles, noting that it often left injured parties with no practical forum for their claims too.

In many ways, *International Shoe* sought to start over. The Court "cast ... aside" the old concepts of territorial jurisdiction that its own earlier decisions had seemingly twisted in favor of out-of-state corporations. At the same time, the Court also cast doubt on the idea, once pursued by many state courts, that a company "consents" to suit when it is forced to incorporate or designate an agent for receipt of process in a jurisdiction other than its home State. In place of nearly everything that had come before, the Court sought to build a new test focused on " 'traditional notions of fair play and substantial justice.' " It was a heady promise. But it is unclear how far it has really taken us. Even today, this Court usually considers corporations "at home" and thus subject to general jurisdiction in only one or two States. All in a world where global conglomerates boast of their many "headquarters." The Court has issued these restrictive rulings, too, even though individual defendants remain subject to the old "tag" rule, allowing them to be sued on any claim anywhere they can be found. Nearly 80 years removed from *International Shoe*, it seems corporations continue to receive special jurisdictional protections in the name of the Constitution. Less clear is why.

Maybe, too, *International Shoe* just doesn't work quite as well as it once did. For a period, its specific jurisdiction test might have seemed a reasonable new substitute for assessing corporate "presence," a way to identify those out-of-state corporations that were simply pretending to be absent from jurisdictions where they were really transacting business. When a company "purposefully availed" itself of the benefits of another State's market in the 1940s, it often involved sending in agents, advertising in local media, or developing a network of on-the-ground dealers, much as Ford did in these cases. But, today, even an individual retiree carving wooden decoys in Maine can "purposefully avail" himself of the chance to do business across the continent after drawing online orders to his eBay "store" thanks to Internet advertising with global reach. A test once aimed at keeping corporations honest about their out-of-state operations now seemingly risks hauling individuals to jurisdictions where they have never set foot.

If that is the logic at play here, I cannot help but wonder if we are destined to return where we began. Perhaps all of this Court's efforts since International Shoe, including those of today's majority, might be understood as seeking to recreate in new terms a jurisprudence about corporate jurisdiction that was developing before this Court's muscular interventions in the early 20th century. Perhaps it was, is, and in the end always will be about trying to assess fairly a corporate defendant's presence or consent. *International Shoe* may have sought to move past those questions. But maybe all we have done since is struggle for new words to express the old ideas. Perhaps, too, none of this should come as a surprise. New technologies and new schemes to evade the process server will always be with us.

None of this is to cast doubt on the outcome of these cases. 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. The real struggle here isn't with settling on the right outcome in these cases, but with making sense of our personal jurisdiction jurisprudence and *International Shoe's* increasingly doubtful dichotomy. On those scores, I readily admit that I finish these cases with even more questions than I had at the start. Hopefully, future litigants and lower courts will help us face these tangles and sort out a responsible way to address the challenges posed by our changing economy in light of the Constitution's text and the lessons of history. 140 S. Ct. at 1036-39.

Section D. The Status of the "Territorial Rules" After *International Shoe* (Page 212)

2. Personal Service in the Forum State—Transient Presence Jurisdiction After *Shaffer* (Page 220)

Add Note 2(c) on p. 226 with the following discussion:

(c) *In Mallory v. Norfolk Southern Railway Co*., 143 S. Ct. 2028 (2023), the U.S. Supreme Court in a 5-4 decision resolved the doubt about the constitutional authority of a state to extract consent to general jurisdiction through corporate registration in the state on claims arising from conduct outside the state. In *Mallory*, the plaintiff worked for Norfolk Southern as a freight-car mechanic for nearly twenty years, first in Ohio, then in Virginia. After he left the company, the plaintiff moved to Pennsylvania for a period before returning to Virginia. The plaintiff was diagnosed with cancer. Because the plaintiff attributed his illness to his work at Norfolk Southern, the plaintiff sued Norfolk Southern under the Federal Employers' Liability Act (the federal workers' compensation scheme permitting railroad employees to recover damages for their employers' negligence) in a Pennsylvania state court. *Id*. at 2032-33.

