CIVIL PROCEDURE
CASES, MATERIALS, AND QUESTIONS

SIXTH EDITION

2015 Update Memorandum

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2015 Updates

Rich Freer and Wendy Perdue provide this memorandum for the benefit of students and faculty who are using the Sixth Edition of the Freer & Perdue casebook. Page numbers are to that edition. Included herein are the proposed amendments to the Federal Rules of Civil Procedure that are scheduled to go into effect (absent congressional action) on December 1, 2015. For ease of reference, we summarize all of the proposed changes together in a Preface to this Supplement. Key provisions will then be discussed at appropriate places throughout the Supplement.

Permission is granted to distribute copies free of charge to students in classes using the casebook.

TABLE OF CONTENTS

PREFACE: PROPOSED 2015 AMENDMENTS TO THE FEDERAL RULES

The Supreme Court has sent a set of amendments of the Federal Rules of Civil Procedure to Congress. These changes will become effective on December 1, 2015 unless Congress acts to the contrary, which, of course, is unlikely. The amendments are aimed principally at discovery, and the most significant are the changes in defining the scope of discovery under Rule 26(b)(1) and concerning preservation of electronically stored information (ESI) under Rule 37(e). We thought it might be handy to summarize all of the proposed changes in one place here, and then to discuss individual changes as warranted throughout the Supplement.

Rule 4(m) will reduce the time in which to serve process from 120 days to 90 days after filing the complaint. This, in turn, leads to amendments of Rule 16(b) to reduce by 30 days the time for the scheduling order, the Rule 26(f) conference, and the initial required disclosures. The impetus for this increased front-loading of litigation is not clear. And though most of the amendments concern discovery, Rule 55 is altered to make clear the relationship between default judgment and a motion to set aside under Rule 60(b) and Rule 84 is abrogated, which means that there will no longer be any official forms as an adjunct to the Federal Rules.

With regard to its discovery changes, the Advisory Committee was guided by four principal goals, each of which was adumbrated at the Duke Conference of 2010. Many of the ideas embodied in these amendments emanated from that conference. The four themes are: cooperation, early and active judicial management, proportionality, and preservation of ESI.

Each of the major changes will be discussed where appropriate throughout this Supplement. We thought it would be handy, however, to provide an overview of the amendments in one place at the outset. Following this list, we discuss the two major amendments – to Rules 26(b)(1) and 37(e) in detail.

Overview of 2015 Amendments

- Rule 1 is amended to impose upon *parties* (and not just the court) to use Rules to secure the just, speedy, and inexpensive determination of every proceeding.
- Rule 4(m) reduces the time in which to serve process from 120 to 90 days after filing. Note that this will have an impact on relation back of amended pleadings under Rule 15(c)(1)(C), which requires that notice be received "within the period provided by Rule 4(m)."
- Rule 16(b)(2) reduces the time for scheduling order, the Rule 26(f) conference, and initial required disclosures by 30 days. These changes were triggered by the amendment to Rule 4(m).
- Rules 26(b)(1) and 26(b)(2) are amendment substantially concerning the scope of discovery (these will be discussed immediately below).
- Rule 26(b)(3)(B) permits the court to add include in scheduling orders appropriate orders concerning preservation of ESI and agreements under Federal Rule of

Evidence 502. (That provision addresses the effect of disclosure of privileged attorney-client communications or of material protected as work product.)

- Rule 26(c)(1)(B) will permit the court to make an order allocating expenses of discovery as part of a protective order.
- Rule 26(d)(2) addresses "early" requests to produce (see Rule 34(b)(2)(A) below).
- Rule 26(d)(3) will permit the parties to stipulate regarding the sequence of discovery.
- Rules 30, 31, and 33 refer to the new standard for the scope of discovery under Rule 26(b)(1).
- Rule 34(b)(2)(A) is amended to allow early "delivery" of requests to produce (starting 21 days after service of process), to be deemed served at the first Rule 26(f) conference and to which responses are due within 30 days after the Rule 26(f).
- Rule 34(b)(2)(B) is amended to require objections with specificity (to reconcile Rule 34 with the same language in Rule 33 regarding interrogatories) and to allow the responding party simply to produce the material rather than respond saying it will do so. The latter change conforms to common practice.
- Rule 34(b)(2)(C) is amended to require a party objecting to a request to produce to state whether it is nonetheless producing some materials. This will remove confusion regarding the scope of the objections.
- Rule 37(a)(3)(B)(iv) is amended to permit a motion to compel if a party fails either to respond or to produce materials under Rule 34 (this complements the change to Rule 34(b)(2)(B)).
- Rule 37(e) is replaced entirely, to change from a focus on failure to produce ESI to a failure to preserve ESI.
- Rule 55(c) is amended to make clear that a final default judgment may be set aside under the demanding standards of Rule 60(b). A nonfinal default judgment may be set aside under the less demanding standards of Rule 55(c).
- Rule 84 will be abrogated, so there will no longer be official forms to the Federal Rules.

Amendment of Rule 26(b)(1)

At present, Rule 26(b)(1) permits discovery generally of nonprivileged matter that is relevant to a claim or defense. Rule 26(b)(2) then limits the frequency and extent of discovery – principally through the doctrine of proportionality, which is presently found in Rule 26(b)(2)(C). The 2015 amendment moves proportionality from being something that can limit discovery of nonprivileged, relevant matter to part of the definition of what is discoverable. Thus, one can now discover nonprivileged matter that is relevant to a claim or defense

> and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

> Information within this scope of discovery need not be admissible in evidence to be discoverable.

In addition, the amended Rule 26(b)(1) deletes three phrases that have long been part of the definition of the scope of discovery. First, the Rule no longer expressly includes "the existence, . . . and location of any documents or other tangible things and the identity and location of person who know of any discoverable matter." Second, though the new version expressly provides that information may be discoverable though not admissible at trial, it no longer says that discoverable information includes that which "appears reasonably calculated to lead to the discovery of admissible evidence." Third, the present Rule permits the court, for good cause, to order broader discovery ("relevant to the subject matter involved in the action"). This is deleted, so courts no longer have authority to permit discovery beyond matter relevant to a claim or defense.

Moreover, the proportionality provision of present Rule 26(c)(2)(C) is not imported into Rule 26(b)(1) verbatim, but repositions some of the factors. Presently, a court must limit discovery if it is cumulative, can be had less burdensomely, or the propounding party already had a chance to obtain the material, or if the burden or expense outweighs the likely benefit. On this latter point, the court is to consider the needs of the case, amount in controversy, the parties' resources, importance of the issues at stake, and the importance of discovery to resolve the issues.

Under the amended Rule 26(b)(1), discovery is proper if nonprivileged, relevant to a claim or defense and "proportional to the needs of the case." On proportionality, the court is to consider the importance of the issues at stake, amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of discovery in resolving issues, and whether the burden or expense of discovery outweighs the likely benefit. Thus, whether the burden outweighs the value goes from a reason to find discovery non-proportional to a factor.

Rule 26(b)(2)(C)(3) requires the court to deny discovery that is outside the scope of Rule 26(b)(1).

Amendment of Rule 37

The current version of Rule 37(e) – regarding failure to "provide" ESI – will be stricken and replaced with a provision entitled failure to "preserve" ESI. The present provision says that absent exceptional circumstances, there would be no sanctions regarding failure to provide ESI that was lost in the good faith, routine operation of an electronic system. That provision is deleted.

The new provision has various steps along the way. It applies when:

- ESI should have been preserved but
- was lost because of failure to take reasonable steps to preserve and
- the ESI cannot be restored or recovered.

If, after these are established, the court finds that the propounding party is prejudiced by the loss of information, the court "may order measures [not sanctions] no greater than necessary to cure the prejudice." The Advisory Committee Note is short on specifics as to what those orders might be. Clearly, however, they cannot include an adverse inference instruction.

Only if the propounding party is found to have "acted with intent to deprive another party of the information's use in the litigation" may the court

- presume that the lost information was unfavorable to the propounding party or
- instruct the jury that it may/must presume it was unfavorable or
- dismiss or enter default judgment.

