



Mining Federal “Golden Nuggets”

Hot, New, Must-Know Cases

June 25, 2021

Western District of Missouri



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Use It/Cite It: The Wagstaffe Group Practice Guide



****Many of You
Already Have it!**

@JWagstaffeLxNx



THE SPECTRUM

Hazelwood School District

HAZELWOOD EAST HIGH SCHOOL

- May 1983

HAZELWOOD V. KUHLMIEIER



In May of 1983, Hazelwood East High School's Principal, Ryan Reynolds, was asked to review the final draft of Hazelwood's student newspaper, *The Spectrum* before it was printed and distributed.

In his reading, he discovered two student articles which he found to be inappropriate for younger readers.

Under the impression that there was insufficient time to edit the articles before printing, he cut them out.

The students who wrote the articles felt that their First Amendment right to freedom of the press had been violated by Reynolds' censoring of *The Spectrum's* contents.

They decided to take Reynolds and the school district to court over the matter.

The case began in District Court, and was afterward brought to the Court of Appeals, then finally moving to the Supreme Court.







Mining Tools



**FRCP &
Title 28**

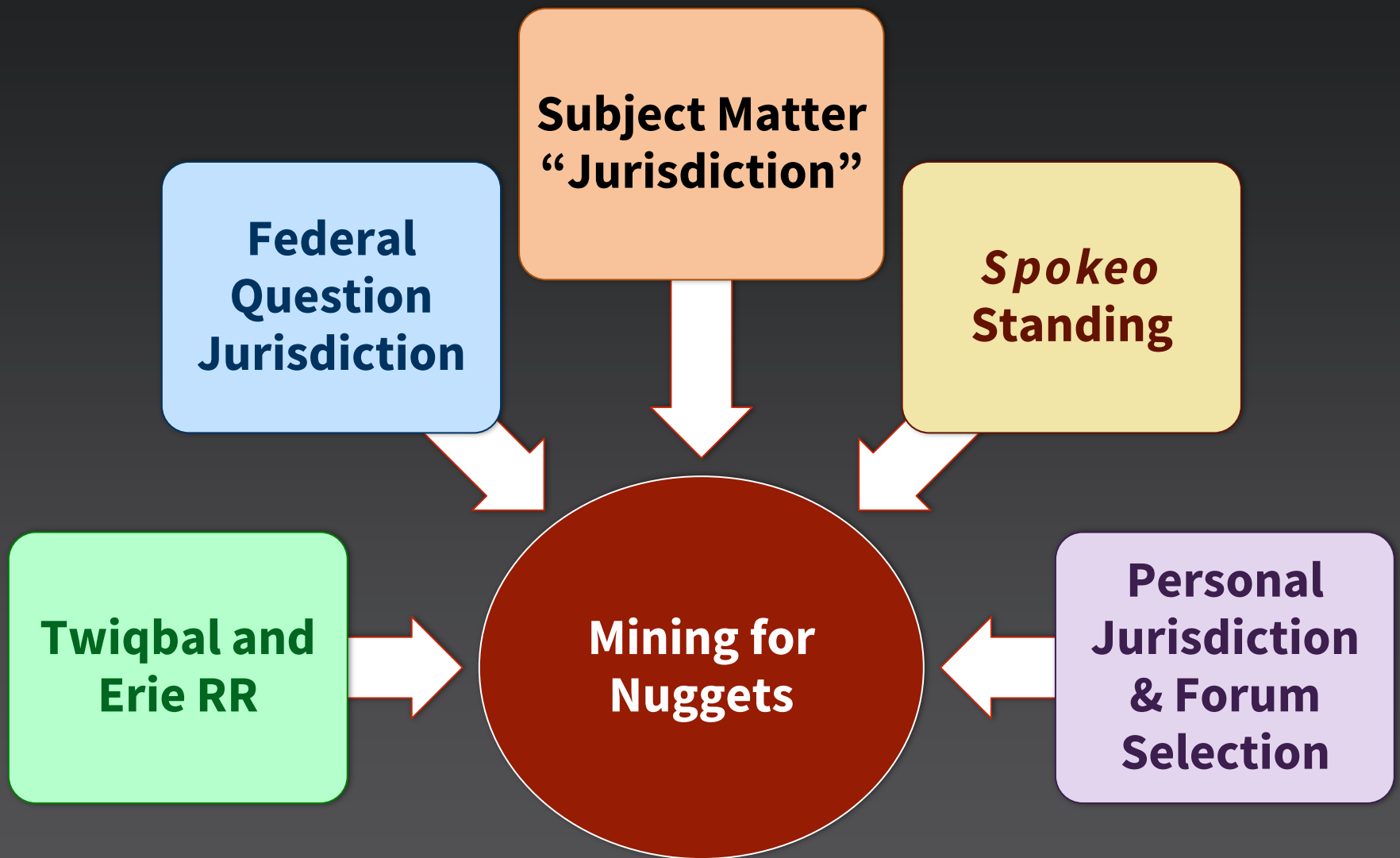


**The Wagstaffe Group
Practice Guide: Fed. Civ.
Pro. Before Trial
& Current Awareness
(LexisNexis 2021)**

WD Missouri

PowerPoint Slides

**2021
Jurisdictional
Update**



Golden Nugget #1: What is “Jurisdictional”?



***Fort Bend County,
Texas v. Davis (2019)***
139 S.Ct. 1843

“Jurisdictional”?