Norfolk Southern, which was incorporated in Virginia and headquartered there at the time of suit, resisted the action on the basis that a Pennsylvania court's exercise of personal jurisdiction over it would offend the Due Process Clause of the Fourteenth Amendment. Norfolk Southern noted that when the complaint was filed, the plaintiff resided in Virginia, and the complaint alleged that the plaintiff was exposed to carcinogens only in Ohio and Virginia. The plaintiff countered by pointing out that Norfolk Southern manages over 2,000 miles of track, operates 11 rail yards, and runs 3 locomotive repair shops in Pennsylvania. In fact, Norfolk Southern had formally registered to do business in Pennsylvania in light of its regular, systematic, and extensive operations there. Furthermore, Pennsylvania statutes require out-of-state companies that register to do business in the Commonwealth to agree to appear in its courts on "any cause of action" against them. On appeal, the Pennsylvania Supreme Court held that the Pennsylvania law—requiring an out-of-state corporation to answer in the Commonwealth any suits against it in exchange for status as a registered foreign corporation and the benefits that entails—violated the Due Process Clause. *Id*. at 2033.

Writing for the majority Justice Gorsuch relied on a Supreme Court precedent *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U. S. 93 (1917): Justice Gorsuch stated "Not every case poses a new question. This case poses a very old question indeed—one this Court resolved more than a century ago in *Pennsylvania Fire*. Because that decision remains the law, the judgment of the Supreme Court of Pennsylvania is vacated, and the case is remanded." *Id*. As described by Justice Gorsuch,

> Pennsylvania Fire was an insurance company incorporated under the laws of Pennsylvania. In 1909, the company executed a contract in Colorado to insure a smelter located near the town of Cripple Creek owned by the Gold Issue Mining & Milling Company, an Arizona corporation. . . . Less than a year later, lightning struck and a fire destroyed the insured facility. When Gold Issue Mining sought to collect on its policy, Pennsylvania Fire refused to pay. So, Gold Issue Mining sued. But it did not sue where the contract was formed (Colorado), or in its home State (Arizona), or even in the insurer's home State (Pennsylvania). Instead, Gold Issue Mining brought its claim in a Missouri state court. Pennsylvania Fire objected to this choice of forum. It said the Due Process Clause spared it from having to answer in Missouri's courts a suit with no connection to the State. *Id*. at 2035-36. Writing for a unanimous Court, Justice Holmes had little trouble dispatching the company's due process argument. Under this Court's precedents, there was 'no doubt' Pennsylvania Fire could be sued in Missouri by an out-of-state plaintiff on an out-of-state contract because it had agreed to accept service of process in Missouri on any suit as a condition of doing business there. *Id*. at 2036 (citing *Pennsylvania Fire*, 243 U.S. at 95.).
>
> Justice Jackson filed a concurring opinion, stating:
>
> I agree with the Court that this case is straightforward under our precedents. I write separately to say that, for me, what makes it so is not just our ruling in *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U. S. 93 (1917). I also consider our ruling in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U. S. 694 (1982), to be particularly instructive. . . . *Insurance Corp. of Ireland* [*See* Casebook at page 135, Note 2] makes clear that the personal-jurisdiction requirement is an individual, waivable right, and I agree with the Court that Norfolk Southern waived that right by choosing to register as a foreign corporation under the circumstances presented in this case. Therefore, I perceive no due process problem with the registration statute at issue here. *Id*. at 2045-2046-47. (Note that Norfolk Southern registered to do business in Pennsylvania with full knowledge of the implications of state law, a fact its counsel conceded at oral argument. Thus, Justice Jackson's view is that due process rights are individual and waivable, and they were waived by Norfolk Southern in this case.)

Justice Alito also filed a concurring opinion:

> I am not convinced . . . that the Constitution permits a State to impose such a submission-to-jurisdiction requirement. A State's assertion of jurisdiction over lawsuits with no real connection to the State may violate fundamental principles that are protected by one or more constitutional provisions or by the very structure of the federal system that the Constitution created. At this point in the development of our constitutional case law, the most appropriate home for these principles is the so-called Dormant Commerce Clause. Norfolk Southern appears to have asserted a Commerce Clause claim below, but the Pennsylvania Supreme Court did not address it. . . . Presumably, Norfolk Southern can renew the challenge on remand. I therefore agree that we should vacate the Pennsylvania Supreme Court's judgment and remand the case for further proceedings. *Id*. at 2047.