Several points are notable. First, the Rule addresses only ESI, and does not apply to discovery of other materials. Second, the Rule does not define when the need to preserve ESI will arise. The Advisory Committee Notes indicate that the question will be governed by the common law of litigation holds, although there may be statutes or other provisions, or court orders that impose a duty to preserve. Third, it is not clear who has the burden of showing that something should have been preserved or what constitute "reasonable steps" to preserve. Fourth, the Advisory Committee Notes say that the burden regarding a showing of prejudice will vary depending upon the facts of the case. Fifth, the court has no authority to enter an adverse inference instruction based upon anything less than intentional deprivation of the material.

CHAPTER 2: PERSONAL JURISDICTION
B. CONSTITUTIONAL LIMITS ON PERSONAL JURISDICTION
3. THE MODERN ERA

At page 60, add the following at the end of the page:

One of the challenges of using Rule 4(k)(2) is that the Rule is applicable only if there is no state in which the defendant is subject to jurisdiction. Proving a negative can be a challenge for the plaintiff. Merial Ltd. v. Cipla Ltd., 681 F.3d 1283 (Fed. Cir. 2012), offers and interesting variation on this problem. There the plaintiff sued a foreign defendant in federal court in Georgia and the complaint alleged personal jurisdiction in Georgia and said nothing about Rule 4(k)(2). The defendant defaulted and later challenged the validity of the judgment. The court held that the notwithstanding the plaintiff's failure explicitly to invoke Rule 4(k)(2) at the time of the first suit, that Rule could nonetheless provide a basis for jurisdiction unless the defendant could demonstrate that there was a state in which jurisdiction would have been proper, without regard to whether the defendant would have consented to jurisdiction.

At page 94, add the following as Note 8:

8. In *Ainsworth v. Moffett Engineering, Ltd*., 716 F.3d 174 (5th Cir. 2013), the plaintiff was injured in Mississippi by a forklift manufactured by a foreign company and sold through an exclusive U.S. distributor. The court distinguished *McIntyre* and upheld jurisdiction in Mississippi because 203 of the defendant's machines were sold in that state. The court also noted that the machine was designed for poultry-related uses and that even though the defendant did not have "specific knowledge" of the sales in Mississippi, "it reasonably could have expected that such sales would be made given the fact that Mississippi is the fourth largest poultry-producing state in the United States."

4. GENERAL JURISDICTION

At page 95, substitute the following case for *Goodyear*:

DAIMLER AG v. BAUMAN

134 S.Ct. 746, 187 L.Ed.2d 624 (2014)

Justice GINSBURG delivered the opinion of the Court.

This case concerns the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States. The litigation commenced in 2004, when twenty-two Argentinian residents filed a complaint in the United States District Court for the Northern District of California against DaimlerChrysler Aktiengesellschaft (Daimler), a German public stock company, headquartered in Stuttgart, that manufactures Mercedes–Benz vehicles in Germany. The complaint alleged that during Argentina's 1976–1983 "Dirty War," Daimler's Argentinian subsidiary, Mercedes–Benz Argentina (MB

Argentina) collaborated with state security forces to kidnap, detain, torture, and kill certain MB Argentina workers, among them, plaintiffs or persons closely related to plaintiffs. Damages for the alleged human-rights violations were sought from Daimler under the laws of the United States, California, and Argentina. Jurisdiction over the lawsuit was predicated on the California contacts of Mercedes–Benz USA, LLC (MBUSA), a subsidiary of Daimler incorporated in Delaware with its principal place of business in New Jersey. MBUSA distributes Daimler-manufactured vehicles to independent dealerships throughout the United States, including California.

The question presented is whether the Due Process Clause of the Fourteenth Amendment precludes the District Court from exercising jurisdiction over Daimler in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint. Plaintiffs invoked the court's general or all-purpose jurisdiction. California, they urge, is a place where Daimler may be sued on any and all claims against it, wherever in the world the claims may arise. For example, as plaintiffs' counsel affirmed, under the proffered jurisdictional theory, if a Daimler-manufactured vehicle overturned in Poland, injuring a Polish driver and passenger, the injured parties could maintain a design defect suit in California. See Tr. of Oral Arg. 28–29. Exercises of personal jurisdiction so exorbitant, we hold, are barred by due process constraints on the assertion of adjudicatory authority.

In *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. ——, 131 S.Ct. 2846 (2011), we addressed the distinction between general or all-purpose jurisdiction, and specific or conduct-linked jurisdiction. As to the former, we held that a court may assert jurisdiction over a foreign corporation "to hear any and all claims against [it]" only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive "as to render [it] essentially at home in the forum State." Instructed by *Goodyear*, we conclude Daimler is not "at home" in California, and cannot be sued there for injuries plaintiffs attribute to MB Argentina's conduct in Argentina.

I

In 2004, plaintiffs (respondents here) filed suit in the United States District Court for the Northern District of California, alleging that MB Argentina collaborated with Argentinian state security forces to kidnap, detain, torture, and kill plaintiffs and their relatives during the military dictatorship in place there from 1976 through 1983, a period known as Argentina's "Dirty War." Based on those allegations, plaintiffs asserted claims under the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991, 106 Stat. 73, note following 28 U.S.C. § 1350, as well as claims for wrongful death and intentional infliction of emotional distress under the laws of California and Argentina. The incidents recounted in the complaint center on MB Argentina's plant in Gonzalez Catan, Argentina; no part of MB Argentina's alleged collaboration with Argentinian authorities took place in California or anywhere else in the United States.

Plaintiffs' operative complaint names only one corporate defendant: Daimler, the petitioner here. Plaintiffs seek to hold Daimler vicariously liable for MB Argentina's

alleged malfeasance. Daimler is a German *Aktiengesellschaft* (public stock company) that manufactures Mercedes–Benz vehicles in Germany and has its headquarters in Stuttgart. At times relevant to this case, MB Argentina was a subsidiary wholly owned by Daimler's predecessor in interest.

Daimler moved to dismiss the action for want of personal jurisdiction. Opposing the motion, plaintiffs submitted declarations and exhibits purporting to demonstrate the presence of Daimler itself in California. Alternatively, plaintiffs maintained that jurisdiction over Daimler could be founded on the California contacts of MBUSA, a distinct corporate entity that, according to plaintiffs, should be treated as Daimler's agent for jurisdictional purposes.

MBUSA, an indirect subsidiary of Daimler, is a Delaware limited liability corporation.[3] MBUSA serves as Daimler's exclusive importer and distributor in the United States, purchasing Mercedes–Benz automobiles from Daimler in Germany, then importing those vehicles, and ultimately distributing them to independent dealerships located throughout the Nation. Although MBUSA's principal place of business is in New Jersey, MBUSA has multiple California-based facilities, including a regional office in Costa Mesa, a Vehicle Preparation Center in Carson, and a Classic Center in Irvine. According to the record developed below, MBUSA is the largest supplier of luxury vehicles to the California market. In particular, over 10% of all sales of new vehicles in the United States take place in California, and MBUSA's California sales account for 2.4% of Daimler's worldwide sales.

The relationship between Daimler and MBUSA is delineated in a General Distributor Agreement, which sets forth requirements for MBUSA's distribution of Mercedes–Benz vehicles in the United States. That agreement established MBUSA as an "independent contracto[r]" that "buy[s] and sell[s] [vehicles] ... as an independent business for [its] own account." The agreement "does not make [MBUSA] ... a general or special agent, partner, joint venturer or employee of DAIMLERCHRYSLER or any DaimlerChrysler Group Company"; MBUSA "ha[s] no authority to make binding obligations for or act on behalf of DAIMLERCHRYSLER or any DaimlerChrysler Group Company."

[The district court granted Daimler's motion to dismiss. The Ninth Circuit initially affirmed but subsequently granted plaintiffs' petition for rehearing, withdrew its original opinion, and reversed the district court.] * * *

We granted certiorari to decide whether, consistent with the Due Process Clause of the Fourteenth Amendment, Daimler is amenable to suit in California courts for claims involving only foreign plaintiffs and conduct occurring entirely abroad.

II

Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons. See Fed. Rule Civ. Proc. 4(k)(1)(A) (service of process is

effective to establish personal jurisdiction over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located"). Under California's long-arm statute, California state courts may exercise personal jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Civ. Proc. Code Ann. § 410.10 (West 2004). California's long-arm statute allows the exercise of personal jurisdiction to the full extent permissible under the U.S. Constitution. We therefore inquire whether the Ninth Circuit's holding comports with the limits imposed by federal due process.