**Title VII case
brought without
P identifying
particular claim
in EEOC filing**

**Post appellate
remand, MTD
claim for failure
to exhaust**

**Is motion to
dismiss
jurisdictional or
can it be waived
by delay?**

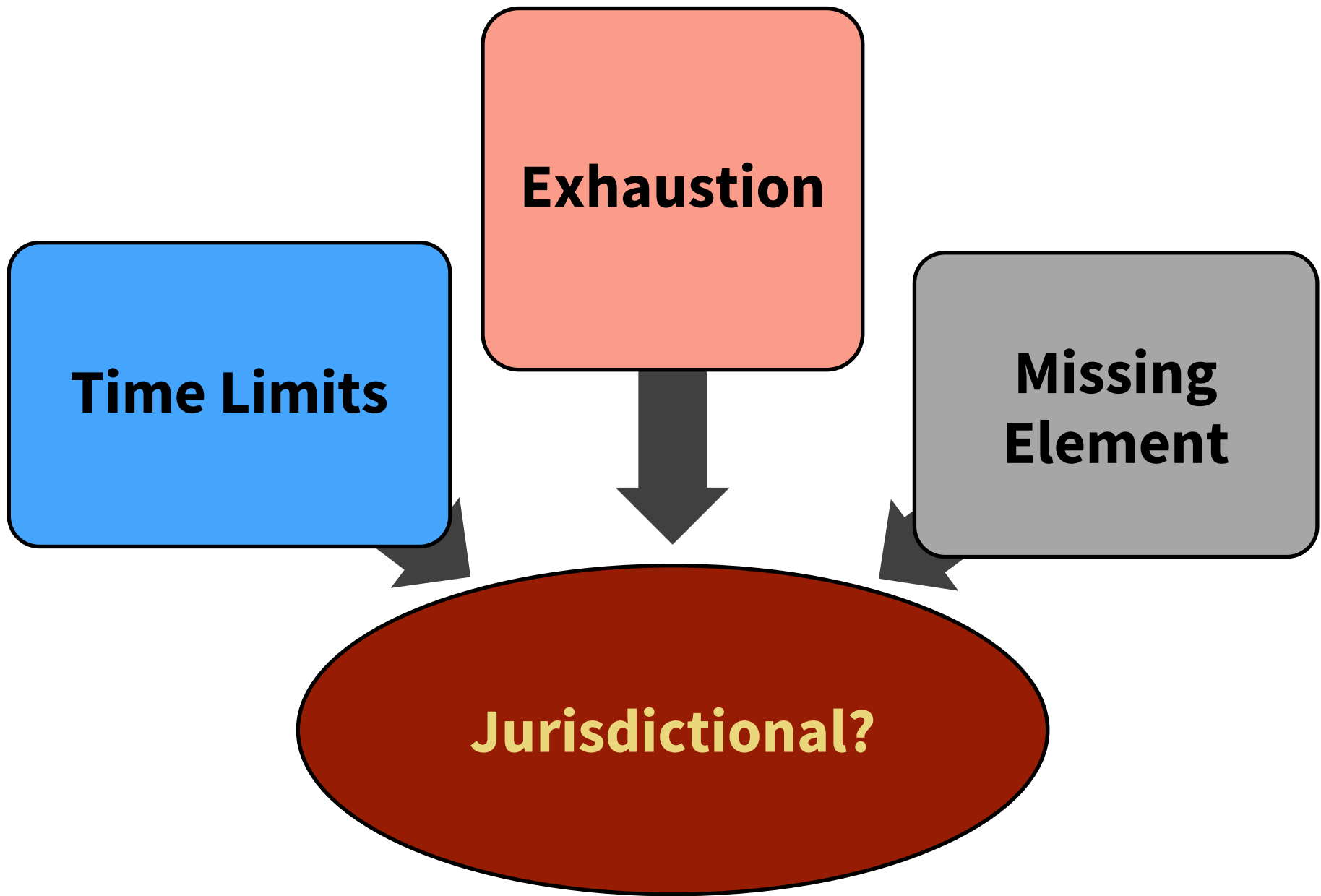


Not Jurisdictional

***Fort Bend County, Texas v. Davis* (2019) 139 S.Ct. 1843**

Full exhaustion of remedies with EEOC is a claims processing, not jurisdictional, rule

Wickfire, L.L.C. v. Woodruff (5th Cir. 2021) 989 F.3d 343– absence of protectable mark in Lanham Act case not jurisdictional; *Sanzone v. Mercy Health* (8th Cir. 2020) 954 F.3d 1031—existence of an ERISA plan not jurisdictional; *U.S. ex rel Ambrosecchia v. Paddock Labs* (8th Cir. 2017) 855 F.3d 949--public disclosure bar for FCA not jurisdictional; see see TWG § 5-IV



Golden Nugget #2: *Spokeo* Standing?



***Thole v. U.S. Bank*
(2020) 140 S.Ct. 1615**

Is there *Spokeo* Standing?

Two retired plan participants sue to challenge plan fiduciaries' investments

Retirement benefits don't fluctuate with value of plan or as a result of allegedly adverse fiduciary investments

MTD for lack of standing?