Justice Barrett filed a dissenting opinion, joined by Chief Justice Roberts, Justices Kagan, and Kavanaugh. Justice Barrett wrote:

> For 75 years, we have held that the Due Process Clause does not allow state courts to assert general jurisdiction over foreign defendants merely because they do business in the State. *International Shoe Co. v. Washington*, 326 U. S. 310, 317 (1945). Pennsylvania nevertheless claims general jurisdiction over all corporations that lawfully do business within its borders. As the Commonwealth's own courts recognized, that flies in the face of our precedent. *See Daimler AG v. Bauman*, 571 U. S. 117, 139–140 (2014). The Court finds a way around this settled rule. All a State must do is compel a corporation to register to conduct business there (as every State does) and enact a law making registration sufficient for suit on any cause (as every State could do). Then, every company doing business in the State is subject to general jurisdiction based on implied "consent"—not contacts. That includes suits, like this one, with no connection whatsoever to the forum. Such an approach does not formally overrule our traditional contacts-based approach to jurisdiction, but it might as well. By relabeling their long-arm statutes, States may now manufacture "consent" to personal jurisdiction. Because I would not permit state governments to circumvent constitutional limits so easily, I respectfully dissent. *Id*. at 2055.

(d) Given division among the Justices, what are the probable effects of *Mallory*? At least in the short term, plaintiffs may look to litigate in Pennsylvania state courts claims arising elsewhere because many corporations with sizable interstate operations in the country are registered to do business in Pennsylvania. *Mallory* may encourage other states interested in opening their courts to claims arising elsewhere to amend their business registration regimes to mimic Pennsylvania's statutes. More likely, some states may amend their registration statutes to require consent to jurisdiction for claims arising elsewhere (general jurisdiction) when the plaintiff is a citizen of the state.

With regard to the law of personal jurisdiction itself, the *Mallory* majority's reasoning may seem to cast doubt on the scope and effect of other recent personal jurisdiction decisions, which held that substantial business contacts with a forum do not give rise to personal jurisdiction unless the contacts are suit-related or the defendant is "at home" in the state. However, a critical difference between those opinions and *Mallory* is that the state legislature, not the courts, made the decision to assert jurisdiction by extracting consent. To make the consent statute to have less of a forum-shopping thrust, the most logical area for a legislature to extract consent on claims arising elsewhere is when the plaintiff is a citizen of the state where the legislature sits (as opposed to nonresidents).

As noted above in (c) above, Justice Alito's concurrence raises another constitutional question: Does a state statute requiring an out-of-state corporation to consent to personal jurisdiction in the state for all purposes or be denied the right to conduct business in the state offend the "Dormant Commerce Clause"? (Article 1, Section 8, Clause 3 of the U.S. Constitution provides that "The Congress shall have Power … to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This provision is known as the Commerce Clause. The "Dormant" Commerce Clause refers to the prohibition, deemed implicit in the Commerce Clause, against states passing legislation that discriminates against or excessively burdens interstate commerce.) Justice Alito's concurrence suggested the answer is "yes," creating the unusual situation where five Justices (including Justice Alito) concurred in the outcome of *Mallory*, but five Justices (also including Justice Alito) expressed grave reservations about the viability of that outcome from the standpoint of interstate federalism. This question may be litigated further upon remand to the Pennsylvania Supreme Court and may result in further appeals to the U.S. Supreme Court.

In this regard, consider the following discussion derived from TEPLY & WHITTEN at 237-38.

> Historically, a corporation, like an individual, could consent to suit in a forum where it would otherwise not have been amenable to suit. In the absence of actual consent, the traditional rule was that a corporation could not be sued outside the state that chartered it. *St. Clair v. Cox*, 106 U.S. 350, 354 (1882) ("[A] foreign corporation could not be sued in an action for the recovery of a personal demand outside of the State by which it was chartered."). To circumvent this rule, states began to require that a *foreign* corporation—one incorporated in another state—appoint an agent upon whom service could be made as a condition of conducting local business of the corporation in the state. If the corporation did not make an actual appointment, the state statutes generally provided for service upon the secretary of state, another public official, or an agent of the corporation in the state. A state could require such an appointment on the theory that the state had the sovereign authority to exclude a foreign corporation from doing local (as opposed to interstate) business altogether. Thus, the state could condition its permission to do local business on the foreign corporation's consent to the appointment of an agent to receive process.
>
> When a foreign corporation conducted only interstate commerce within the state, for example by shipping goods into the state, the state could not exclude the foreign

