COMPLEX LITIGATION

Second Edition

2016 Supplement

E. Thomas Sullivan
C. Douglas Floyd Richard D. Freer Bradley G. Clary

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

TABLE OF CONTENTS

Chapter 1

TERRITORIAL (PERSONAL) JURISDICTION

B. CONSENT OR WAIVER AS A BASIS FOR JURISDICTION

At Text, page 28, insert at the end of Note 2:

But see *Leonard v. USA Petroleum Corp.*, 829 F. Supp. 882 (S.D. Tex. 1993); and compare with *Siemer v. Learjet Corp.*, 966 F.2d 179, 183 (5th Cir. 1992)(designation of an agent for service of process does not mean there is general jurisdiction over a corporation).

H. PERSONAL JURISDICTION IN MDL CASES

At Text, page 82, insert after the parenthetical for the* Ferens *case:

But see *In Re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 241 F.R.D. 185, 193 (S.D.N.Y. 2007)("the law of the transferee circuit controls pretrial issues such as whether the court has subject matter or personal jurisdiction over the action")

Chapter 2

B. THE TWO MAJOR TYPES OF FEDERAL SUBJECT MATTER JURISDICTION AND THE CONCEPT OF REMOVAL

2. Diversity of Citizenship Jurisdiction

a. The Complete Diversity Rule

***At Text, page 91, immediately above subpart (b), insert*:**

The Court reaffirmed the "doctrinal wall" between corporations and non-incorporated associations in Americold Realty Trust v. Conagra Foods, Inc., 136 S. Ct. 1012, 1017 (2016). There, it held that a Maryland real estate investment trust partook the citizenship of all its members ("shareholders" under Maryland law). Similarly, though ownership interests in master limited partnerships are publicly traded, the business is non-incorporated; for diversity purposes, a court must consider the citizenship of all limited partners and the general partner. Kinder Morgan Energy Partners, LP, is thus a citizen of all 50 states. Grynberg v. Kinder Morgan Energy Partners, LP, 805 F.3d 901 (10th Cir. 2015).

3. The Defendant's Prerogative: Removal Jurisdiction

At Text, page 95, insert:

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." The Court relied upon the fact that Congress used language in § 1446(a) that tracks the general pleading requirements of Federal Rule 8(a). Each requires a "short and plain" statement.

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).

Chapter 3

AGGREGATE LITIGATION

C. CLASS LITIGATION

2. Class Actions Under Federal Rule 23

a. Rule 23(a) Requirements

i. Existence of an Ascertainable Class

At Text, page 168, insert the following at the end of numbered paragraph 4:

In *Mullins v. Direct Digital*, LLC, 795 F.3d 654 (7th Cir. 2015), however, the Seventh Circuit rejected what it characterized as the "heightened ascertainability" requirement adopted by the Third Circuit in *Marcus* and subsequent decisions (*e.g.*, *Carrera v. Bayer Corp*., 727 F.3d 300 (3d Cir. 2013)):

> We begin with the current state of the law in this circuit. Rule 23 requires that a class be defined, and experience has led courts to require that classes be defined clearly and based on objective criteria. . . . When courts wrote of this implicit requirement of "ascertainability," they trained their attention on the adequacy of the class definition itself. They were not focused on whether, given an adequate class definition, it would be difficult to identify particular members of the class."

Id. at 659.

> Ultimately, we decline Direct Digital's invitation to adopt a heightened ascertainability requirement. Nothing in Rule 23 mentions or implies it, and we are not persuaded by the policy concerns identified by other courts. Those concerns are better addressed by a careful and balanced application of the Rule 23(a) and (b)(3) requirements, keeping in mind under Rule 23(b)(3) that the court must compare the available alternatives to class action litigation. District courts should continue to insist that the class definition satisfy the established meaning of ascertainability by defining classes clearly and with objective criteria. If a class is ascertainable in this sense, courts should not decline certification merely because the plaintiff's proposed method for identifying class members relies on affidavits. If the proposed class presents unusually difficult manageability problems, district courts have discretion to press the plaintiff for details about the plaintiff's plan to identify class members. A plaintiff's failure to address the district court's concerns adequately may well cause the plaintiff to flunk the superiority requirement of Rule 23(b)(3). But in conducting this analysis, the district court should always keep in mind

> that the superiority standard is comparative and that Rule 23(c) and (d) permit creative solutions to the administrative burdens of the class device.

Id. at 672.

iii. Commonality and Typicality

At Text, page 183, add the following new paragraphs 5, 6, and 7, and renumber exiting paragraphs 5, 6, and 7 to 8, 9, and 10 accordingly:

5. Decisions applying *Dukes* suggest that *Dukes* will not prevent certification where (1) some other company-wide employment practice—perhaps operating in conjunction with delegated discretion—is alleged to have had a discriminatory impact on all class members, or (2) the discretionary decisions at issue are taken at a high enough management level that their alleged discriminatory impact similarly affected all class members. *See, e.g.,* Scott v. Family Dollar Stores, Inc., 733 F.3d 105 (4th Cir. 2013); McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482-489 (7th Cir. 2012).

6. One important question that has arisen after *Dukes* is whether a class may be certified if it contains some class members who may not have been injured by the defendant's conduct. *See, e.g., In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014), in which the Fifth Circuit held that a class action settlement does not violate Article III and satisfies the "commonality" and "predominance" requirements of Rule 23(a)(2) and (b)(3) even if the settlement class includes some members whose injuries were not in fact caused by defendants' conduct. According to the divided Fifth Circuit panel, *Dukes*' "legal requirement that class members have all 'suffered the same injury' can be satisfied by an instance of the defendant's injurious conduct, even when the resulting injurious effects—the damages—are diverse. . . . [T]he principal requirement of *Wal-Mart* is merely a single common contention that enables the class action 'to generate common *answers* apt to drive the resolution of the litigation.' These 'common answers' may indeed relate to the injurious effects experienced by the class members, but they may also relate to the defendant's injurious conduct. . . . Although all of the factual and legal questions identified by the district court are more closely related to BP's injurious conduct than to the injurious effects experienced by the class members, they nonetheless demonstrate that the class members claim to have suffered the 'same injury' in the sense that *Wal-Mart* used this phrase. Additionally, the district court did not err by failing to determine whether the class contained individuals who have not actually suffered any injury, because this would have amounted to a determination of the truth of falsity of the parties' contentions, rather than an evaluation of those contentions' commonality." *Id.* at 810-12. *See also In re Urethane Antitrust Litig*., 768 F.3d 1245 (10th Cir. 2014) (necessity for individualized damages determinations and the fact that some class members may have suffered no injury did not defeat the Rule 23(b)(3) "predominance" requirement, discussed *infra*).

In *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015), the First Circuit similarly concluded that the Supreme Court's decision in *Dukes* does not require that plaintiff establish that all members of the class actually suffered injury at the class certification stage, so long as there is a manageable method of separating the injured from the uninjured later in the

proceedings—at least where only a de minimis number of class members possibly were uninjured.