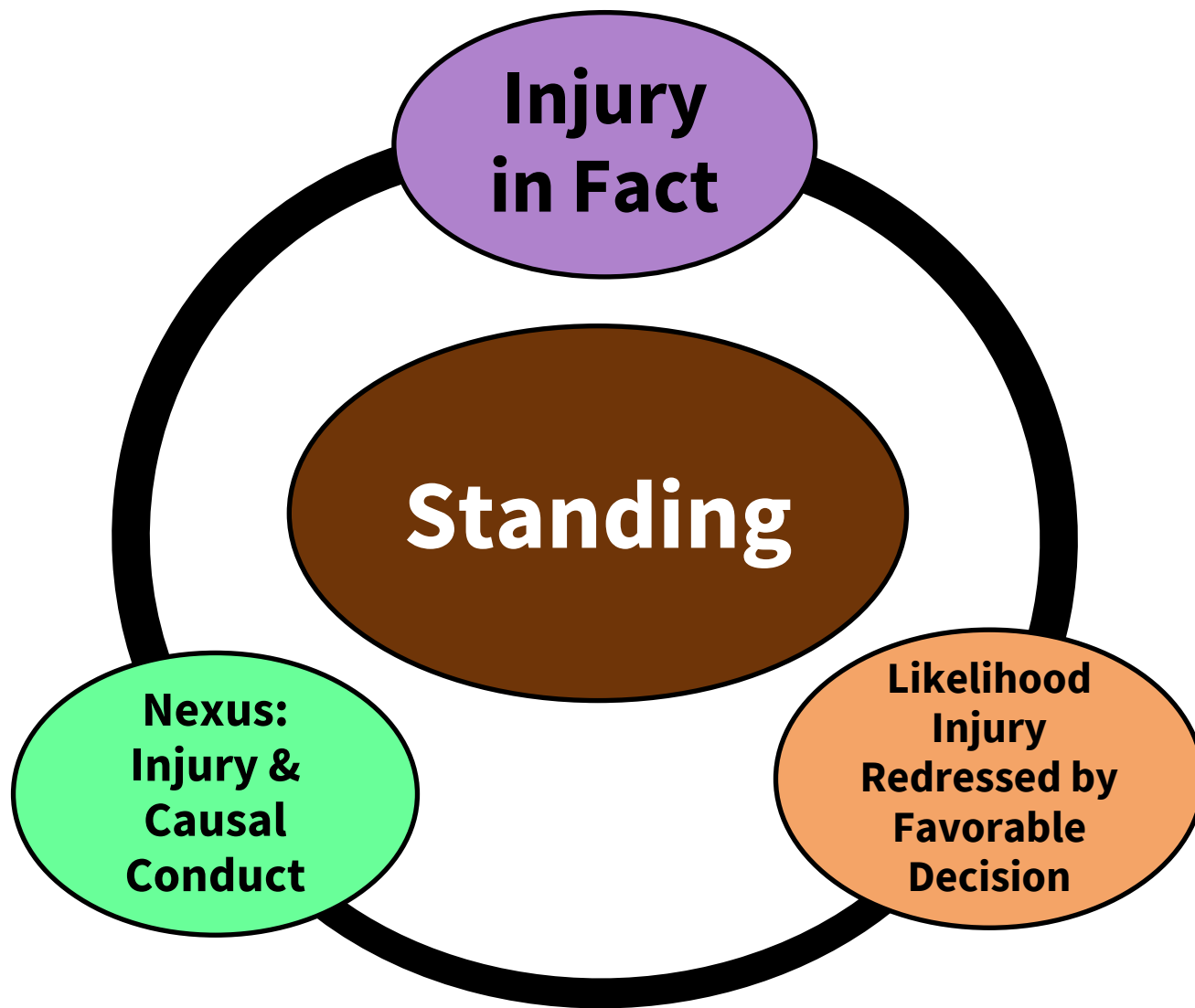


GRANT

***Thole v. U.S. Bank* (2020) 140 S.Ct. 1615**

- **Plaintiffs lack standing as they have no concrete stake in lawsuit as outcome of suit would not affect future benefits**

See *Spokeo, Inc. v. Robins* (2016) 136 S.Ct. 1540; *Carney v. Adams* (2020) 141 S.Ct. 493—no standing by asserting abstract, general interest in changing state’s “partisan balance” requirement for judgeships; *Clapper v. Amnesty Int’l USA* (2013) 133 S.Ct. 1138—no standing based on possible future governmental interception of phone calls; *California v. Texas* (June 17, 2021) 2021 U.S. LEXIS 3119—lack of standing under Affordable Care Act; cf. *Uzuegbunam v. Preczewski* (2021) 141 S.Ct. 792 – for purpose of Art. III standing, nominal damages provide necessary redress for completed violation of legal right



Yeransian v. B. Riley FBR, Inc. (8th Cir. 2021) 984 F.3d 633—no injury in fact for those suing under contract for additional compensation for contingent money owed by third party

Is there *Spokeo* Standing?

D attempted to collect unpaid credit card debt and in dunning letter falsely overstated amount owed

Plaintiff alleged statutorily noncompliant letter violated her rights under FDCPA and alleged she was annoyed and consulted a lawyer, but otherwise didn't allege any harm

MTD for lack of standing?



GRANT

***Nettles v. Midland Funding LLC* (7th Cir. 2020) 983 F.3d 896**

- **No concrete injury traceable to false representation in letter; mere violation of statute (FDCPA) insufficient**

See *Auer v. Trans Union, LLC* (8th Cir. 2018) 902 F.3d 873—disclosure violations of FCRA without injury means no standing; *Flecha v. Mediacredit, Inc.* (5th Cir. 2020) 946 F.3d 762—class members receiving false dunning letter lack FDCPA standing if ignored as junk mail; *Thomas v. Toms King* (6th Cir. 2021) 997 F.3d 629—no standing when leaving credit card number on receipt caused no injury; cf. *Cranor v. 5 Star Nutrition, LLC* (5th Cir. 5/26/21) 2021 U.S. App. LEXIS 15795 – standing shown under TCPA claim for autodial texts to cell phone since affects battery life

Rule 12(b)(1)

No Waiver

**No
Supplemental
Claims**

**Dismissed
w/o
Prejudice**

Rule 12(b)(6)