> corporation from transacting that interstate commerce. Thus, the consent theory would not work. To subject foreign corporations to jurisdiction under these circumstances, the courts resorted to the presence theory: "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such a manner and to such extent as to warrant the inference that it is present there." *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U.S. 264, 265 (1917). The presence theory offered a loophole through which a corporation could escape jurisdiction. If the claim against the corporation arose out of its activities within the state, it could still avoid jurisdiction by ceasing to do business within the state before an action was commenced. Under such circumstances, it would cease to be "present" within the state. *See Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U.S. 213 (1921). However, if the corporation was found to have consented to jurisdiction, ceasing business prior to suit would not vitiate the consent. *See Washington ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Court*, 289 U.S. 361 (1933).

Justice Gorsuch in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 140 S. Ct. 1017 (2021) cited an early case using the use of the Dormant Commerce Clause affirming "an out-of-state corporation often has a right to do business in another State unencumbered by that State's registration rules, thanks to the so-called Dormant Commerce Clause." In support of this observation, Justice Gorsuch cited *International Text-Book Co. v. Pigg*, 217 U.S. 91, 107–12 (1910). The *Pigg* case involved an unusual situation. The International Text-Book Co. engaged in instruction by correspondence by having local agents solicit students in Kansas. The local agents collected and forwarded to International's home office in Pennsylvania the tuition fees. The defendant in the action was a Kansas student who had signed a contract at Topeka, Kansas and it was accepted by International in Pennsylvania committing the student to a course of instruction by correspondence in commercial law. The defendant had agreed to pay therefor $84, in instalments, but the student failed to complete the course and owed $79.60 with interest to International, which commenced an action in Kansas to recover that amount. *Id*. at 101.

The issue in *Pigg* involved the application of a Kansas statute, which provided:

> It shall be the duty of the president and secretary or of the managing officer of each corporation for profit, doing business in this state, except banking, insurance, and railroad corporations, annually, on or before the 1st day of August, to prepare and deliver to the secretary of state a complete detailed statement of the condition of such corporation on the 30th day of June next preceding. Such statement shall set forth and exhibit the following, namely: 1st. The authorized capital stock. 2d. The paid-up capital stock. 3d. The par value and the market value per share of said stock. 4th. A complete and detailed statement of the assets and liabilities of the corporation. 5th. A full and complete list of the stockholders, with the post office address of each, and the number of shares held and paid for by each. 6th. The names and post office addresses of the officers, trustees, or directors and manager elected for the ensuing year, together with a certificate of the time and manner in which such election was held. [It also provided that] No action shall be maintained or recovery had in any of the courts of this state by any

> corporation doing business in this state without first obtaining the certificate of the secretary of state that statements provided for in this section have been properly made. *Id*. at 102-03.

The U.S. Supreme Court held that interstate commerce was unconstitutionally regulated and burdened by this provision of the Kansas statute. The Court also held that the unconstitutional part of the Kansas statute and the bar from maintaining an action in Kansas courts were so connected with and dependent upon each other that the bar was also stricken down. *Id*. at 113. How would you make an argument that the consent statute in *Mallory* unconstitutionally violates the Dormant Commerce Clause?

* * * * *

Chapter 4

Subject-Matter Jurisdiction

Section C. Diversity and Alienage Jurisdiction (Page 347)

2. Citizenship of Corporations (Page 356)

Add the following at the end of Note 1(a) at p.356:

As noted previously in the Casebook, the federal courts take subject-matter jurisdiction very seriously. Special care when limited liability corporations are concerned because an LLC is a citizen of every jurisdiction of its members or sub-members. In *Akno Market Street St. Louis Mo. LLC v. Pourtaghi*, 43 F.4th 624 (6th Cir. 2022), the Sixth Circuit pointed out that the parties and the district court spent years in discovery and dispositive motion practice without properly establishing the parties' citizenship in the case. On appeal after briefs had been filed and oral argument had been scheduled, the Sixth Circuit noticed that the plaintiff appeared to have not adequately alleged its own citizenship in the complaint—simply that the plaintiff was "organized under the laws of Michigan." The Sixth Circuit remanded the case to the district court for consideration of subject-matter jurisdiction. *Id*. at 626-28. As was suspected, it turned out that the parties were not diverse (because there were only foreign citizens on both sides of the dispute). 2023 WL 22906 at *1 (E.D. Mich. 2023) (order dismissing the case noting that while the LLC had subsequently been reorganized, the critical time for assessing jurisdiction is at the time the complaint was filed).