7. In *Rikos v. The Proctor & Gamble Co*., 799 F.3d 497 (6th Cir. 2015), plaintiffs who purchased defendant's probiotic nutritional supplement sought to maintain a class action alleging violations of various states' unfair or deceptive practices statutes, on the ground that the supplement did not work as advertised to promote digestive health. The Sixth circuit rejected defendant's argument that the "commonality" requirement was not satisfied because the evidence showed that defendant's supplement may have improved the digestion of some class members, and plaintiffs therefore could not demonstrate that all class members had suffered a common injury. The court of appeals held that this contention improperly required it to resolve the merits at the class cetification stage. Instead, the only question at that stage was whether plaintiffs had shown that they *could* establish that all members of the class had suffered the "same injury" with common evidence. Plaintiffs' contention in *Rikos* was that defendant's supplement did not provide any benefits to *any* member of the class, and that contention could be resolved on the basis of expert testimony common to all members of the class. In contrast to *Dukes*, "Plaintiffs have identified a common question—whether Align is 'snake oil' and thus does not yield benefits to *anyone*—that will yield a common answer for the entire class and that, if true, will make P & G liable to the entire class." *Id.* at 506. "The key point at the class-certification stage is that this kind of dueling scientific evidence will apply classwide such that individual issues will not predominate. In other words, assessing this evidence will generate a common answer for the class based on Plaintiffs' theory of liability—whether Align has in fact been proven scientifically to provide digestive health benefits for anyone. That common answer, of course, may be that Align does work for some subsets of the class. That does not transform this classwide evidence into individualized evidence that precludes class certification . . . . Rather, the . . . impact of this evidence is simply that it may prevent Plaintiffs from succeeding on the merits." *Id.* at 520. (The court also rejected defendant's contention that the "predominance" requirement of Rule 23(b)(3) was not satisfied because individualized issues of reliance and causation would predominate over common questions, concluding that under the various state laws at issue, plaintiffs could establish their case by showing that defendant's alleged misrepresentation would be likely to deceive a reasonable consumer and that defendant made its representations in a generally uniform way to the entire class.) The Supreme Court denied *certiorari* to review, *inter alia*, "[w]hether a district court at the class certification stage must evaluate the evidence regarding whether putative class members in fact suffered a common injury . . . or whether such an inquiry should occur only at the merits stage." *See* 2015 WL 9591989 (2015); 2016 WL 1173171 (2016).

In *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016), the Court declined to address the question, on which it had granted certiorari, whether a class may be certified if it contains "members who were not injured and have no legal right to any damages," on the ground that contention had been abandoned in petitioner's brief on the merits. *Id.* at 1049. As to petitioner's revised argument that, in a case in which some class members may not have been injured, plaintiffs must demonstrate "some mechanism to identify the uninjured class members prior to judgment" so that they do not recover damages, the Court recognized that "the question whether uninjured class members may recover is one of great importance," but concluded that it was not yet "fairly presented by this case, because the damages award has not yet been

disbursed, nor does the record indicate how it will be disbursed." *Id.* at 1050. The Court remanded the case to permit the District Court to address that question.

b. The Rule 23(b) "Categories" of Class Actions

iii. Rule 23(b)(3)

(a) Introduction

At Text, page 223, substitute the following for existing numbered paragraph 2:

2. In *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016), the Supreme Court held that a class action had been properly certified under Rule 23(b)(3) in action claiming that Tyson had failed to pay required overtime compensation in violation of federal and state law for time spent by class members "donning and doffing" protective gear required for their work in a pork processing plant. To determine whether any class member had worked overtime, it was necessary to determine how much time they had spent donning and doffing. It was undisputed that the time spent donning and doffing varied among individual class members. However, Tyson kept no records of how much time they actually spent. To overcome this difficulty, plaintiffs offered "representative evidence," including, most importantly, a study by an industrial relations expert who had observed 744 videotaped samples of how long various donning and doffing activities took, and then averaged the time taken in the samples to reach a generic estimate of the time the activities took for each employee. The Supreme Court rejected the argument that use of such representative evidence was improper and that the action failed to satisfy the "predominance" requirement of Rule 23(b)(3) because of individual variations in the donning and doffing time spent by each employee. In doing so, the Court first offered the following explication of the predominance requirement:

> Federal Rule of Civil Procedure 23(b)(3) requires that, before a class is certified under that subsection, a district court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members." The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). This calls upon courts to give careful scrutiny to the relation between common and individual questions in a case. An individual question is one where "members of a proposed class will need to present evidence that varies from member to member," while a common question is one where "the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." 2 W. Rubenstein, Newberg on Class Actions § 4:50, pp. 196-197 (5th ed. 2012). The predominance inquiry "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Id.,* § 4:49, at 195–196. When "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to

> some individual class members." 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778, pp. 123-124 (3d ed. 2005).

Id. at 1045.

The Court concluded:

> Here, the parties do not dispute that there are important questions common to all class members, the most significant of which is whether time spent donning and doffing the required protective gear is compensable work under the FLSA. . . . To be entitled to recovery, however, each employee must prove that the amount of time spent donning and doffing, when added to his or her regular hours, amounted to more than 40 hours in a given week. Petitioner argues that these necessarily person-specific inquiries into individual work time predominate over the common questions raised by respondents' claims, making class certification improper.
>
> Respondents counter that these individual inquiries are unnecessary because it can be assumed each employee donned and doffed for the same average time observed in Mericle's sample. Whether this inference is permissible becomes the central dispute in this case. Petitioner contends that Mericle's study manufactures predominance by assuming away the very differences that make the case inappropriate for classwide resolution. Reliance on a representative sample, petitioner argues, absolves each employee of the responsibility to prove personal injury, and thus deprives petitioner of any ability to litigate its defenses to individual claims.
>
> Calling this unfair, petitioner and various of its *amici* maintain that the Court should announce a broad rule against the use in class actions of what the parties call representative evidence. A categorical exclusion of that sort, however, would make little sense. A representative or statistical sample, like all evidence, is a means to establish or defend against liability. Its permissibility turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action.
>
> It follows that the Court would reach too far were it to establish general rules governing the use of statistical evidence, or so-called representative evidence, in all class-action cases. Evidence of this type is used in various substantive realms of the law. . . . Whether and when statistical evidence can be used to establish classwide liability will depend on the purpose for which the evidence is being introduced and on "the elements of the underlying cause of action" . . . .
>
> In many cases, a representative sample is "the only practicable means to collect and present relevant data" establishing a defendant's liability. Manual of Complex Litigation § 11.493, p. 102 (4th ed. 2004). In a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules

> Enabling Act's pellucid instruction that use of the class device cannot "abridge . . . any substantive right."
>
> One way for respondents to show, then, that the sample relied upon here is a permissible method of proving classwide liability is by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action. If the sample could have sustained a reasonable jury finding as to hours worked in each employee's individual action, that sample is a permissible means of establishing the employees' hours worked in a class action.
>
> This Court's decision in *Anderson v. Mt. Clemens*[, 328 U.S. 680 (1946),] explains why Mericle's sample was permissible in the circumstances of this case. In *Mt. Clemens,* 7 employees and their union, seeking to represent over 300 others, brought a collective action against their employer for failing to compensate them for time spent walking to and from their workstations. The variance in walking time among workers was alleged to be upwards of 10 minutes a day, which is roughly consistent with the variances in donning and doffing times here.
>
> The Court in *Mt. Clemens* held that when employers violate their statutory duty to keep proper records, and employees thereby have no way to establish the time spent doing uncompensated work, the "remedial nature of [the FLSA] and the great public policy which it embodies . . . militate against making" the burden of proving uncompensated work "an impossible hurdle for the employee." Instead of punishing "the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work," the Court held "an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." Under these circumstances, "[t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence."
>
> In this suit, as in *Mt. Clemens,* respondents sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records. If the employees had proceeded with 3,344 individual lawsuits, each employee likely would have had to introduce Mericle's study to prove the hours he or she worked. Rather than absolving the employees from proving individual injury, the representative evidence here was a permissible means of making that very showing.

Id. at 1045-47.