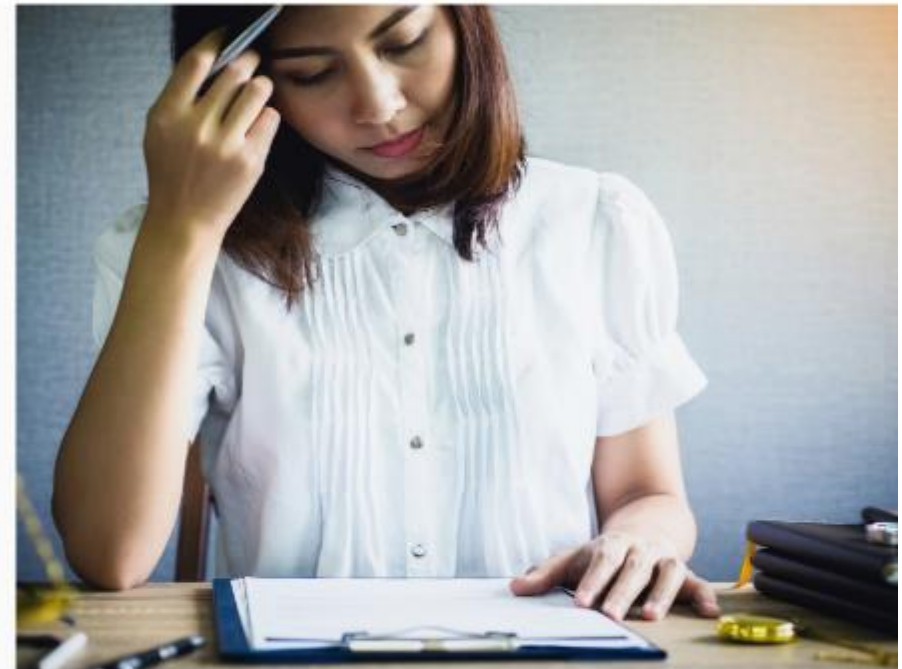
**Can be
Waived
(Aff. Defense)**

**Supplemental
Claims
Discretionary**

**Dismissed
with
Prejudice**

APRIL 2019

Five Essential Tips for Surviving the Supreme Court's Tectonic Changes to the Meaning of "Jurisdiction" and the *Spokeo* Standing Earthquake



When Dorothy reacted to the earthshaking storm by telling Toto they weren't in Kansas anymore, she was expressing what litigators may feel when examining the tectonic changes underway in the U.S. Supreme Court as to what is meant by "subject matter jurisdiction" and Article III standing. And make no mistake about it, surviving these tremblors means more than a quick reading of the hot-off-the-press June 2019 decision in *Fort Bend County* as the latest word on jurisdiction and other recent cases addressing the *Spokeo* juggernaut.

"Jurisdiction" – the Word With Limited Meaning under *Fort Bend County*

reaffirmed that "the word 'jurisdictional' generally is reserved for prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction)." In contrast, reasoned the Court, an exhaustion requirement—even if mandated by statute—is a claims-processing rule that will be enforced if properly raised, but one that may be forfeited if the party waits too long to raise the point.

Thus, the High Court continued its attack on what it calls the "profligate use" of the term "jurisdiction" in situations where Congress did not expressly and clearly describe the

Miner's Tips



- **Subject Matter Jurisdiction First**
- **Read Statute's Jurisdictional Label**
- **Remember *Spokeo* standing is jurisdictional, so apply “no harm, no foul” rule in statutory violation cases (original and removal)**
- **And stay tuned for SCOTUS decision in *TransUnion, LLC v. Ramirez* as to whether every member of class must have standing**

Four Doorways to Federal Court



Front Door

Arising Under



Visitors' Door

Complete
Diversity



Back Door

Removal =
Origin. Juris.



Side Door

Same Trans.



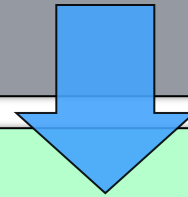
Golden Nugget #3: The Missing Federal Claim



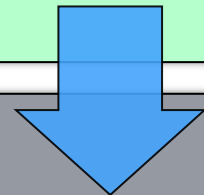
Gunn v. Minton
(2013) 568 U.S. 251

Federal Question

Minton loses federal patent suit



Minton sues attorney Gunn for malpractice



Question: Motion to Dismiss for lack of Subject Matter Jurisdiction?