III

In *Pennoyer v. Neff,* decided shortly after the enactment of the Fourteenth Amendment, the Court held that a tribunal's jurisdiction over persons reaches no farther than the geographic bounds of the forum. In time, however, that strict territorial approach yielded to a less rigid understanding, spurred by "changes in the technology of transportation and communication, and the tremendous growth of interstate business activity." *Burnham v. Superior Court of Cal.,* ***754** *County of Marin,* 495 U.S. 604, 617 (1990) (opinion of SCALIA, J.).

"The canonical opinion in this area remains *International Shoe*, in which we held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has 'certain minimum contacts with [the State] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' " *Goodyear,* (quoting *International Shoe*). Following *International Shoe,* "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction." *Shaffer*.

International Shoe's conception of "fair play and substantial justice" presaged the development of two categories of personal jurisdiction. The first category is represented by *International Shoe* itself, a case in which the in-state activities of the corporate defendant "ha[d] not only been continuous and systematic, but also g[a]ve rise to the liabilities sued on." *International Shoe* recognized, as well, that "the commission of some single or occasional acts of the corporate agent in a state" may sometimes be enough to subject the corporation to jurisdiction in that State's tribunals with respect to suits relating to that in-state activity. Adjudicatory authority of this order, in which the suit "aris[es] out of or relate[s] to the defendant's contacts with the forum," *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414, n. 8 (1984), is today called "specific jurisdiction." See *Goodyear* (citing von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1144–1163 (1966) (hereinafter von Mehren & Trautman)).

International Shoe distinguished between, on the one hand, exercises of specific

jurisdiction, as just described, and on the other, situations where a foreign corporation's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." As we have since explained, "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear.*[5]

Since *International Shoe,* "specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role." *Goodyear.* *International Shoe*'s momentous departure from *Pennoyer*'s rigidly territorial focus, we have noted, unleashed a rapid expansion of tribunals' ability to hear claims against out-of-state defendants when the episode-in-suit occurred in the forum or the defendant purposefully availed itself of the forum. Our subsequent decisions have continued to bear out the prediction that "specific jurisdiction will come into sharper relief and form a considerably more significant part of the scene."

Our post-*International Shoe* opinions on general jurisdiction, by comparison, are few. "[The Court's] 1952 decision in *Perkins v. Benguet Consol. Mining Co.* remains the textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum." *Goodyear*. The defendant in *Perkins*, Benguet, was a company incorporated under the laws of the Philippines, where it operated gold and silver mines. Benguet ceased its mining operations during the Japanese occupation of the Philippines in World War II; its president moved to Ohio, where he kept an office, maintained the company's files, and oversaw the company's activities. *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 448 (1952). The plaintiff, an Ohio resident, sued Benguet on a claim that neither arose in Ohio nor related to the corporation's activities in that State. We held that the Ohio courts could exercise general jurisdiction over Benguet without offending due process. That was so, we later noted, because "Ohio was the corporation's principal, if temporary, place of business."[8]

The next case on point, *Helicopteros,* arose from a helicopter crash in Peru. Four U.S. citizens perished in that accident; their survivors and representatives brought suit in Texas state court against the helicopter's owner and operator, a Colombian corporation. That company's contacts with Texas were confined to "sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from [a Texas-based helicopter company] for substantial sums; and sending personnel to [Texas] for training." Notably, those contacts bore no apparent relationship

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[5] Colloquy at oral argument illustrated the respective provinces of general and specific jurisdiction over persons. Two hypothetical scenarios were posed: *First,* if a California plaintiff, injured in a California accident involving a Daimler-manufactured vehicle, sued Daimler in California court alleging that the vehicle was defectively designed, that court's adjudicatory authority would be premised on specific jurisdiction. *Second,* if a similar accident took place in Poland and injured Polish plaintiffs sued Daimler in California court, the question would be one of general jurisdiction.

[8] * * * All of Benguet's activities were directed by the company's president from within Ohio. * * * Given the wartime circumstances, Ohio could be considered "a surrogate for the place of incorporation or head office." * * *

to the accident that gave rise to the suit. We held that the company's Texas connections did not resemble the "continuous and systematic general business contacts ... found to exist in *Perkins*." "[M]ere purchases, even if occurring at regular intervals," we clarified, "are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions."

Most recently, in *Goodyear*, we answered the question: "Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State? " That case arose from a bus accident outside Paris that killed two boys from North Carolina. The boys' parents brought a wrongful-death suit in North Carolina state court alleging that the bus's tire was defectively manufactured. The complaint named as defendants not only The Goodyear Tire and Rubber Company (Goodyear), an Ohio corporation, but also Goodyear's Turkish, French, and Luxembourgian subsidiaries. Those foreign subsidiaries, which manufactured tires for sale in Europe and Asia, lacked any affiliation with North Carolina. A small percentage of tires manufactured by the foreign subsidiaries were distributed in North Carolina, however, and on that ground, the North Carolina Court of Appeals held the subsidiaries amenable to the general jurisdiction of North Carolina courts.

We reversed, observing that the North Carolina court's analysis "elided the essential difference between case-specific and all-purpose (general) jurisdiction." Although the placement of a product into the stream of commerce "may bolster an affiliation germane to *specific* jurisdiction," we explained, such contacts "do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant." As *International Shoe* itself teaches, a corporation's "continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." Because Goodyear's foreign subsidiaries were "in no sense at home in North Carolina," we held, those subsidiaries could not be required to submit to the general jurisdiction of that State's courts. See also *J. McIntyre Machinery, Ltd. v. Nicastro* (GINSBURG, J., dissenting) (noting unanimous agreement that a foreign manufacturer, which engaged an independent U.S.-based distributor to sell its machines throughout the United States, could not be exposed to all-purpose jurisdiction in New Jersey courts based on those contacts).

As is evident from *Perkins*, *Helicopteros,* and *Goodyear*, general and specific jurisdiction have followed markedly different trajectories post-*International Shoe*. Specific jurisdiction has been cut loose from *Pennoyer*'s sway, but we have declined to stretch general jurisdiction beyond limits traditionally recognized. As this Court has increasingly trained on the "relationship among the defendant, the forum, and the litigation," *Shaffer, i.e.,* specific jurisdiction, general jurisdiction has come to occupy a less dominant place in the contemporary scheme.[11]

[11] As the Court made plain in *Goodyear* and repeats here, general jurisdiction requires affiliations "so 'continuous and

IV

* * *

A

In sustaining the exercise of general jurisdiction over Daimler, the Ninth Circuit relied on an agency theory, determining that MBUSA acted as Daimler's agent for jurisdictional purposes and then attributing MBUSA's California contacts to Daimler. The Ninth Circuit's agency analysis derived from Circuit precedent considering principally whether the subsidiary "performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services."

This Court has not yet addressed whether a foreign corporation may be subjected to a court's general jurisdiction based on the contacts of its in-state subsidiary. Daimler argues, and several Courts of Appeals have held, that a subsidiary's jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be its alter ego. The Ninth Circuit adopted a less rigorous test based on what it described as an "agency" relationship. Agencies, we note, come in many sizes and shapes: "One may be an agent for some business purposes and not others so that the fact that one may be an agent for one purpose does not make him or her an agent for every purpose." [13] A subsidiary, for example, might be its parent's agent for claims arising in the place where the subsidiary operates, yet not its agent regarding claims arising elsewhere. The Court of Appeals did not advert to that prospect. But we need not pass judgment on invocation of an agency theory in the context of general jurisdiction, for in no event can the appeals court's analysis be sustained.

The Ninth Circuit's agency finding rested primarily on its observation that MBUSA's services were "important" to Daimler, as gauged by Daimler's hypothetical readiness to perform those services itself if MBUSA did not exist. Formulated this way, the inquiry into importance stacks the deck, for it will always yield a pro-jurisdiction answer: "Anything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist." The Ninth Circuit's agency theory thus appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the "sprawling view of general jurisdiction" we rejected in *Goodyear*.

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systematic' as to render [the foreign corporation] essentially at home in the forum State." *i.e.,* comparable to a domestic enterprise in that State.