The Court further rejected Tyson's (and two dissenters') argument that this holding impermissibly deprived Tyson of its right to litigate individual defenses to its liability to each employee, on the ground that, given plaintiffs' reliance on such representative evidence, Tyson's defense necessarily had focused on the validity of Mericle's study—a question that itself was common to the claims of all class members. *Id. Query:* Is the Court's reasoning persuasive?

Mt. Clemens itself recognized the employer's right to rebut the inference supported by such representative evidence. Why wouldn't Tyson be entitled to do so by using the videotapes to show variations in donning and doffing times with respect to the employees involved, and to cross-examine employees individually regarding how much time they typically spent donning and doffing? Why wouldn't such individualized evidence defeat the predominance requirement? As the dissenters argued, given the admission of Mericle's study, "looking to what defenses [then] remained available is an unsound way to gauge whether the class-action device prevented the defendant from mounting individualized defenses. That Tyson was able to mount only a *common* defense confirms its disadvantage. Testifying class members attested to spending less time on donning and doffing than Mericle's averages would suggest. Had Tyson been able to cross-examine more than four of them, it may have incurred far less liability." *Id.* at 1059-60. Or, was the problem that Tyson failed to attempt to offer individual testimony from each class member (rather than to discredit Mericle's study itself)?

Finally, the Court rejected Tyson's contention that reliance on such representative evidence was precluded by *Dukes, supra*. See the discussion in this Supplement at page 30, relating to Chapter 10 of the Text on the subject of Streamlining the Trial Process.

At Text, page 225, insert the following new material at the end of numbered paragraph 6:

In contrast to these decisions, the Seventh Circuit, in the context of state law consumer fraud class actions, has rejected the argument that the necessity for individual proof of causation precludes satisfaction of the predominance requirement. Suchanek v. Sturm Foods, Inc., 764 F.3d 750 (7th Cir. 2014). In the Seventh Circuit's view, such a rule effectively would prevent certification of most consumer fraud class actions, frustrating the purpose of Rule 23 to permit small claims class actions. "Every consumer fraud case involves individual elements of reliance or causation. . . . [A] rule requiring 100% commonality would eviscerate consumer-fraud class actions." *Id*. at 759. In determining predominance, "the court needs to assess the difficulty and complexity of the class-wide issues as compared with the individual issues. The class issues often will be the most complex and costly to prove, while the individual issues and the information needed to prove them will be simpler and more accessible to individual litigants." *Id.* at 760. The court reasoned that, at the "back end," if the class were to prevail on the common issue, it would be straightforward for each purchaser to present her evidence on reliance and causation, and indeed, the action would likely settle. *Id.*

The Tenth Circuit adopted an intermediate position on this issue in *CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076 (10th Cir. 2014). The court rejected the claim that the necessity to show individual reliance to establish the element of proximate causation in a civil RICO action prevented satisfaction of the predominance requirement. The court reasoned that even though the *Basic* presumption of reliance applicable in securities fraud class actions should not be extended to civil RICO claims, the element of reliance nevertheless could be established by circumstantial evidence that would be common to the class:

> The status of reliance as a focal point at the class certification stage is primarily a forward-looking evidentiary concern. Since reliance is often a highly idiosyncratic issue that might require unique evidence from individual plaintiffs, it may present an

impediment to the economies of time and scale that encourage class actions as an alternative to traditional litigation. In terms of Rule 23 doctrine, individualized issues of reliance often preclude a finding of predominance.

But that is not always the case. Sometimes issues of reliance can be disposed of on a classwide basis without individualized attention at trial. For example, where circumstantial evidence of reliance can be found through generalized, classwide proof, then common questions will predominate and class treatment is valuable in order to take advantage of the efficiencies essential to class actions. . . . Under certain circumstances, therefore, it is beneficial to permit a commonsense inference of reliance applicable to the entire class to answer a predominating question as required by Rule 23. In the RICO context, class certification is proper when "causation can be established through an inference of reliance where the behavior of plaintiffs and the members of the class cannot be explained in any way other than reliance upon the defendant's conduct." *In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Practices Litig.,* 277 F.R.D. 586, 603 (S.D. Cal. 2011).

Cases involving financial transactions, such as this one, are the paradigmatic examples of how the inference operates as an evidentiary matter. On this point, the Second Circuit's recent decision in *In re U.S. Foodservice Inc. Pricing Litigation*[, 729 F.3d 108 (2d Cir. 2013),] is instructive. In that case, defendants challenged the certification of a nationwide RICO class action against a food distributor for fraudulent overbilling under a "cost-plus" payment plan. Defendants appealed the district court's class certification decision on several grounds, including that the district court ignored particularized issues of reliance that were bound to predominate. The Second Circuit disagreed, finding circumstantial proof of classwide reliance in the fact that class members made payments pursuant to the agreements:

> In cases involving fraudulent overbilling, payment may constitute circumstantial proof of reliance based on the reasonable inference that customers who pay the amount specified in an inflated invoice would not have done so absent reliance on the invoice's implicit representation that the invoiced amount was honestly owed. Fraud claims of this type may thus be appropriate candidates for class certification because "while each plaintiff must prove reliance, he or she may do so through common evidence (that is, through legitimate inferences based on the nature of the alleged misrepresentations at issue)."
>
> *Id.* at 120 (quoting [*Klay v. Humana*, 382 F.3d 1241, 1258 (11th cir. 2004)]).

Likewise, the Eleventh Circuit in *Klay v. Humana* found that an inference of reliance was appropriate where "circumstantial evidence that can be used to show reliance is common to the whole class. That is, the same considerations could lead a reasonable factfinder to conclude beyond a preponderance of the evidence that each individual plaintiff relied on the defendants' representations." . . . *Klay* involved class claims brought by doctors against health maintenance organizations (HMOs), alleging a conspiracy to systematically underpay physicians on reimbursements for their services. To rebut the

> HMOs' claims that this inference was inappropriate, the court commented that "[i]t does not strain credulity to conclude that each plaintiff, in entering into contracts with the defendants, relied upon the defendants' representations and assumed they would be paid the amounts they were due."
>
> *In re U.S. Foodservice Inc. Pricing Litigation* and *Klay* are persuasive and they are hardly alone in reasoning that circumstantial evidence of reliance is sufficient to allege RICO causation for purposes of Rule 23.

Id. at 1089-90.

At Text, page 229, insert the following new numbered paragraph 9 and renumber existing paragraphs 9 and 10 as 10 and 11:

It is doubtful that *Behrend* should be read to alter the rule that the necessity for individual proof of damages does not prevent satisfaction of the predominance requirement where defendants' liability can be established by evidence common to the class. More particularly, the Supreme Court in *Behrend* held that plaintiffs' damages model was legally insufficient because it failed to isolate damages attributable to the theory of impact on which class certification had been granted from damages attributable to theories on which class certification had been denied. Further, plaintiffs had not contested the need to prove damages on a classwide basis.