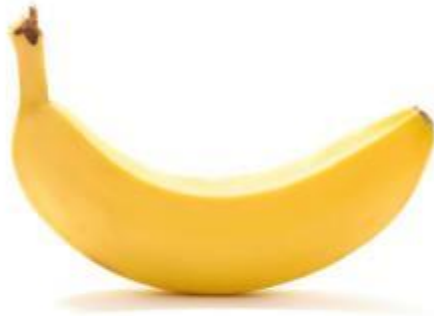
GRANT

***Gunn v. Minton* (2013) 568 U.S. 251**

- **Malpractice claim does not “arise under” federal law**

See C.J. v. Truman Med. Ctr., Inc. (W.D. Mo. 2020) 2020 U.S. Dist. LEXIS 111915 (Kays, J.)--no federal jurisdiction over state law claims of theft of personal information on laptop even if HIPAA issues implicated; *Tisdale v. Pagourtzis* (S.D. Tex. 2020) (Brown, J.)—no *Grable* jurisdiction over state claim against ammunition seller to school shooter even if reference made to federal criminal statute

Cf. Insubstantial Federal Claim



**Pleading a securities
fraud claim asserting
a banana is a federal
security**

***Carr v. Tillery* (7th Cir. 2010) 591 F.3d 909; *Arnold v. U.S.* (N.D. Cal. 2020) (Van Keulen, J.)--mind abduction allegation jurisdictionally insubstantial**

Fun Miner's Case - 2021



***Castro v. U.S.* (S.D. Tex. 4/13/21)
(Eskridge, J.)**

P asserts he is God and reasons that since the U.S. Treasury is “government under God” he’s entitled to control of all Treasury funds.

Holding: No subject matters jurisdiction or standing.

See also *U.S. ex rel Mayo v. Satan & his Staff* (W.D. Pa. 1971) 54 F.R.D. 282—no personal jurisdiction over defendant; *State Senator Ernie Chambers v. God*, No. 1075-462 (Neb. Dist. Ct. Oct. 8, 2008)-- dismissing case due to impossibility of service on defendant

And Bivens Ain't What It Used to Be

Hernandez v. Mesa (2020) 140 S.Ct. 735—no *Bivens* implied cause of action unless (1) it is precisely akin to context of one of the three claims (*Bivens/Carlson/Davis*) recognized before, and (2) there're no special factors counseling hesitation

Ahmed v. Weyker (8th Cir. 2020) 984 F.3d 564—no *Bivens* claim for rogue law-enforcement alleged lies and manipulation landing plaintiffs in jail; *Byrd v. Lamb* (5th Cir. 2021) 990 F.3d 879 (Homeland Security officer allegedly threatened P with a gun in a parking lot)

Miner's Tips



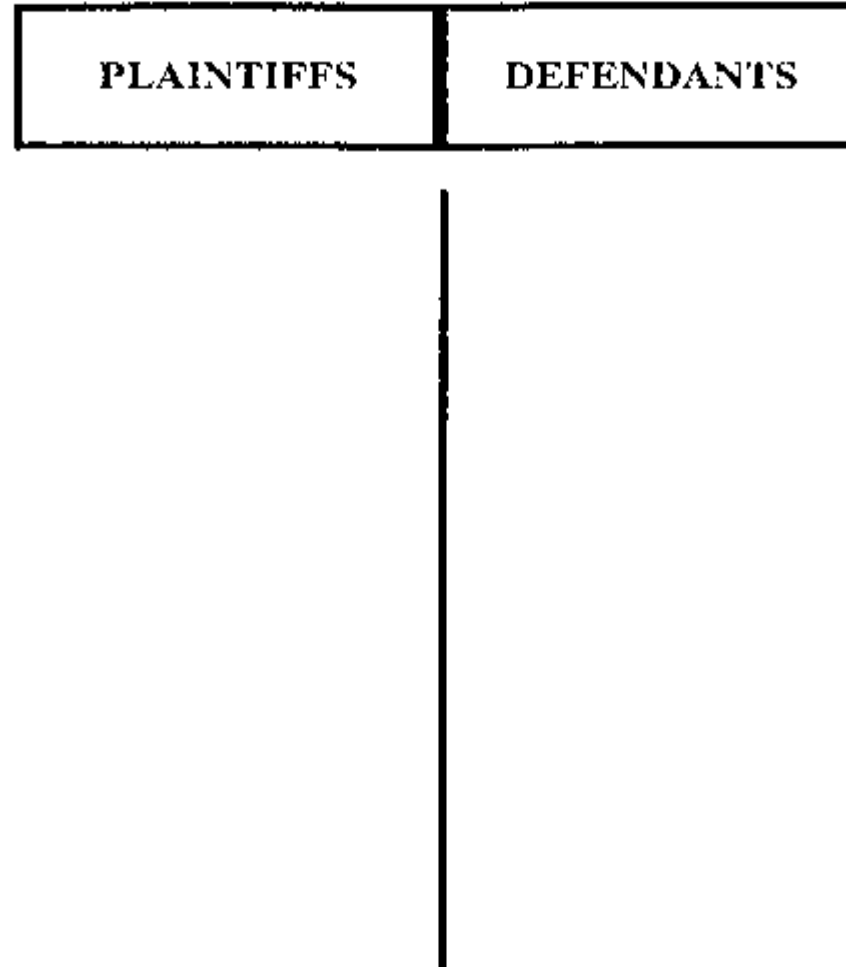
- **Read Complaint**
- **Trust federal claims & distrust “substantial” federal issue**
- **Careful about implying private rights of action**