[13] Agency relationships, we have recognized, may be relevant to the existence of *specific* jurisdiction. "[T]he corporate personality," *International Shoe Co. v. Washington,* observed, "is a fiction, although a fiction intended to be acted upon as though it were a fact." See generally 1 W. Fletcher, Cyclopedia of the Law of Corporations § 30, p. 30 (Supp.2012–2013) ("A corporation is a distinct legal entity that can act only through its agents."). As such, a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there. It does not inevitably follow, however, that similar reasoning applies to *general* jurisdiction.

B

Even if we were to assume that MBUSA is at home in California, and further to assume MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there.

Goodyear made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." With respect to a corporation, the place of incorporation and principal place of business are "paradig[m] ... bases for general jurisdiction." Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable. These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.

Goodyear did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums. Plaintiffs would have us look beyond the exemplar bases *Goodyear* identified, and approve the exercise of general jurisdiction in every State in which a corporation "engages in a substantial, continuous, and systematic course of business." That formulation, we hold, is unacceptably grasping.

As noted, the words "continuous and systematic" were used in *International Shoe* to describe instances in which the exercise of *specific* jurisdiction would be appropriate. Turning to all-purpose jurisdiction, in contrast, *International Shoe* speaks of "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit ... *on causes of action arising from dealings entirely distinct from those activities*." Accordingly, the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense "continuous and systematic," it is whether that corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State."[19]

Here, neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there. If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA's sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state

[19] We do not foreclose the possibility that in an exceptional case, see, *e.g., Perkins*, described *supra,* at 755 – 757, a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State. But this case presents no occasion to explore that question, because Daimler's activities in California plainly do not approach that level. It is one thing to hold a corporation answerable for operations in the forum State, quite another to expose it to suit on claims having no connection whatever to the forum State.

defendants "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp*.

It was therefore error for the Ninth Circuit to conclude that Daimler, even with MBUSA's contacts attributed to it, was at home in California, and hence subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California.[20]

C

Finally, the transnational context of this dispute bears attention. * * *

The Ninth Circuit, moreover, paid little heed to the risks to international comity its expansive view of general jurisdiction posed. Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case. In the European Union, for example, a corporation may generally be sued in the nation in which it is "domiciled," a term defined to refer only to the location of the corporation's "statutory seat," "central administration," or "principal place of business." The Solicitor General informs us, in this regard, that "foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the "fair play and substantial justice" due process demands. *International Shoe*

[20] To clarify in light of Justice SOTOMAYOR's opinion concurring in the judgment, the general jurisdiction inquiry does not "focu[s] solely on the magnitude of the defendant's in-state contacts." General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, "at home" would be synonymous with "doing business" tests framed before specific jurisdiction evolved in the United States. Nothing in *International Shoe* and its progeny suggests that "a particular quantum of local activity" should give a State authority over a "far larger quantum of ... activity" having no connection to any in-state activity.

Justice SOTOMAYOR would reach the same result, but for a different reason. Rather than concluding that Daimler is not at home in California, Justice SOTOMAYOR would hold that the exercise of general jurisdiction over Daimler would be unreasonable "in the unique circumstances of this case." In other words, she favors a resolution fit for this day and case only. True, a multipronged reasonableness check was articulated in *Asahi,* but not as a free-floating test. Instead, the check was to be essayed when *specific* jurisdiction is at issue. See also *Burger King Corp. v. Rudzewicz*. First, a court is to determine whether the connection between the forum and the episode-in-suit could justify the exercise of specific jurisdiction. Then, in a second step, the court is to consider several additional factors to assess the reasonableness of entertaining the case. When a corporation is genuinely at home in the forum State, however, any second-step inquiry would be superfluous.

Justice SOTOMAYOR fears that our holding will "lead to greater unpredictability by radically expanding the scope of jurisdictional discovery." But it is hard to see why much in the way of discovery would be needed to determine where a corporation is at home. Justice SOTOMAYOR's proposal to import *Asahi*'s "reasonableness" check into the general jurisdiction determination, on the other hand, would indeed compound the jurisdictional inquiry. The reasonableness factors identified in *Asahi* include "the burden on the defendant," "the interests of the forum State," "the plaintiff's interest in obtaining relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," "the shared interest of the several States in furthering fundamental substantive social policies," and, in the international context, "the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction." Imposing such a checklist in cases of general jurisdiction would hardly promote the efficient disposition of an issue that should be resolved expeditiously at the outset of litigation.

(quoting *Milliken v. Meyer,* 311 U.S. 457, 463 (1940)).

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the Ninth Circuit is

Reversed.

[The concurrence of Justice Sotomayor is omitted.]

Notes and Questions

1. After *Daimler*, how likely is it that any corporation will be held subject to general jurisdiction in a state other than where it is incorporated or where it has its principal place of business?

2. It is clear that the Court has limited general jurisdiction to states in which the defendant is "at home." Does it tell us *why* it does so? In fact, does the Court tell us why we have general jurisdiction at all? What is the purpose of the doctrine?

3. The Court says that a human is "at home," and therefore subject to general jurisdiction, where she is domiciled. Doesn't *Burnham*, page ___, also provides that a human defendant is subject to general jurisdiction where she was served with process? Does *Daimler* undermine the validity of *Burnham*?

4. Not all businesses are corporations. For instance, many businesses are partnerships or limited liability companies. Where are such businesses "at home"?

7. Transient Presence

Jurisdiction Over Corporations and Partnerships

At page 127, add the following at the end of subsection 7:

In Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals Inc., 2015 U.S. Dist. LEXIS 4056 (D. Del. Jan. 14, 2015), plaintiffs alleged patent infringement concerning the manufacture and marketing of various pharmaceuticals. Defendants moved to dismiss for lack of general personal jurisdiction based upon the Court's holding in *Daimler*, which permits general jurisdiction only where defendant is "at home." Because the defendants were neither incorporated in Delaware nor had their principal placed of business there, defendants asserted, *Daimler* required dismissal.

The court agreed that general jurisdiction was not possible under *Daimler*, but upheld it on the basis of consent: "this Court may exercise general jurisdiction over Mylan Pharma based on Mylan Pharma's consent, consent which Mylan Pharma gave

when it complied with the Delaware business registration statute by appointing a registered agent in Delaware to accept service of process." 2015 U.S. Dist. LEXIS 4056 at *31. The court concluded that "*Daimler* does not eliminate consent as a basis for a state to establish general jurisdiction over a corporation which has appointed an agent for service of process in that state, as is required as part of registering to do business in that state." 2015 U.S. Dist. LEXIS 4056 at *34. Interestingly, another judge in the same district reached the opposite conclusion on similar facts, and concluded that Daimler does not permit upholding general jurisdiction on the basis of compliance with the state's registration statute. AstraZenica AB v. Mylan Pharms., Inc., 2014 U.S. Dist. LEXIS 156660 at *11-15 (D. Del. Nov. 5, 2014). Yet a third judge in the same district, in another related case, concluded that "[s]ince Mylan Pharmaceuticals Inc. has complied with the Delaware registration statutes, I find that it consented to general jurisdiction." Novartis Pharms. Corp. v. Mylan, Inc., 2015 U.S. Dist. LEXIS 31812 at *8 (D. Del. March 16, 2015).

8. Personal Jurisdiction and the Internet

At Page 134, add the following to Note 3:

In *Walden v. Fiore*, 134 S.Ct. 1115 (2014), the Supreme Court addressed the requirements for minimum contacts in intentional tort cases and rejected the idea that the place of injury necessarily has personal jurisdiction. The case grew out of a search of plaintiffs' luggage in the Atlanta airport in which a DEA agent seized a large amount of cash. Plaintiffs alleged that they returned to their home in Nevada, their Nevada attorney called the agent seeking return of the funds and provided documentation supporting the legitimacy of the funds. Subsequently, the agent allegedly drafted a false affidavit to support the fund's forfeiture and forwarded that affidavit to Georgia. The Ninth Circuit upheld jurisdiction on the grounds that the agent "expressly aimed" the false affidavit at Nevada because he knew it would harm people with significant connections to Nevada. The Supreme Court reversed explaining that "it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State." The Court further stressed that "our 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there."