In *Butler v. Sears, Roebuck and Co*., 727 F.3d 796 (7th Cir. 2013) (Posner, J.), the Seventh Circuit held that *Behrend* had not altered the settled rule. On remand for reconsideration in light of *Behrend,* the Seventh Circuit reaffirmed class certification even though individual damages determinations might be required. The court held that proof of liability was the predominant issue and the product defects at issue could be proved by evidence common to the class. *Behrend* was distinguishable. That decision simply held that a damages suit cannot be certified as a class action unless the damages sought are the result of the class-wide injury that the suit alleges. "Furthermore and fundamentally, the district court in our case, unlike *Comcast*, was neither asked to decide nor did decide whether to determine damages on a class-wide basis. . . . [A] class action limited to determining liability on a class-wide basis with separate hearings to determine—if liability is established—the damages of individual class members . . . is permitted by Rule 23(c)(4) and will often be the sensible way to proceed. . . .It would drive a stake through the heart of the class action device, in cases in which damages were sought . . . to require that every member of the class have identical damages. If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification. Otherwise defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits." *Id.* at 800-01. *Accord*, Roach v. T.L. Cannon Corp., 778 F.3d 401 (2d Cir. 2015); In re Nexium Antitrust Litig., 777 F.3d 9 (1st Cir. 2015); In re Urethane Antitrust Litig., 768 F.3d 1245 (10th Cir. 2014); Jimenez v. Allstate Ins. Co., 765 F.3d 1161 (9th Cir. 2014); In re Deepwater Horizon, 739 F.3d 790, 815-17 (5th Cir. 2014); Leyva v. Medline Indus. Inc., 716 F.3d 510 (9th Cir. 2013).

In *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig*., 722 F.3d 838 (6th Cir. 2013), the Sixth Circuit likewise concluded:

> This case is different from *Comcast Corp.* Here the district court certified only a liability class and reserved all issues concerning damages for individual determination; in *Comcast Corp.* the court certified a class to determine both liability and damages. Where determinations on liability and damages have been bifurcated . . . the decision in *Comcast*—to reject certification of a liability and damages class because plaintiffs failed to establish that damages could be measured on a classwide basis—has limited application. . . .
>
> . . . Use of the class method is warranted particularly because class members are not likely to file individual actions—the cost of litigation would dwarf any potential recovery. *See Amgen,* 133 S.Ct. at 1202; *Amchem Prods., Inc.,* 521 U.S. at 617 (finding that in drafting Rule 23(b)3), "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all' "); *Carnegie v. Household Int'l, Inc.,* 376 F.3d 656, 661 (7th Cir. 2004) (noting that "[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits" because of litigation costs). As the district court observed, any class member who wishes to control his or her own litigation may opt out of the class under Rule 23(c)(2)(B)(v).

Id. at 860-61.

(c) Predominance and the Use of "Limited Issue" Certification under Rule 23(c)(4)

At Text, p. 245, insert the following new paragraph 5 after numbered paragraph 4:

5. In *Constructing Issue Classes*, 101 Va. L. Rev. 1855 (2015), Professor Elizabeth Chamblee Burch states that "issue classes are now experiencing a renaissance" (*id.*, at 1857), noting increasing receptiveness to their use in a number of circuits (*id.*, at 1891-92, citing, *inter alia*, *Butler* and *Whirlpool, supra*, p. 229; *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014); and *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012)). She argues that issue classes limited to the question of defendant's liability-creating conduct uniform to the class—as distinct from individualized elements governing each class member's eligibility for relief based on that conduct (e.g., causation, reliance, or damages)—will "materially advance" the ultimate termination of the litigation, and should be encouraged to promote consistent outcomes, efficient use of judicial resources, and enhance enforcement objectives. She also explores a number of practical difficulties attending this approach, including determining the preclusive effect of the judgment in subsequent individual or *parens patriae* proceedings, and awarding fees to class counsel in cases where no common fund is created by the issue class judgment. *See also* Joseph A. Seiner, *The Issue Class*, 56 B.C. L. Rev.

121, 122 (2015) (noting decisions and literature suggesting that the Fifth Circuit's strict application of the predominance requirement to issue classes may be eroding, and arguing that use of issue classes to address common policies, practices, and supervisorial conduct alleged to have had a discriminatory impact is "the best tool currently available to workers pursuing class-wide employment discrimination cases").

c. The Relevance of the merits in Ruling on Class Certification

At Text, page 257, insert the following additional citation before the citation to the Messner case in numbered paragraph 9:

In re Blood Reagents Antitrust Litig., 783 F.3d 183, 187 (3d Cir. 2015) (full *Daubert* inquiry is necessary with respect to expert testimony critical to proving class certification requirements, because "[e]xpert testimony that is insufficiently reliable to satisfy the *Daubert* standard cannot 'prove' that the Rule 23(a) prerequisites have been met 'in fact,' nor can it establish 'through evidentiary proof' that Rule 23(b) is satisfied," quoting *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1432 (2013));

3. Class Action Settlement

c. Criteria Governing Approval of Class Action Settlements

At Text, page 305, insert the following new paragraph 8 after numbered paragraph 7:

8. An important question relating to settlement approval is the difficulty of distributing relief to the members of the class where identification of those entitled to compensation is difficult or impossible, those who are identified do not submit claims, or the expense of distribution exceeds the amount of potential recovery. In such circumstances, a significant portion of the settlement fund may remain unclaimed after the claims process has concluded. In addressing this problem, parties and courts have increasingly resorted to so-called "*cy pres*" distributions (a term derived from historic trust doctrine applicable where the original terms of the trust have failed) of the unclaimed funds to charitable organizations whose purposes are aligned with those of the litigation. Such distributions seek to preserve the remedial and deterrent purposes of the settlement while avoiding reversions to the defendant. *See, e.g.,* In re Baby Products Antitrust Litig., 708 F.3d 163 (3d Cir. 2013) (noting increasing incidence of *cy pres* settlement awards).

While prevalent, such *cy pres* awards have been controversial. *See generally* Rhonda Wasserman, *Cy Pres in Class Action Settlements,* 88 S. Cal. L. Rev. 97 (2014) (discussing problems with *cy pres* distributions and recommending procedures to minimize overreliance on them and align them with the best interests of the class, including a presumptive reduction of attorneys' fees in actions involving *cy pres* distributions). Some scholars have argued that *cy pres* distributions are inconsistent with the Article III role of the federal judiciary, impermissibly alter the substantive law, and implicate the due process rights of class members. *See* Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617 (2010). *See also* Martin

H. Redish, *Rethinking the Theory of the Class Action: The Risks and Rewards of Capitalistic Socialism in the Litigation Process*, 64 Emory L.J. 451, 454, 466-67, 473 (2014) (arguing that the modern class action is "an entirely new procedural animal, distinct from any procedural device that has preceded it," that class actions should not be permitted unless "there is a significant likelihood of meaningful relief for the bulk of the absent class members," that attorney compensation should be based on class members actually compensated, and that *cy pres* relief should be "categorically rejected"). For a fuller development of Professor Redish's views, *see* MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT (2009).

Most decisions and scholarly analysis accept the propriety of such awards, but require or suggest that they be governed by stringent standards to assure that that they are not used excessively, are closely aligned with the purposes of the class action, compensate class members to the extent feasible, and do not result in windfall fee awards to counsel. *See, e.g.,* Wasserman, *supra.* For example, in *Baby Products*, supra, the Third Circuit held that district courts have discretion to approve *cy pres* settlement awards where they are directed to a third party to be used for a purpose relating to the class injury, but that direct distributions to the class are preferred over a *cy pres* award. Further, "[b]arring sufficient justification, cy pres awards should generally represent a small percentage of total settlement funds." 708 F.3d at 174. The court vacated a class action settlement approval and percentage fee award based on entire fund where the district court had no information about the amount of award that would go to *cy pres* recipients when it approved the settlement, only a small portion of which directly benefitted the class, with the bulk going to *cy pres*. (Attorneys fees and costs were $14 million; $3 million went to the class; and the *cy pres* award was $18 million). The court rejected the contention that *cy pres* awards must be discounted in determining the fee award to counsel, but gave trial courts discretion to do so where it appears the *cy pres* award primarily benefits counsel: "Where a district court has reason to believe that counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class, we therefore think it appropriate for the court to decrease the fee award." *Id.* at 178. *See also* In re BankAmerica Corp. Securities Litig., 775 F.3d 1060 (8th Cir. 2015) (extensively reviewing principles governing *cy pres* awards, and reversing award in the case at bar because further distributions to the class were feasible and the contention that class members had been fully compensated was speculative; discussing how to determine a proper *cy pres* recipient if unclaimed settlement funds remain after applying the "rigorous" standards applicable to such awards).