This strict approach applies to all allegations of diversity. *See, e.g.*, *Yeh Ho v. Merrill Lynch Pierce Fenner & Smith, Inc*., 2023 WL 2017380 *1-*2 (11th Cir. 2023) (affirming a dismissal with prejudice after pro se plaintiff failed to plead diversity jurisdiction properly after being told what the defects were and warned that the second complaint would be dismissed with prejudice if the defects concerning the state of incorporation and principal place of business of a corporate defendant were not properly alleged).

4. Determining the Amount in Controversy (Page 366)

(a) Cases in Which the Plaintiff Requests Money Damages (Page 367)

Add the following Note on p.370.

3. A frequent issue arises when punitive damages are used to satisfy the amount-in-controversy requirement. As the starting point, a court will accept the amount asserted unless it

appears to a legal certainty that the plaintiff cannot recover the amount claimed. The court's role is not to determine whether the amount claimed is likely to be recovered—just that the amount was "in controversy." *See Schutte v. Ciox Health, LLC*, 28 F.4th 850, 855-56 (7th Cir. 2022) (if a statute specifically authorizes damages up to $25,000 per violation, that full amount is in controversy and may be counted).

In *State Farm Mut. Auto Ins. Co. v. Campbell*, 508 U.S. 408, 425 (2003), the U.S. Supreme Court held that an award of punitive damages that exceeds a single-digit ratio to compensatory damages in most cases violates the Due Process Clause of the Fourteenth Amendment. As a result, several states have enacted statutory caps on punitive damages, often expressed as a multiplier. Of course, when a cap exists, allegations seeking punitive damages above the cap will not be included in the calculation of the amount in controversy. However, even in some states without a cap, courts will limit the punitive damages included in the amount in controversy to a reasonable multiple of compensatory damages. Thus, a litigant should expect that courts will give a punitive damage claim "particularly close scrutiny" when it appears that the claim was asserted solely or primarily for purposes of conferring diversity jurisdiction. *See, e.g.*, *Coffin v. TGM Assocs. L.P.*, 2021 WL 1238560 *1, *7 (D. Md. 2021) (complaint asserting $150 in compensatory damages will not satisfy the amount-in-controversy requirement as a matter of law when it demands punitive damages in excess of $74,850, even if state law does not impose a rigid cap on the ratio of punitive damages to compensatory damages; in this instance, the plaintiff would need to recover about five hundred times the compensatory damages).

Section D. Judicial Exceptions to Federal Jurisdiction (Page 375)

Add the following Note before the Problems on p.377.

Note

The federal courts continue to face challenges to their jurisdiction based on the probate exception to diversity jurisdiction. *See, e.g.*, *Fisher v. PNC Bank, N.A.*, 2 F.4th 1352 (11th Cir. 2021) (probate exception held inapplicable to suit against bank by daughter who co-owned investment account with mother prior to her mother's death; plaintiff's claims involved harm caused prior to her mother's death that could be adjudicated without probating the mother's will, administering the estate, or disposing of the estate's property and noting that federal courts have virtually unflagging obligation to exercise jurisdiction given them).

A good example of the difficulty of determining whether a case properly falls within the probate exception is *Silk v. Bond*, 65 F.4th 445 (9th Cir. 2023). In *Silk*, a California financial advisor (Silk) who had provided extensive tax-and-estate-planning services over several years to a taxpayer client (Bond). To align the advisor's interest with the taxpayer's interest, the parties agreed on a fee arrangement that paid the advisor a percentage of the taxes saved. The fees were to be paid after the taxpayer's death. When the taxpayer died, the advisor filed a claim in a

Maryland probate court against the taxpayer's estate for $3.1 million the advisor contended was due under the parties' contract. *Id*. at 448-49.

After the estate denied the claim, the advisor brought a diversity action against the estate in a federal district court in California against the personal representatives of the estate, which was being probated in Maryland state court, for breach of contract and, alternatively, unjust enrichment and promissory estoppel. The advisor sought certain fees from the estate under the advisor's contracts with the client and an accounting sufficient to calculate those fees. The federal district court dismissed the action under the probate exception. The district court held that the claim could not be resolved without first determining the value of the estate, and the court would be required to take control of the appraisal process, which would amount to the administration of the estate. The court also held that because the contract required the estate to pay the cost of any appraisal, ordering the appraisal would "improperly interfere with the probate court's authority and dispose of estate assets in its control." *Id*. at 49-50.