CHAPTER 3: NOTICE AND OPPORTUNITY TO BE HEARD
B: NOTICE
2: STATUTORY REQUIREMENTS

At page 159, add the following at the end of Note 8:

Effective December 1, 2015, Rule 4(m) is scheduled to be amended to require that process be served within 90 days (not 120 days) of filing.

At page 161, add the following as Note 20:

20. For an interesting example of service of process, effected on the singer Ciara at a concert, see: http://www.nbcnews.com/entertainment/singer-ciara-gets-served-legal-papers-middle-concert-6C10272130

Along similar lines, a New York family court upheld the use of Facebook to serve an ex-spouse with notice of an action for child support. See: http://www.slate.com/blogs/future_tense/2014/09/22/family_court_official_rules_that_staten_island_man_can_use_facebook_to_serve.html

CHAPTER 4: SUBJECT MATTER JURISDICTION
C: FEDERAL COURTS AND LIMITED SUBJECT MATTER JURISDICTION
3: DIVERSITY OF CITIZENSHIP AND ALIENAGE
d(ii). NON-INCORPORATED BUSINESSES

At page 204, add the following at the bottom of the page:

The Third Circuit decided an interesting diversity case that provides a primer on various business forms. In *Johnson v. SmithKline Beecham Corp.,* 724 F.3d 337 (3d Cir. 2013), plaintiffs (citizens of Louisiana and Pennsylvania) brought a state-court products liability case against several entities related to the pharmaceutical giant SmithKline Beecham. Plaintiffs clearly prefer to litigate in state court and defendants clearly would prefer to litigate in federal court. The defendants removed to federal court on the basis of diversity. Plaintiffs moved to remand, contending that at least one of the defendants was a citizen of Pennsylvania. The district court found that none of the defendants was a citizen of Pennsylvania and refused plaintiffs' motion to remand. On interlocutory appeal, the Third Circuit affirmed.

One of the defendants, GSK LLC, was the successor to SmithKline Beecham, which was a Pennsylvania corporation. In 2009, however, before this case was filed, it re-chartered as a Delaware corporation and converted into a Delaware LLC. The Pennsylvania entity dissolved. Operationally, the business was unaffected by the conversion. It management remained the same and its headquarters remained in Philadelphia, where it continued to employ 1800 people. Because it is now an LLC, however, its principal place of business is irrelevant for purposes of citizenship. As we saw in *Belleville Catering,* an LLC is a citizen of the same state(s) as its member(s). GSK LLC has only one member – GSK Holdings, which is a Delaware corporation.

The question became whether GSK Holdings' principal place of business was Delaware or Pennsylvania. If the former, there would be diversity. If the latter, there would not. The court noted that holding companies, by their nature, have limited activities. Its board of directors consisted of three people, one of whom worked in Philadelphia, one in London and one in Delaware. The board met quarterly for 15 to 30 minutes in Delaware. One director usually attended, with the other two joining by conference call. Beyond this, GSK Holdings leased a 10-foot by 10-foot office, which served chiefly to house its books and records. It paid bills from that office as well. The Third Circuit concluded that GSK Holdings' principal place of business thus was in Delaware, and upheld diversity jurisdiction.

> Beyond those limited functions, GSK Holdings has no operations. It produces no products, conducts no research, and has no sales. Rather, as is typical for a holding company, its role is confined to owning its interest in its subsidiary – GSK LLC. That subsidiary, on the other hand, has widespread and complex operations, as it develops, produces, and sells pharmaceutical products nationwide.

4: FEDERAL QUESTION JURISDICTION
b.(ii). CENTRALITY OF THE FEDERAL ISSUE TO THE CLAIM

At page 233, add the following at the top of the page as Note 9:

9. The Court applied *Grable* to reject jurisdiction in *Gunn v. Minton*, 133 S.Ct. 1059 (2013). Plaintiff asserted a state-law claim against his lawyers for malpractice in a patent matter. Specifically, he argued that they were negligent in not asserting the "experimental use" exception to the "on-sale" bar in underlying infringement suit. The Court held that the malpractice claim does not arise under federal law and thus did not invoke federal question jurisdiction. Decision of the malpractice claim would required resolution of a federal patent issue which was actually disputed. But the federal issue was not sufficiently substantial to federal system. Moreover, state-court jurisdiction over such malpractice claims would not upset the appropriate balance between federal and state judicial responsibilities. Chief Justice Roberts wrote for a unanimous Court:

> [E]ven where a claim finds its origins in state rather than federal law—as Minton's legal malpractice claim indisputably does—we have identified a "special and small category" of cases in which arising under jurisdiction still lies. *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U. S. 677, 699 (2006). In outlining the contours of this slim category, we do not paint on a blank canvas. Unfortunately, the canvas looks like one that Jackson Pollock got to first.
>
> In an effort to bring some order to this unruly doctrine several Terms ago, we condensed our prior cases into the following inquiry: Does the "state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities"? *Grable*, 545 U. S., at 314. That is, federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Where all four of these requirements are met, we held, jurisdiction is proper because there is a "serious federal interest in claiming the advantages thought to be inherent in a federal forum," which can be vindicated without disrupting Congress's intended division of labor between state and federal courts. *Id.*, at 313–314.

133 S.Ct. at 1064-1065 (citation omitted).

6: REMOVAL JURISDICTION

At page 234, add the following before Notes and Questions:

In *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S.Ct. 547 (2014), the Supreme Court rejected the argument that a defendant who removes a case must have *evidence* that the amount in controversy requirement is satisfied. Instead, all the defendant need do is have a "plausible allegation" that the amount requirement is met.

The Court said: "as specified in § 1446(a), a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. Evidence establishing the amount is required by § 1446(c)(2)(B) only when the plaintiff contests, or the court questions, the defendant's allegation." 135 S.Ct. at 554. It relied upon the fact that Congress used language in § 1446(a) consistent with the general pleading requirements of Federal Rule 8(a). Each requires a "short and plain" statement. 135 S.Ct. at 553 ("By design, § 1446(a) tracks the general pleading requirement stated in Rule 9(a) of the Federal Rules of Civil Procedure.")

Dart Cherokee was a class action removed under CAFA, which requires that the class claims, in the aggregate, exceed $5,000,000. Because the opinion interprets the removal provision of § 1446(c), however, its holding will apply to the removal of diversity cases under § 1332(a). See 135 S.Ct. at 554 n.1 (assuming without deciding an issue the parties did not dispute, that § 1446(c) applies to removal of CAFA cases).

At page 239, add the following to Note 9:

Under CAFA, a class action satisfies the amount in controversy requirement if the aggregated claims exceed $5,000,000. Class action plaintiffs desiring to litigate in state court have attempted to avoid removal by stipulating that the class claims will not exceed $5,000,000. The Supreme Court rejected such an effort in *Standard Fire Insurance Co. v. Knowles,* 133 S.Ct. 1345 (2013). There, the representative of class asserting a state-law claim for alleged breach of homeowners' insurance policies sued in state court and stipulated that he would not seek damages for the class in excess of $5,000,000. Defendant removed and showed that the claims, in fact, aggregated to slightly more than that figure. Plaintiff moved to remand to state court based upon his stipulation that the class would in no event accept more than $5,000,000. The district court ordered remand and the Eighth Circuit declined to hear an interlocutory appeal.

The Court vacated the ruling and held that the case invoked federal jurisdiction under CAFA. It recognized that a plaintiff can defeat removal by stipulating that she will not accept an amount that invokes federal jurisdiction. But the stipulation must be binding on the plaintiff. In *Knowles,* the class representative had no authority to bind the class members to the stipulation, since the court had not certified a class. Accordingly, he was not in a position to bind the absentees. The Court explained:

> "[A] plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified. * * * Because his precertification stipulation does not bind anyone but himself, Knowles has not reduced the value of the putative class members' claims. * * * The Federal District Court, therefore, wrongly concluded that Knowles' precertification stipulation could overcome its finding that the CAFA jurisdictional threshold had been met."