Section 3.07 of The American Law Institute's Principles of the Law, Aggregate Litigation (2010) cautiously endorses the approval of class action settlements that include a *cy pres* award. However, it provides that where class members can be identified through reasonable effort, and individual distributions to class members are economically feasible, distributions should be made directly to them (*id.,* § 3.07(a)). If settlement funds remain after individual distributions have been made because some class members cannot be identified or did not submit claims, further distributions should be made to those who did participate unless they are not economically viable (*id.,* § 3.07(b)). A *cy pres* award is said to be proper only if such individual distributions are not feasible, in which case they should be made to a "recipient whose interests reasonably approximate those being pursued by the class" unless no such recipient can be identified. *Id.,* § 3.07(c).

5. Class Action Mootness

At Text, top of page 321, insert the following new numbered paragraph 5 after paragraph 4:

5. In C*ampbell-Ewald Co. v. Gomez*, 136 S.Ct. 663 (2016), the Supreme Court held that an unaccepted Rule 68 offer of judgment fully satisfying the named plaintiff's individual claim made before a motion for class certification was filed did not moot the action. The Court held that under basic principles of contract law and the terms of Rule 68(b) itself providing that an offer of judgment pursuant to its terms is deemed "withdrawn" if not accepted within fourteen days, the unaccepted offer was a "legal nullity" and "had no continuing efficacy," leaving the action as if the offer had never been made. "In short, with no settlement offer still operative, the parties remained adverse; both retained the same stake in the litigation they had at the outset." *Id.* at 670-671. The Court expressly reserved the question whether an action might be mooted "if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." *Id.* at 672.

E. CLASS ARBITRATION

At Text, page 330, insert the following at the end of numbered paragraph 2:

Accord, Dell Webb Communities, Inc. v. Carlson, 817 F.3d 867 (4th Cir. 2016) (concluding, based on Supreme Court decisions subsequent to *Bazzle*, that the availability of class arbitration is a "gateway question" for the court to decide unless the parties have "unmistakably" provided that the arbitrator would decide that question). *See also* Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746 (3d Cir. 2016) (following *Reed Elsevier* and concluding that the question of class arbitration is for the court to decide unless the parties' agreement clearly and unmistakably delegates the question to the arbitrators, and that general incorporation of the AAA arbitration rules does not satisfy that requirement).

At Text, top of page 334, after numbered paragraph 6, insert the following new paragraph 7, and renumber existing paragraph 7 as paragraph 8:

7. In *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015), the Supreme Court considered whether non-class arbitration could be compelled under a boilerplate arbitration provision in DIRECTV's service agreement that generally prohibited class arbitration, but specified that the entire arbitration provision was unenforceable if the "law of your state" made class-arbitration waivers unenforceable. At the time the agreement was entered, the class action waiver was invalid in California under the *Discover Bank* rule, which the Supreme Court later held to be preempted by the FAA in *Concepcion.* In *Imburgia*, the California Court of Appeal held that the reference to "law of your state" meant California law as it existed without regard to the *Concepcion's* holding preempting the *Discover Bank* rule, in part on the ground that ambiguous

contract language should be construed against the drafter (DIRECTV). The Supreme Court reversed, holding that although parties were free to specify the law which governed their contracts, including the law governing the enforceability of a class-arbitration waiver, and although "the interpretation of a contract is ordinarily a matter of state law to which we defer" (*id.* at 468), the ordinary meaning of a reference to the "law or your state" was to "*valid* state law." *Id.* at 469. "After examining the grounds upon which the Court of Appeal rested its decision, we conclude that California courts would not interpret contracts other than arbitration contracts the same way." *Id.* Accordingly, even if the California Court of Appeal's decision was a correct statement of state law in the arbitration context, it was preempted by the FAA, which places arbitration agreements on the same footing as other contracts. In a dissent joined by Justice Sotomayor, Justice Ginsburg argued that the Court had unnecessarily extended *Concepcion* by construing the contract in favor of the drafter rather than the customer, and that "through harsh construction, this Court has again expanded the scope of the FAA, further degrading the rights of consumers and further insulating already powerful economic entities from liability for unlawful acts." *Id.* at 478.

At Text, p. 336, insert the following new paragraph 9 after renumbered paragraph 8 at the end of part 3.E:

9. There is a conflict of authority on whether *Concepcion's* holding applies to class action waivers in mandatory arbitration agreements in industries covered by the National Labor Relations Act. In *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (2012), the National Labor Relations Board concluded that such provisions are unenforceable because they unlawfully interfere with employees' rights to engage in concerted activities for the purpose of mutual aid and protection protected by section 7 of the Act. The Circuits are in conflict on whether this ruling is consistent with *Concepcion. Compare* Lewis v. Epic Systems Corp., 2016 WL 3029464 (7th Cir. May 26, 2016) (concluding that a mandatory arbitration provision coupled with a waiver of class or other collective remedies for wage and hour claims was invalid under section 7 and fell within the FAA's "savings clause" providing that agreements to arbitrate are valid "save upon such grounds as exist at law or in equity for the revocation of any contract"); *with*, D.R. Horton, Inc. v. National Labor Relations Board, 737 F.3d 344, 362 (5th Cir. 2013) (applying the reasoning in *Concepcion* to conclude that the Board's interpretation of section 7 as prohibiting class action waivers in mandatory arbitration agreements does not fall within the savings clause because it would discourage employers from using individual arbitration; noting (before the decision in *Lewis, supra*), that "[e]very one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB's rationale, and held arbitration agreements containing class waivers enforceable").

F. NON-CLASS AGGREGATE PROCEEDINGS AND "QUASI-CLASS ACTIONS"

At Text, page 339, insert the following at the end of Chapter 3.F:

In addition to MDL proceedings, mass claim resolution through publicly or privately created victim compensation funds has assumed increasing prevalence and importance.

Examples include the September 11th Victim Compensation Fund, created by Congress, and the BP Gulf Coast Claim Fund, privately created in the wake of the Deepwater Horizon disaster. In *Dissagregative Mechanisms: Mass Claims Resolution Without Class Actions*, 63 Emory L.J. 1253 (2014), Professor Jamie Dodge explores the impetus for, and advantages and disadvantages of such "disaggregative" dispute resolution systems (including not only such post-dispute victim compensation funds, but also pre-dispute arbitration agreements containing class action waivers), which focus on individualized rather than aggregate or class claims resolution. She notes that through procedural and substantive streamlining, such "next-generation system[s] built upon the foundations and dysfunctions of the aggregate and single-plaintiff litigation systems" (*id.* at 1287) that preceded them, may generate mutual gains and provide increased compensation to victims with less delay and at lower cost than traditional "aggregative" mechanisms such as class actions. At the same time, she argues, they entail potential disadvantages such as fractional participation and claiming, over- or under- compensation, under-deterrence, lack of transparency and public supervision, and (particularly because private systems typically are designed by defendants), raise questions of fairness, accuracy, and legitimacy. *See also* Jamie Dodge, *Privatizing Mass Settlement*, 90 Notre Dame L. Rev. 335 (2014) (positing that a transition from opt-out mechanisms such as class actions to "opt-in" mechanisms such MDLs, arbitration, and private claims facilities is occurring, and that, in the context of private settlement funds, defendants in some cases may have an incentive to offer full or super-compensatory payments to ensure broad participation and foreclose competing class actions); Dana A. Remus and Adam S. Zimmerman, *Aggregate Litigation Goes Private,* 63 Emory L.J. 1317, 1318, 1320 (2014) (commenting on the "bulk outsourcing of civil justice" and arguing that, while it may resolve disputes privately and efficiently, it also presents dangers that should be countered by government oversight with the objective of "encourag[ing] the sound regulation of private settlement agreements without compromising their potential contributions to increased access, equality, and efficiency").