The advisor appealed, and the Ninth Circuit Court of Appeals reversed. Relying on the Supreme Court's opinion in *Marshall v. Marshall*, 547 U.S. 293 (2006), the Ninth Circuit limited the probate exception to cases in which the federal court would need to (1) probate or annul a will; (2) administer a decedent's estate; or (3) assume in rem jurisdiction over property that is in the custody of the probate court. The Ninth Circuit found that the advisor's action did not involve any of those actions. The Ninth Circuit concluded that the advisor's complaint did not implicate the court's in-rem jurisdiction (which determines interest in the res as against the whole world). If an action simply seeks to determine personal rights and obligations of the parties, it is an in personam contract action which simply determined the estate's obligation to pay the fees to the advisor. The Ninth Circuit similarly rejected the argument that paying for an appraisal and paying the advisor's fees amounted to a disposition of estate assets, a function under the control of Maryland's Probate Court. If the federal district court's determination that fees were owed under the parties' contract was a prohibited disposition of estate assets by a federal court, such a finding would amount to a "sweeping extension" of the probate exception. 65 F.4th at 450-56.

Section F. Removal Jurisdiction (Page 402)

Add the following discussion at the end of the "Remand of Improperly Removed Actions" on p.410.

Section 1447(c) authorizes the district courts to enter "An order remanding the case [requiring] payment of just costs and any actual expenses, including attorney fees, incurred as a result of removal." The purpose of this provision is to deter removals sought for the purpose of prolonging the litigation or increasing expenses for the opposing party. *See, e.g.*, *Koncept Props. Inc. v. Scopelliti*, 627 F. Supp. 3d 1282, 1287 (M.D. Fla. 2022) (holding that removal was objectively unreasonable and supported an award of attorney fees and costs to plaintiff); *Curators of Univ. v. Corizon Health, Inc.*, 627 F. Supp. 3d 1030, 1041 (W.D. Mo. 2022) (noting that the reasonableness standard was ultimately the result of balancing the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied, and also noting even losing arguments must be supported and made in good faith).

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Chapter 5

Sources of Law

Section A. Overview of the *Erie* Doctrine (Page 413)

5. *Klaxon* and the Application of *Erie* to Conflict-of-Laws Issues (Page 424)

Add "not" in the following discussion which starts at the bottom of p.424 and continues on the top of p.425.

Conflict-of-laws rules define when the state will apply its own laws in deciding a case and when it will apply the laws of some other state or country that may also have a connection to the case. In this process, a forum state always applies its own conflict-of-laws rules, but this does **not** mean that the forum state will automatically apply its own substantive laws.

Section C. The Evolution of the Erie "Branches" and the Search for Standards (Page 454)

Add an additional Note at p.490.

3. Justice Scalia's "bright line" approach in *Shady Grove* was applied in *In re Vascepa Antitrust Litig. Indirect Purchaser Plaintiffs*, 2023 WL *4-*5 (D.N.J. 2023) to a requirement of Illinois law that limited standing to bring certain types of class action claims for antitrust violations in a nationwide class action by limiting standing for Illinois claims to actions commenced by the Illinois Attorney General. The Court held that Federal Rule 23 does not impose any claim-specific standing requirements, and the plaintiffs were permitted to pursue their antitrust claims because Federal Rule 23 controlled what claims could or could not be prosecuted as class actions in federal courts.

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Chapter 6
Pleading and Related Matters

Section E. Amendments (Page 556)

1. Amendments Pursuant to Rule 15(a) (Page 556)

Add the following at the end of the textual discussion of "Amendments as a Matter of Course" on p.557.

The U.S. Supreme Court has published an amendment of Federal Rules of Civil Procedure 15(a)(1), which will go into effect on December 1, 2023 (unless blocked by Congress). The amendment to Rule 15(a)(1) addresses an ambiguity regarding the time period during which an amendment to a pleading may be made as a matter of right. Rule 15(a)(1) currently appears to create two separate 14-day windows for amendments as a matter of right—one triggered by the filing of the original pleading and the other triggered by a responsive pleading or a Rule 12(b) motion. Arguably, if the first window has closed, but the second window has not opened, a party may not amend as a matter of right. As amended, Rule 15(a)(1) specifically authorizes a party to amend as a matter of right during this gap and at any time until the later of the two windows had closed.