133 S.Ct. at 1349.

CHAPTER 5: VENUE
B. LOCAL AND TRANSATORY ACTIONS

At page 242, add the following at the end of the section:

Although Congress has explicitly repealed the local action rule as a matter of venue, the Ninth Circuit has held that the local action rule is a limitation of the subject matter jurisdiction of the federal courts. Eldee-K Rental Props. LLC v. DIRECTV, Inc, 748 F.3d 943 (9th Cir. 2014). The case involved a trespass claim by an apartment owner against DIRECTV for placing satellite equipment on its buildings without permission. The Ninth Circuit held that the federal court in California lacked subject matter jurisdiction because the property in question was located in Connecticut.

E. CHANGE OF VENUE
2: TRANSFER OF CIVIL ACTIONS IN FEDERAL COURT

At page 257, add the following at the end of subsection (e):

One interesting question is whether a forum selection clause renders venue improper in any other district. Suppose, for example, that the parties' forum selection clause requires litigation in the Eastern District of Missouri. But suppose venue would be proper under § 1391(b) in the District of Arizona. Plaintiff files the suit in Arizona. Defendant wants that court to enforce the forum selection clause by ordering transfer to the Eastern District of Missouri. Defendant's choice of response depends upon whether the forum selection clause, requiring suit in the Eastern District of Missouri, renders venue in the District of Arizona improper. If so, Defendant can move to dismiss under Federal Rule 12(b)(3) or to transfer or dismiss under § 1406(a). If not – that is, if the forum selection clause does not affect what constitutes a proper venue under § 1391(b) – Defendant could only move to transfer under § 1404(a). Moreover, as we will see in the next subsection, the choice of transfer statute will affect what law applies to govern the case after transfer.

The Court brought certainty to the area in *Atlantic Marine Construction Co, Inc. v. U.S. District Court*, 134 S.Ct. 568 (2013). There, the plaintiff filed suit in a district in which venue was proper under § 1391(b), but which violated a forum-selection clause. The defendant moved to dismiss the case or to transfer under it under § 1406(a). The trial court declined to dismiss or to transfer, and held that the applicable statute was § 1404(a). Applying the discretionary factors under that statute, the court declined to transfer. The Fifth Circuit agreed, but the Supreme Court reversed.

The opinion clarified several important points. First, the Court held that § 1406(a) was not applicable because that section applies only where venue is inconsistent with the statutory venue requirements without regard to the presence of a forum-selection clause. Second, with respect to § 1404(a), the Court held that although § 1404(a) refers to "the convenience of parties and witnesses, in the interest of justice," where there is a forum-selection clause, the court should treat the agreement itself as having fully

resolved any issues as to what would be most convenient for the parties and their witnesses. As the Court explained, "[i]n all but the most unusual cases . . .'the interest of justice' is served by holding parties to their bargain." Finally, the Court held that although usually in a § 1404 transfer, the receiving court would apply the same law that the transferring court would have applied, this is not true when the case was transferred pursuant to a forum-selection clause.

Page 258, add the following at the end of subsection (f):

The cases that are consolidated for pretrial purposes under § 1407 remain separate actions; they are not merged into a single litigative unit. In *Gelboim v. Bank of America Corp*., 135 S.Ct. 897 (2015), about 60 cases were transferred under § 1407 for MDL treatment in the Southern District of New York. The MDL judge granted summary judgment in favor of the defendants in one of those cases. The plaintiffs attempted to appeal the final judgment in that case, but the Second Circuit dismissed the appeal because the summary judgment had not disposed of all 60 MDL cases. The Supreme Court reversed. When, as in *Gelboim*, no "master complaint" or "consolidated answer" has superseded the pleadings of the individual cases, the cases retain their individual character. Because the summary judgment completely resolved the one case, it was appealable to the Second Circuit.

CHAPTER 7
PLEADINGS AND JUDGMENTS BASED ON PLEADINGS

Section C: The Complaint

At page 306, add the following at the end of Note 1:

The Court emphasized the distinction between legal and factual sufficiency in *Johnson v. City of Shelby*, 134 S.Ct. 346 (2014). There, the plaintiffs, police officers, sued the City for which they worked, alleging that they had been fired for investigating possible criminal activity of city aldermen. They failed to allege that they sued under 42 U.S.C. § 1983, which creates a claim for those whose federal rights are violated by a defendant who acts under color of state law. The Fifth Circuit held that the failure to cite § 1983 was fatal, and dismissed the case under Rule 12(b)(6). The Supreme Court summarily granted certiorari and reversed without briefing or oral argument.

The Court held that *Twombly* did not apply. That case (and *Iqbal*, discussed at pages 307-10) dealt with *factual* sufficiency and not *legal* sufficiency. Nothing in Rule 8(a)(2) requires the plaintiff to cite the legal authority for her claim. The Rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." 134 S.Ct. at 346. The Court instructed that on remand the plaintiffs should be permitted to amend their complaint to cite § 1983. 134 S.Ct. at 347. This instruction seems odd: nowhere did the Court indicate why plaintiffs should amend to state something that (the Court just said) is not necessary to stating a claim.

At page 311, please add the following at the end of Note 1:

The Court seems to be shying away from a strict reading of "*Twiqbal*." In subsequent cases, it has given more favorable signals to plaintiffs. In *Matrixx Initiatives, Inc. v. Siracusano*, 131 S.Ct. 1309 (2011), it found sufficient allegations of a class action claim under the securities law. In *Skinner v. Switzer*, 131 S.Ct. 1289 (2011), though upholding dismissal, the Court emphasized that the question on a Rule 12(b)(6) motion is not whether the plaintiff ultimately will win, but whether she may proceed in litigation. The tone of the opinion is reminiscent of *Dioguardi*. In *Fifth Third Bancorp v. Dudenhoeffer*, 134 S.Ct. 2459 (2014), the Court rejected a presumption in cases involving retirement funds that the defendant had acted prudently in managing the fund. And in *Johnson v. City of Shelby*, 135 S.Ct. 346 (2014), discussed immediately above, it emphasized that "*Twiqbal*" deals with factual sufficiency and does not require plaintiffs to cite the law under which they sue.

CHAPTER 8: DISCOVERY
A: INTRODUCTION AND INTEGRATION

At page 364, add the following before section B:

Amendments to Rules 37 and 45 became effective December 1, 2013. The Advisory Committee Notes to the amendment of Rule 45 state the purposes of the changes:

> The amendments recognize the court where the action is pending as the issuing court, permit nationwide service of a subpoena, and collect in a new subdivision (c) the previously scattered provisions regarding place of compliance. These changes resolve a conflict that arose after the 1991 amendment about a court's authority to compel a party or party officer to travel long distances to testify at trial; such testimony may now be required only as specified in new Rule 45(c). In addition, the amendments introduce authority in new Rule 45(f) for the court where compliance is required to transfer a subpoena-related motion to the court where the action is pending on consent of the person subject to the subpoena or in exceptional circumstances.

The amendments to Rule 37 conform the sanctions provision to the changed in Rule 45, "particularly the addition of Rule 45(f) providing for transfer of a subpoena-related motion to the court where the action is pending. A second sentence is added to Rule 37(b)(1) to deal with contempt of orders entered after such a transfer."

C. SCOPE OF DISCOVERY
1. General Scope

At page 369, add the following before the *United Oil Co*. case:

At present, Rule 26(b)(1) permits discovery generally of nonprivileged matter that is relevant to a claim or defense. Rule 26(b)(2) then limits the frequency and extent of discovery – principally through the doctrine of proportionality, which is presently found in Rule 26(b)(2)(C). The amendment scheduled to go into effect December 1, 2015 moves proportionality from being something that can limit discovery of nonprivileged, relevant matter to part of the definition of what is discoverable. Thus, one can now discover nonprivileged matter that is relevant to a claim or defense

> and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

In addition, the amended Rule 26(b)(1) deletes three phrases that have long been part of the definition of the scope of discovery. First, the Rule no longer expressly includes "the existence, . . . and location of any documents or other tangible things and the identity and location of person who know of any discoverable matter." Second, though the new version expressly provides that information may be discoverable though not admissible at trial, it no longer says that discoverable information includes that which "appears reasonably calculated to lead to the discovery of admissible evidence." Third, the present Rule permits the court, for good cause, to order broader discovery ("relevant to the subject matter involved in the action"). This is deleted, so courts no longer have authority to permit discovery beyond matter relevant to a claim or defense.