Chapter 4

COORDINATION AND CONSOLIDATION OF OVERLAPPING LITIGATION

B. Overlapping Federal Cases

2: Transfer of Cases under § 1404(a) or § 1406(a)

At Text, page 361, insert the following Note:

8. Atlantic Marine did not decide the standard of review regarding forum selection clause matters. The Fifth Circuit has held that an appellate court will review the interpretation and questions of enforceability de novo, but will review balancing of public and private factors for abuse of discretion. On the facts of the case, the court upheld and enforced a mandatory forum selection clause that required litigation in Germany. The court enforced the clause by dismissal under forum non conveniens. Weber v. PACT XPP Techs., Inc., 811 F.3d 758 (5th Cir. 2016).

4. Multidistrict Litigation (MDL)

At Text, page 363, insert the following Note:

For an interesting study of the increase in importance of the MDL docket, see Thomas Metzloff, *The MDL Vortex Revisited*, 99 JUDICATURE, 37, (2015). Among Professor Metzloff's surprising conclusions is that 96 percent of disputes pending in MDL are mass-tort claims. *Id.* at 41.

At Text, page 364, insert the following:

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. One of those cases was an antitrust class action. The MDL judge granted summary judgment in that case because the plaintiffs, under relevant antitrust law, could not show an injury. Plaintiffs attempted to appeal that result as a final judgment under 28 U.S.C. § 1291. The Second Circuit dismissed the appeal, however, because the summary judgment did not dispose of all of the MDL cases. The Supreme Court reversed, and held that the summary judgment (which disposed of the one case in its entirety) was an appealable final judgment. The fact that cases are transferred under § 1407 does not merge them into a monolithic litigative unit. They retain their separate character. Because the final judgment in that case was entered in the Southern District of New York, it was properly appealed to the Second Circuit.

In a footnote, the Court noted that parties in MDL cases might file a "master complaint" and a "consolidated answer," which can supersede the individual pleadings. "In such a case, the transferee [MDL] court may treat the master pleadings as merging the discrete actions for the duration of the MDL pretrial proceedings." There is no such merger, though, if a master complaint is filed merely as an administrative summary and not meant to supersede the individual complaints. 135 S.Ct. at 904 n. 3. In another footnote, the Court expressed no opinion on whether judgment in one of several cases combined in master pleadings would be appealable as a final judgment. 135 S.Ct. at 904-05 n. 4.

D. Overlapping Litigation in American and Foreign Courts

1. Anti-Suit Injunctions by the American Court

At Text, page 411, Note 7, replace the extant sentence with the following:

In *Winter v. NRDC*, 555 U.S. 7 (2008), the Supreme Court rejected a Ninth Circuit practice that allowed a preliminary injunction based upon mere 'possibility' of harm to the applicant if (and only if) the applicant had shown a *strong* likelihood of success on the merits. The Supreme Court held that even if the party seeking the preliminary injunction makes a strong showing of likely success on the merits, he must also show a 'strong likelihood' that he will suffer irreparable injury if the injunction is not granted.

In that case, the Ninth Circuit had granted a preliminary injunction to stop the Navy from conducting antisubmarine drills that allegedly harmed marine mammals. The Ninth Circuit entered the injunction based on mere "possibility" of irreparable harm because, it concluded, the plaintiffs (environmental groups) had shown a strong likelihood of success on the merits. The Supreme Court vacated the injunction and reiterated the four-step balancing test we read in *Goss*. The Court concluded that the public interest in the Navy's continuing the antisubmarine drills.

Chapter 6

JUDICIAL MANAGEMENT

B. Overview of Pretrial Judicial Management

At Text, page 477, insert the following, which is an overview of the 2015 amendments to the Federal Rules of Civil Procedure. Among other things, these amendments affect the timing of matters under Rule 16 and Rule 26:

2015 Amendments to the Federal Rules of Civil Procedure

The Supreme Court sent a set of amendments of the Federal Rules of Civil Procedure to Congress. These changes became effective on December 1, 2015. 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).

Still, other changes are worth noting. For example, Rule 4(m) reduced the time in which to serve process from 120 days to 90 days after filing the complaint. This, in turn, led 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 concerned discovery, Rule 55 was altered to make clear the relationship between default judgment and a motion to set aside under Rule 60(b). Rule 84 was 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.

We thought it would be handy 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 was amended to impose upon *parties* (and not just the court) the obligation to use the Rules to secure the just, speedy, and inexpensive determination of every proceeding.
- Rule 4(m) reduced the time in which to serve process from 120 to 90 days after filing. Note that this impacts 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) reduced the time for the scheduling order, the Rule 26(f) conference, and the initial required disclosures by 30 days. These changes were triggered by the amendment to Rule 4(m).
- Rule 16(b)(3)(B) now permits the court to 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.)
- Rules 26(b)(1) and 26(b)(2) were amended substantially concerning the scope of discovery. (These changes will be discussed further immediately below.)
- Rule 26(c)(1)(B) now permits the court to make an order allocating expenses of discovery as part of a protective order.
- Rule 26(d)(2) now addresses "early" requests to produce (see Rule 34(b)(2)(A) below).
- Rule 26(d)(3) now permits the parties to stipulate regarding the sequence of discovery.
- Rules 30, 31, and 33 now refer to the new standard for the scope of discovery under Rule 26(b)(1).
- Rule 34(b)(2)(A) now allows early "delivery" of requests to produce (starting 21 days after service of process), to be deemed served at the first Rule 26(f) conference, in which case responses are due within 30 days after that conference.
- Rule 34(b)(2)(B) now requires objections with specificity (to reconcile Rule 34 with the same language in Rule 33 regarding interrogatories) and now allows the responding party simply to produce the material rather than to respond by saying it will do so. The latter change conforms to common practice that pre-dated the amendment.
- Rule 34(b)(2)(C) now requires a party objecting to a production request 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) now permits 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) now is replaced entirely, to change from a focus on failure to produce ESI to a failure to preserve ESI.
- Rule 55(c) now makes clear that a final default judgment may be set aside under the demanding standards of Rule 60(b). A non-final default judgment may be set aside under the less demanding standards of Rule 54(b).
- Rule 84 is abrogated, so there will no longer be official forms to the Federal Rules.

Amendment to Rule 26(b)(1)

Rule 26(b)(1) permits discovery generally of non-privileged 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 used to be found in Rule 26(b)(2)(C). The 2015 amendment moved proportionality from being something that can limit discovery of non-privileged, relevant matter to part of the broad definition of what is discoverable. Thus, one can now discover non-privileged 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 amended Rule no longer grants courts authority to permit discovery beyond matter relevant to a claim or defense.