3. Relation Back of Amendments: Rule 15(c) (Page 563)

Add the following Note before the Question on p.572.

Note

In *Rodriguez v. McCloughen*, 49 F.4th 1120 (7th Cir. 2022), a plaintiff/prisoner filed a civil rights action under 28 U.S.C. § 1983 and initially identified the federal agent/defendants by code names and then substituted the defendants' real names after the statute of limitations had run. The question arose whether the substitution of their real names met the "mistake" requirement of Federal Rule 15(c)(1)(C). The district court concluded that someone who names a defendant using a code cannot have made a "mistake" because the plaintiff knew that a code is not a name. *Id*. at 1121.

On appeal, the Seventh Circuit relied on *Krupski* and held that the operation of Rule 15(c)(1)(C) principally depends on what the putative defendant knew or should have known. Thus, the appropriate question is whether someone in the position of the newly added defendant knew or should have known that the defendant would have been a party, but for the occurrence of some problem. This knowledge is enough to allow substitution of real names for the agents initially identified by code names. The Seventh Circuit also distinguished code names from the typical "John Doe" situation or an equivalent placeholder, which would not qualify under Rule 15(C)(1)(C). *Id*. at 1123-24 ("the world has a lot of people named 'John Smith'—and even some named 'John Q. Public'—while a unique identifier like a code name is specific").

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Chapter 7

Joinder of Claims and Parties

Section D. Basic Joinder of Claims by Defendants: Counterclaims and Crossclaims (Page 593)

1. Who Is an "Opposing Party"? (Page 596)

Change the date at the end of the first line to "1993" on p.597.

[Two actions are involved in this case. The first was commenced on July 22, **1993** (not 1983).]

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Chapter 11

Post-Trial Motions, Appellate Review, and Extraordinary Relief from Judgments

Section A. Post-Trial Motions (Page 839)

1. Motions for Judgment Notwithstanding the Verdict (Judgment as a Matter of Law) (Page 839)

Add to the following discussion at the end of the text "Necessity of Preserving Record in Trial Court" on p.842 after the discussion of the *Unitherm* case.

In *Dupree v. Younger*, 143 S. Ct. 1382 (2023), a former pretrial detainee at Maryland state prison brought a civil rights action against a former lieutenant and other prison officials for damages under 42 U.S.C. § 1983. The detainee alleged that the lieutenant ordered three corrections officers to assault him using excessive force in violation of the Due Process Clause. The lieutenant moved for summary judgment arguing that the detainee failed to exhaust administrative remedies. The federal district court denied the motion. Following a jury trial, the court entered judgment against the lieutenant and four other officials and awarded detainee $700,000 in damages. The lieutenant, who had not renewed the exhaustion defense in a post-trial motion, appealed. Like several other courts of appeals, the Fourth Circuit held that Federal Rule 50(a) and (b) required motions for all issues, even purely legal ones, and dismissed appeal for failure to preserve the exhaustion defense for appellate review.

In a unanimous opinion authored by Justice Barrett, the U.S. Supreme Court held that the lieutenant was not required to renew in a post-trial motion purely legal arguments that were denied at summary judgment to preserve those arguments for appeal, resolving a conflict among the circuits. Justice Barrett pointed out that because the factual record developed at trial supersedes the record existing at the time of the summary-judgment motion, it follows that a party must raise in a post-trial motion a claim that the evidence is legally insufficient to support the verdict to preserve that argument for appeal. *Id*. at 1387-88. That motion allows the district court to take a "first crack" at the question that the appellate court will ultimately face: Was there sufficient evidence in the trial record to support the jury's verdict? On the other hand, Justice Barrett explained the same is not true for pure questions of law resolved in an order denying summary judgment. These conclusions are not superseded by later developments in the litigation, and thus such rulings merge into the final judgment, at which point they are reviewable on appeal. The reviewing court does not benefit from having a district court reexamine a purely legal pretrial ruling after trial because nothing at trial will have given the district court any reason to question its prior analysis. *Id*. at 1389-91.

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