Moreover, the proportionality provision of present Rule 26(c)(2)(C) is not imported into Rule 26(b)(1) verbatim, but repositions some of the factors. Presently, a court must limit discovery if it is cumulative, can be had less burdensomely, or the propounding party already had a chance to obtain the material, or if the burden or expense outweighs the likely benefit. On this latter point, the court is to consider the needs of the case, amount in controversy, the parties' resources, importance of the issues at stake, and the importance of discovery to resolve the issues.

Under the amended Rule 26(b)(1), discovery is proper if nonprivileged, relevant to a claim or defense and "proportional to the needs of the case." On proportionality, the court is to consider the importance of the issues at stake, amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of discovery in resolving issues, and whether the burden or expense of discovery outweighs the likely benefit. Thus, whether the burden outweighs the value goes from a reason to find discovery non-proportional to a factor.

Rule 26(b)(2)(C)(3) requires the court to deny discovery that is outside the scope of Rule 26(b)(1).

2. Discovery of Material in Electronic Form

At page 376, add the following before the *Zubulake* case:

Effective December 1, 2015, Rule 26(c)(1)(B) will permit the court to make an order allocating expenses of discovery as part of a protective order. Rule 37(e), which presently addresses failure to produce ESI, will become focused on failure to produce ESI.

At page 387, add the following as Note 6:

6. Effective December 15, 2015, the current version of Rule 37(e) – regarding failure to "provide" ESI – is scheduled to be stricken and replaced with a provision entitled failure to "preserve" ESI. The present provision says that absent exceptional

circumstances, there would be no sanctions regarding failure to provide ESI that was lost in the good faith, routine operation of an electronic system. That provision is deleted.

The new provision has various steps along the way. It applies when:

- ESI should have been preserved but
- was lost because of failure to take reasonable steps to preserve and
- the ESI cannot be restored or recovered.

If, after these are established, the court finds that the propounding party is prejudiced by the loss of information, the court "may order measures [not sanctions] no greater than necessary to cure the prejudice." The Advisory Committee Note is short on specifics as to what those orders might be. Clearly, however, they cannot include an adverse inference instruction.

Only if the propounding party is found to have "acted with intent to deprive another party of the information's use in the litigation" may the court

- presume that the lost information was unfavorable to the propounding party or
- instruct the jury that it may/must presume it was unfavorable or
- dismiss or enter default judgment.

Several points are notable. First, the Rule addresses only ESI, and does not apply to discovery of other materials. Second, the Rule does not define when the need to preserve ESI will arise. The Advisory Committee Notes indicate that the question will be governed by the common law of litigation holds, although there may be statutes or other provisions, or court orders that impose a duty to preserve. Third, it is not clear who has the burden of showing that something should have been preserved or what constitute "reasonable steps" to preserve. Fourth, the Advisory Committee Notes say that the burden regarding a showing of prejudice will vary depending upon the facts of the case. Fifth, the court has no authority to enter an adverse inference instruction based upon anything less than intentional deprivation of the material.

D. TIMING AND PRETRIAL DISCLOSURES, CONFERENCE, AND ORDERS

1. Timing

At page 416, add the following:

Effective December 1, 2015, Rule 4(m) will reduce the time in which to serve process from 120 to 90 days after filing. Amendments to Rule 16(b)(2) will at the same time reduce the time for the scheduling order, the Rule 26(f) conference, and initial required disclosures by 30 days. These changes were triggered by the amendment to Rule 4(m).

CHAPTER 9: ADJUDICATION WITH AND WITHOUT A JURY
B. RIGHT TO A JURY
2. SELECTION AND SIZE OF THE JURY
b. PEREMPTORY CHALLENGES

At page 479, add the following at the end of Note 4:

The Ninth Circuit has held that equal protection prohibits the exercise of peremptory challenges on the basis of sexual orientation. See SmithKline Beecham Corp. v. Abbott Labs. 740 F.3d 471 (9th Cir. 2014).

C. SUMMARY JUDGMENT – ADJUDICATION WITHOUT TRIAL OR JURY

At page 508, add the following:

In Tolan v. Cotton, 134 S.Ct. 1861 (2014) (per curiam), reiterated that "in ruling on a motion for summary judgment '[t]he evidence of the non-moving party is to be believed, and all justifiable inferences are to be drawn in his favor.'" In that case, an unarmed plaintiff was shot by police and sued, alleging excessive force. The district court granted summary judgment for the defendant and the Fifth Circuit affirmed. The Supreme Court vacated and remanded the case, and the Court's discussion of the disputed evidence is instructive:

> In holding that Cotton's actions did not violate clearly established law, the Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case. By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly "weigh[ed] the evidence" and resolved disputed issues in favor of the moving party, *Anderson*, 477 U. S., at 249.
>
> First, the court relied on its view that at the time of the shooting, the Tolans' front porch was "dimly-lit." The court appears to have drawn this assessment from Cotton's statements in a deposition that when he fired at Tolan, the porch was "'fairly dark,'" and lit by a gas lamp that was "'decorative.'" In his own deposition, however, Tolan's father was asked whether the gas lamp was in fact "more decorative than illuminating." He said that it was not. Moreover, Tolan stated in his deposition that two floodlights shone on the driveway during the incident, and Cotton acknowledged that there were two motion-activated lights in front of the house. And Tolan confirmed that at the time of the shooting, he was "not in darkness."
>
> Second, the Fifth Circuit stated that Tolan's mother "refus[ed] orders to remain quiet and calm," thereby "compound[ing]" Cotton's belief that Tolan

"presented an immediate threat to the safety of the officers." But here, too, the court did not credit directly contradictory evidence. Al-though the parties agree that Tolan's mother repeatedly informed officers that Tolan was her son, that she lived in the home in front of which he had parked, and that the vehicle he had been driving belonged to her and her husband, there is a dispute as to how calmly she provided this information. Cotton stated during his deposition that Tolan's mother was "very agitated" when she spoke to the officers. By contrast, Tolan's mother testified at Cotton's criminal trial that she was neither "aggravated" nor "agitated."

Third, the Court concluded that Tolan was "shouting," and "verbally threatening" the officer, in the moments before the shooting. The court noted, and the parties agree, that while Cotton was grabbing the arm of his mother, Tolan told Cotton, "[G]et your fucking hands off my mom.". But Tolan testified that he "was not screaming." And a jury could reasonably infer that his words, in context, did not amount to a statement of intent to inflict harm. Tolan's mother testified in Cotton's criminal trial that he slammed her against a garage door with enough force to cause bruising that lasted for days. A jury could well have concluded that a reasonable officer would have heard Tolan's words not as a threat, but as a son's plea not to continue any assault of his mother.

Fourth, the Fifth Circuit inferred that at the time of the shooting, Tolan was "moving to intervene in Sergeant Cotton's" interaction with his mother. The court appears to have credited Edwards' account that at the time of the shooting, Tolan was on both feet "[i]n a crouch" or a "charging position" looking as if he was going to move forward. Tolan testified at trial, however, that he was on his knees when Cotton shot him, a fact corroborated by his mother. Tolan also testified in his deposition that he "wasn't going anywhere," and emphasized that he did not "jump up."

Considered together, these facts lead to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion. And while "this Court is not equipped to correct every perceived error coming from the lower federal courts," we intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents.

The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing

the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.

Applying that principle here, the court should have acknowledged and credited Tolan's evidence with regard to the lighting, his mother's demeanor, whether he shouted words that were an overt threat, and his positioning during the shooting. This is not to say, of course, that these are the only facts that the Fifth Circuit should consider, or that no other facts might contribute to the reasonableness of the officer's actions as a matter of law. Nor do we express a view as to whether Cotton's actions violated clearly established law. We instead vacate the Fifth Circuit's judgment so that the court can determine whether, when Tolan's evidence is properly credited and factual inferences are reasonably drawn in his favor, Cotton's actions violated clearly established law.

D. CONTROLLING AND SECOND-GUESSING JURIES
e. Juror Misconduct

At page 533, add the following at the end of the text:

The Court emphasized the limited circumstances in which jurors may impeach a verdict in *Warger v. Shauers*, 134 S.Ct. 521 (2014). There, the plaintiff in a vehicle crash case moved for new trial based upon the affidavit of one juror that another juror concealed at voir dire that her daughter had been involved in a crash and that her life would have been ruined had she been sued. If the juror had admitted this view in voir dire, she would have been stricken for cause as lacking impartiality. The Court unanimously held that the evidence was inadmissible under Federal Rule of Evidence 606(b). The evidence concerned an "internal" matter concerning the juror and did not constitute extrinsic evidence concerning the case.