Moreover, the proportionality provision of old Rule 26(c)(2)(C) is not imported into Rule 26(b)(1) verbatim, but repositions some of the factors. Under the amended Rule 26(b)(1), discovery is proper if non-privileged, 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 being a reason to find discovery non-proportional to being merely a factor.

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

Amendment of Rule 37

The prior version of Rule 37(e) – regarding failure to "provide" ESI – was stricken and replaced with a provision entitled failure to "preserve" ESI. The old provision said 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 was deleted.

The new provision 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 8

DISCOVERY

B. THE DISCOVERY PROCESS IN COMPLEX LITIGATION

6. Electronic Discovery

At Text, page 631, append after note 4:

Amendments to the Federal Rules of Civil Procedure went into effect December 1, 2015. In his year-end report, Chief Justice Roberts wrote that these amendments are a "big deal." John Roberts, 2015 Year-End Report on the Federal Judiciary at 5. They "address the most serious impediments to just, speedy, and efficient resolution of civil disputes." *Id.* at 4. Accordingly, the amendments "(1) encourage greater cooperation among counsel; (2) focus discovery . . . on what is truly necessary to resolve the case; (3) engage judges in early and active case management; and (4) address serious new problems associated with vast amounts of electronically stored information." *Id.* at 5.

Additional language in Rule 1 extends the duty of securing the "just, speedy, and inexpensive determination of every action and proceeding" to the employment of the rules by the court *and the parties*.

Rule 26(b)(1), concerning the scope of discovery, has been revised, according to Chief Justice Roberts, to "crystalize[] the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality . . ." Roberts at 6. In determining whether a discovery request is proportional, one should consider

> [T]he importance of the issues at stake in the action, the amount in controversy, the parties' relative access to the relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Fed. R. Civ. P. 1.

The previous proportionality limit to discovery under Rule 26(b)(2)(C)(iii) has been replaced with a reference to the new proportionality test under 26(b)(1).

> Proportionality in discovery under the Federal Rules is nothing new. . . New Rule 26(b)(1) simply takes the factors explicit or implicit in these old requirements to fix the scope of all discovery demands in the first instance. What will change—hopefully—is mindset. No longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence . . . Instead, a party seeking discovery of relevant, non-privileged information must show, before anything else, that the discovery sought is proportional to the needs of the case. *Gilead Sciences, Inc. v. Merck & Co.*, 2016 U.S. Dist. LEXIS 5616 at *4-5 (N.D. Cal. 2016)

According to the Advisory Committee note on the 1991 amendments to Rule 45, "a non-party witness is subject to the same scope of discovery under this rule as that person would be as a party to whom a request is addressed pursuant to Rule 34." A federal district court in Indiana recently held that the new proportionality test under Rule 26(b)(1) governs the scope of Rule 45 subpoenas. *Noble Roman's, Inc. v. Hattenhauer Distributing Co.*, 2016 U.S. Dist. LEXIS 38428 at *8-14 (S.D. Ind. 2016).

Amended Rule 26(c)(1)(B) now explicitly permits fee shifting as part of a protective order.

As amended, Rule 37(e) clarifies the remedial regime for failure to provide electronically stored information (ESI). "If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, . . .," the court has the following options. If the court finds the loss of ESI prejudices another party, the court may "order measures no greater than necessary to cure the prejudice." If, however, and only if the court finds "that the party acted with the intent to deprive another party of the information's use in the litigation," the court may presume the lost information unfavorable, issue an adverse inference, dismiss the action, or enter a default judgment.

> The amendments to the Federal Rules . . . mandate substantial changes in civil practice, some of the most significant of which relate to spoliation sanctions under Rule 37(e). Previously, the rule consisted entirely of a modest safe harbor provision that protected against the imposition of sanctions where ESI was lost as a result of routine computer functions such as automatic deletion. The amended rule is much more comprehensive. It was adopted to address concerns that parties were incurring burden and expense as a result of overpreserving data, which they did because they feared severe spoliation sanctions, especially since federal circuits had developed varying standards for penalizing the loss of evidence. *Cat3, LLC v. Black Lineage, Inc.*, 2016 U.S. Dist. LEXIS 3618 at *13-14 (S.D.N.Y. 2016).
>
> It is clear from the language of [Rule 37](e)(2) as well as the Committee Notes that the adverse inference instruction . . . falls within the measures that are not permissible absent a finding of intent. *Nuvasive, Inc. v. Madsen Med., Inc.*, 2016 U.S. Dist. LEXIS 8997 at *5 (S.D. Cal. 2016).
>
> The new [Rule] 37(e) governs a party's failure to preserve electronically stored information. Thus as the law currently exists in the Second Circuit, there are separate legal analyses governing the spoliation of tangible evidence versus electronic evidence . . . The court may issue an adverse inference instruction with regard to tangible evidence . . . on a finding that Plaintiff acted negligently, but may not issue an adverse inference with regard to electronic evidence . . . unless the Court finds that Plaintiff acted with intent to deprive Defendants of that information. *Best Payphones, Inc. v. City of New York*, 2016 U.S. Dist. LEXIS 25655 at *12, 18 (E.D.N.Y. 2016).

A federal district court in Florida considered the intent requirement of amended Rule 37(e) and appropriate sanctions in *Brown Jordan International, Inc. v. Carmicle*, 2016 U.S. Dist.

LEXIS 25879 (S.D. Fla. 2016). The defendant, Carmicle, a former high-ranking employee of the plaintiff, Brown Jordan International (BJI), was fired and subsequently sued for violating the Computer Fraud and Abuse Act and the Stored Communications Act; Carmicle had accessed the email accounts of other high-ranking BJI officials with a generic password provided during an email service transition. Carmicle counterclaimed for wrongful termination.

Although employed at BJI, Carmicle kept a personal laptop and iPad, and a company owned laptop and iPad. On the day Carmicle was fired, he demanded his personal laptop, but BJI did not release it. The same day Carmicle's counsel and BJI discussed the retention of Carmicle's personal laptop and the duty to preserve electronic data in anticipation of litigation. Returning home, Carmicle used the "Find my iPhone" application to remotely lock the company-owned laptop. He later claimed he intended to lock his personal laptop instead.

Soon after, BJI told Carmicle he had locked the company laptop and asked for the password. Carmicle claimed he had forgotten it. The court made two observations. First, if Carmicle intended to lock his personal laptop, he would have locked it when he found out he had locked the company laptop instead. Second, if it was his own laptop he intended to lock, Carmicle would have remembered his password. Carmicle did neither, and so the court concluded Carmicle intentionally locked the company-owned laptop.

In addition, on the morning of his firing, Carmicle remotely wiped his company-owned iPad. One month after BJI filed its claim, Carmicle said that his personal iPad—the iPad he used to take screenshots of the other employees' emails—had been lost by his son on a family vacation. Finally, the forensic examination of Carmicle's personal laptop showed that almost all the files on that laptop had been accessed within 48 hours prior to the date Carmicle surrendered the laptop for analysis.

The court chose to apply rule 37(e) despite the conduct in question having occurred before the adoption of the amended rules because its application "would be neither unjust nor impractical." *Id.* at *115. Finding that "the information—including metadata . . . —cannot be restored or replaced through additional discovery" and that Carmicle "acted with the intent to deprive the Brown Jordan Parties of the information's use in litigation, the court [presumed] that the lost information was unfavorable to Carmicle." *Id.* at *118. The court declined, however, to dismiss Carmicle's counterclaims, enter default judgment against him, or award attorney's fees in this particular motion, noting that attorney's fees had been awarded already for other closely related discovery violations.