CHAPTER 10: WHAT LAW APPLIES IN FEDERAL COURT?
B: DETERMINING WHAT LAW APPLIES
3. THE FEDERAL RULES OF CIVIL PROCEDURE
c. APPLYING THE *HANNA* STRUCTURE

At page 583, add the following as Note 10:

10. California, Virginia, and some other states provide for dismissal of "SLAPP" suits, which are "strategic lawsuits against public participation." The idea is that one should not be subject to suit (typically for defamation) for statements made in exercise of her rights of free speech or petition of the government. When the defendant makes a motion to strike the claim and demonstrates that the claim involves her protected activity, the burden shifts to the claimant to show that the defendant acted with malice in making the statements. In *Makaeff v. Trump University*, 715 F.3d 254 (9th Cir. 2013)(applying California law), the plaintiff made an anti-SLAPP motion to strike a defamation counterclaim against her. The district court denied the motion, but the Ninth Circuit here reversed.

Judge Kozinsky wrote a concurring opinion, in which Judge Paez joined, raising the *Erie* question. Judge Kozinsky joined the opinion for the court, because previous Ninth Circuit law ("*Newsham*") required application of state law. He then argued that the precedent was wrong and should be reconsidered.

> In most cases, it's easy enough to tell whether a rule is substantive or procedural. Whether a defendant is liable in tort for a slip-and-fall, or has a Statute of Frauds defense to a contract claim, is controlled by state law. Just as clearly, the time to answer a complaint, the manner in which process is served, the methods and time limits for discovery, and whether the jury must be unanimous are controlled by the Federal Rules of Civil Procedure. The latter is true, even though such procedural rules can affect outcomes and, hence, substantive rights. *See Hanna*, 380 U.S. at 471.
>
> But the distinction between substance and procedure is not always clear-cut. While many rules are easily recognized as falling on one side or the other of the substance/procedure line, there are some close cases that call for a more nuanced analysis. * * *
>
> Most of *Newsham*'s analysis was devoted to showing that there's no "conflict" between California's anti-SLAPP statute and the Federal Rules of Civil Procedure and, therefore, the two regimes can operate side-by-side in the same lawsuit. But the question of a conflict only arises if the state rule is substantive; state procedural rules have no application in federal court, no matter how little they interfere with the Federal Rules. *Newsham*'s mistake was that it engaged in conflict analysis without first determining whether the state rule is, in fact, substantive.

> It's not. The anti-SLAPP statute creates no substantive rights; it merely provides a procedural mechanism for vindicating existing rights. The language of the statute is procedural: Its mainspring is a "special motion to strike"; it contains provisions limiting discovery; it provides for sanctions for parties who bring a non-meritorious suit or motion; the court's ruling on the potential success of plaintiff's claim is not "admissible in evidence at any later stage of the case"; and an order granting or denying the special motion is immediately appealable. * * * The statute deals only with the conduct of the lawsuit; it creates no rights independent of existing litigation; and its only purpose is the swift termination of certain lawsuits the legislators believed to be unduly burdensome. It is codified in the state code of civil procedure and the California Supreme Court has characterized it as a "procedural device to screen out meritless claims."
>
> Federal courts must ignore state rules of procedure because it is Congress that has plenary authority over the procedures employed in federal court, and this power cannot be trenched upon by the states. *Erie,* 304 U.S. at 78 ("[T]he law to be applied in any [diversity] case is the law of the State" except for "matters governed by the Federal Constitution or *acts of Congress* . . . ." (emphasis added)). To me, this is the beginning and the end of the analysis. Having determined that the state rule is quintessentially procedural, I would conclude it has no application in federal court.

715 F.3d at 272-275 (citations omitted).

CHAPTER 13: SPECIAL MULTIPARTY LITIGATION
C. THE CLASS ACTION
PART 4: PRACTICE UNDER FEDERAL RULE 23
c. REQUIREMENTS FOR CERTIFICATION UNDER RULE 23

At page 768, add the following as Note 8:

8. There have been some interesting cases concerning courts' efforts to impose prerequisites to class certification beyond those mandated by Rule 23. In securities cases, for example, some courts required that the representative – as a prerequisite to certification – show "loss causation" (which is a substantive element for securities fraud cases under Rule 10b-5). The Supreme Court rejected that effort in *Erica P. John Fund v. Halliburton Co.*, 131 S.Ct. 2179 (2011). In 2013, the Court rejected another such effort. In *Amgen v. Connecticut Retirement Plans,* 133 S.Ct. 1184 (2013), a six-to-three decision, the Court held that a showing of "materiality" (another element of the merits in securities fraud cases) is not required for certification.

The Second Circuit reached a different conclusion in a copyright case. In *Authors Guild, Inc. v. Google Inc.,* 721 F.3d 123 (2d Cir. 2013), a class of authors sued Google for copyright infringement for providing "snippets" of millions of copyrighted works. The defendant asserted the defense of fair use under the copyright law. The district judge certified the plaintiff class. The Second Circuit ruled that the holding was premature:

> * * * On the particular facts of this case, we conclude that class certification was premature in the absence of a determination by the District Court of the merits of Google's "fair use" defense. Accordingly, we vacate the June 11, 2012 order certifying the class and remand the cause to the District Court, for consideration of the fair use issues, without prejudice to any future motion for class certification.

721 F.3d at 132. Can this holding be reconciled with the Supreme Court's holdings in the two securities cases discussed?

At page 773, add the following as Note 3.

3. In *Comcast Corp. v. Behrend,* 133 S.Ct. 1426 (2013), the Supreme Court, in a five-to-four decision, reversed certification of a Rule 23(b)(3) class asserting antitrust claims. The majority concluded that the lower courts erred by certifying the class without sufficient validation of the plaintiffs' damages model. The Court explained:

> Respondents' class action was improperly certified under Rule 23(b)(3). By refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry. And it is clear that, under the proper standard for evaluating certification, respondents' model falls far short of

> establishing that damages are capable of measurement on a classwide basis. Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class.

133 S.Ct. at 1432-1433.

CHAPTER 14: APPEALS
B. APPELLATE JURISDICTION IN THE FEDERAL COURTS
8. MECHANICS AND TIMING OF FILING AN APPEAL

At page 814, add the following the first paragraph of the subsection:

In *Budinich,* the Court held that a district court's decision that left unresolved a question of whether a party was entitled to a statutory award of attorney's fees was an appealable "final decision" under § 1291(a). In *Ray Haluch Gravel Co. v. Central Pension Fund of International Union of Operating Eng'rs & Participating Employers,* 134 S.Ct. 773 (2014), the Supreme Court held that the pendency of a ruling on attorney's fees does not prevent a ruling on the merits from being final and appealable. In that case, the district court entered judgment on the merits and, more than a month later, ruled on contractual attorney's fees. Appellant filed a notice of appeal on both the merits and the ruling regarding fees within 30 days after the fees ruling. The Supreme Court held that the appeal of the merits was untimely because it was more than 30 days after the decision on the merits.

CHAPTER 15: ALTERNATIVE MODELS OF DISPUTE RESOLUTION
C: MODELS OF NON-JUDICIAL RESOLUTION
1: NON-JUDICIAL ADJUDICATION: ARBITRATION

At page 843, add the following before subsection 2:

The Supreme Court has continued its robust embrace of arbitration. In *American Express Co. v. Italian Colors Restaurant,* 133 S.Ct. 2304 (2013), the Court, in a five-to-three decision, upheld a contractual waiver of class arbitration even though the cost of pursuing individual litigation would be prohibitive. In such cases, plaintiffs argue that forbidding class arbitration effectively denies enforcement of the law. The Court had rejected the argument concerning small-amount consumer claims in *Concepcion.* In *Italian Colors,* it reached the same conclusion regarding antitrust claims by restaurants. Evidence suggested that obtaining the expert testimony to show an antitrust violation would far exceed recovery in the case. The Court responded: "But the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." 133 S.Ct. 2309.