Mathew Enterprise, Inc. v. Chrysler Group, LLC, 2016 U.S. Dist. LEXIS (N.D. Cal. 2016), involved a Rule 37(e)(1) motion for non-intentional spoliation sanctions. The plaintiff, Stevens Creek, a Chrysler dealer, sued Chrysler for price discrimination under the Robinson-Patman Act (RPA). For nearly a year after first threatening Chrysler with litigation, and during the period in which Chrysler allegedly continued to violate RPA, Stevens Creek "made no effort to preserve communications from customers or internal emails." *Id.* at *2. The outside vendor that stored Stevens Creek's emails was not notified of a litigation hold and continued to automatically delete emails. Additionally, Stevens Creek switched email providers during this period and lost all its old emails in the process. The data could not be recovered.

As part of its deal with Chrysler, Stevens Creek received bonuses if it met certain sales goals. Sales goals were increased annually. When another Chrysler dealer opened 14 miles from Stevens Creek, the sales goals were not lowered despite the competing dealer's expected effect on Stevens Creek's sales and the lower sales goals set for the new dealer. As a result, Stevens Creek no longer earned the sales bonuses from Chrysler. Stevens Creek intended to show statistically that Chrysler's refusal to lower sales goals for Stevens Creek prevented Stevens Creek from offering competitive prices, thereby driving customers to the new dealer. Chrysler intended to show that it was not unattainable sales goals which drove business away from Stevens Creek but bad salesmanship or poor customer service, which Chrysler hoped to prove with the lost emails.

As a result the court granted the following relief: (1) Chrysler was allowed to use Stevens Creek's communications post-dating the alleged price discrimination to prove its theory; (2) To the extent Stevens Creek's witnesses testify about why they believe customers were diverted to the other dealer, Chrysler may rebut such testimony with evidence and argument about the spoliation; (3) Chrysler may do the same with respect to any testimony offered by Stevens Creek about specific or aggregate customer interactions; (4) the presiding judge may instruct the jury regarding the evaluation of such evidence and argument; and (5) the court ordered Stevens Creek to pay attorney's fees associated with the motion.

In constructing this relief, the court noted, "the court should take care, . . . 'to ensure that curative measures under (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation.'" *Id*. at *10. Continuing to quote the advisory committee notes, the court wrote, "'an example of an inappropriate (e)(1) measure might be an order . . . precluding a party from offering any evidence in support of[] the central or only claim or defense in the case.'" *Id.* at *15.

Litigation of the issues faced in these cases may have been prevented if the attorneys had the benefit of amended Rule 16(b)(2), which now instructs that Rule 16(b)(1) scheduling orders "may . . . provide for . . . preservation of electronically stored information. . ."

D. ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE

Note on Waiver of Privilege

At Text, page 669, append after note 1:

In *SEC v. Blackburn*, 2015 U.S. Dist. LEXIS 178322 (E.D. La. 2016), the SEC inadvertently produced the entire file of privileged emails related to the underlying action. Upon learning of the mistake, the SEC moved to compel the return of the leaked documents pursuant to Rule 26(b)(5)(B). In determining whether to grant the motion, the court considered (1)

whether the disclosure was inadvertent; (2) whether the SEC took reasonable steps to prevent the disclosure; and (3) whether the SEC took prompt, reasonable steps to rectify the error.

In preparation for disclosure the SEC emails were subject to two layers of privilege review. First, the custodians of the emails reviewed them for privilege. Second, the SEC's trial attorney re-reviewed each document for privilege and for relevance. The privileged documents were disclosed when the trial attorney's legal assistant forwarded the entire file of emails, both privileged and non-privileged, instead of just the non-privileged sub-file. Accordingly, the trial court found that the disclosure was inadvertent.

Second, the court found that the SEC's privilege review process was reasonable. The number of disclosed privileged emails did not weigh against the reasonableness of the precautions taken by the SEC. The court also noted that the amount of time it took the SEC to make the motion does not make the review process unreasonable. The court quoted the advisory committee in stating, "'the rule does not require the producing party to engage in a post-production review . . .'" *Id.* at *11.

Third, the court found that the SEC took prompt, reasonable steps to rectify the mistaken disclosure. Once the SEC attorney realized the privileged emails had been leaked, she took immediate action, including filing the Rule 26(b)(5)(B) motion. Again the court noted that the amount of time that passed before the motion was made was not relevant. If the producing party is not required to engage in post-production review, it is likely only opposing counsel would be aware of the inadvertent production. It is therefore likely that a significant amount of time will pass before the producing party learns of its error.

Amended Rule 16(b)(2) now suggests that Rule 16(b)(1) scheduling orders may include "agreements reached under Federal Rules of Evidence 502," and may "direct that before moving for an order relating to discovery, the movant must request a conference with the court."

Chapter 10

STREAMLINING THE TRIAL PROCESS

F. IN RE FIBREBOARD AND TRIAL BY STATISTICS

10. Due Process Problems with Trial By Statistics

At Text, page 843, insert after the citation to* Wal-Mart*:

The Supreme Court addressed the issue of statistical proof again in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016). Once again addressing a class certification issue, the Supreme Court held that a class action had been properly certified under Rule 23(b)(3) in an action claiming that Tyson had failed to pay required overtime compensation in violation of federal and state law for time spent by class members "donning and doffing" protective gear required for their work in a pork processing plant. To determine whether any class member had worked overtime, it was necessary to determine how much time was spent donning and doffing. It was undisputed that the time spent donning and doffing varied among individual class members. However, Tyson kept no records of how much time they actually spent. To overcome this difficulty, plaintiffs offered "representative evidence," including, most importantly, a study by an industrial relations expert who had observed 744 videotaped samples of how long various donning and doffing activities took, and then averaged the time taken in the samples to reach a generic estimate of the time the activities took for each employee. The Supreme Court rejected the argument that use of such representative evidence was improper. The Court said in relevant part:

> [P]etitioner and various of its *amici* maintain that the Court should announce a broad rule against the use in class actions of what the parties call representative evidence. A categorical exclusion of that sort, however, would make little sense. A representative or statistical sample, like all evidence, is a means to establish or defend against liability. Its permissibility turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action. *Id.* at 1046.
>
> It follows that the Court would reach too far were it to establish general rules governing the use of statistical evidence, or so-called representative evidence, in all class-action cases. Evidence of this type is used in various substantive realms of the law. Brief for Complex Litigation Law Professors as *Amici Curiae* 5–9; Brief for Economists et al. as *Amici Curiae* 8–10. Whether and when statistical evidence can be used to establish classwide liability will depend on the purpose for which the evidence is being introduced and on "the elements of the underlying cause of action." *Id.*
>
> In many cases, a representative sample is "the only practicable means to collect and present relevant data" establishing a defendant's liability. Manual of Complex Litigation

> § 11.493, p. 102 (4th ed. 2004). In a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot "abridge ... any substantive right." *Id.*
>
> One way for respondents to show, then, that the sample relied upon here is a permissible method of proving classwide liability is by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action. *Id.*
>
> *Wal-Mart* does not stand for the broad proposition that a representative sample is an impermissible means of establishing classwide liability. . . . *Id.* at 1048.
>
> The underlying question in *Wal-Mart*, as here, was whether the sample at issue could have been used to establish liability in an individual action. . . . *Id.*
>
> [T]he study here could have been sufficient to sustain a jury finding as to hours worked if it were introduced in each employee's individual action. *Id.*

Thus, the possibility of trial-by-formula through statistical sampling appears potentially still supportable in an appropriate case, notwithstanding the Court's previous language in *Wal-Mart*.