Golden Nugget #4: Diversity: Go to Kindergarten



**Case Off the
Docket By Monday**

Diversity Algebra



Complete Diversity

PLAINTIFFS	DEFENDANTS
P-1 (MO)	D-1 (NY)
P-2 (MO)	D-2 (OH)

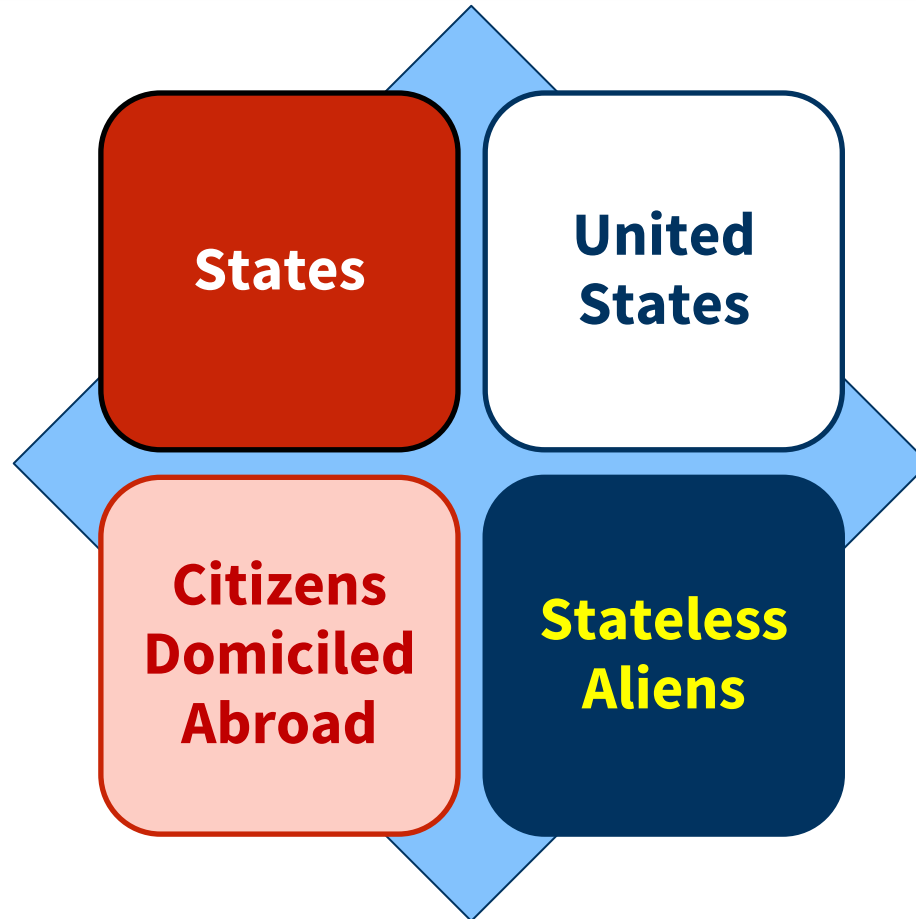
28 U.S.C. Sec. 1332

No Complete Diversity

PLAINTIFFS	DEFENDANTS
P-1 (MO)	D-1 (NY)
P-2 (MO)	D-2 (MO)

28 U.S.C. Sec. 1332

Citizens – Not



Mitchell v. Bailey (5th Cir. 2020) 982 F.3d 937--Indian Tribe a stateless entity and defeats diversity; *Eckerberg v. Inter-State Studio & Publishing Co.* (8th Cir.2017) 860 F.3d 1079 – that military person assigned to various places did not change his original Florida domicile

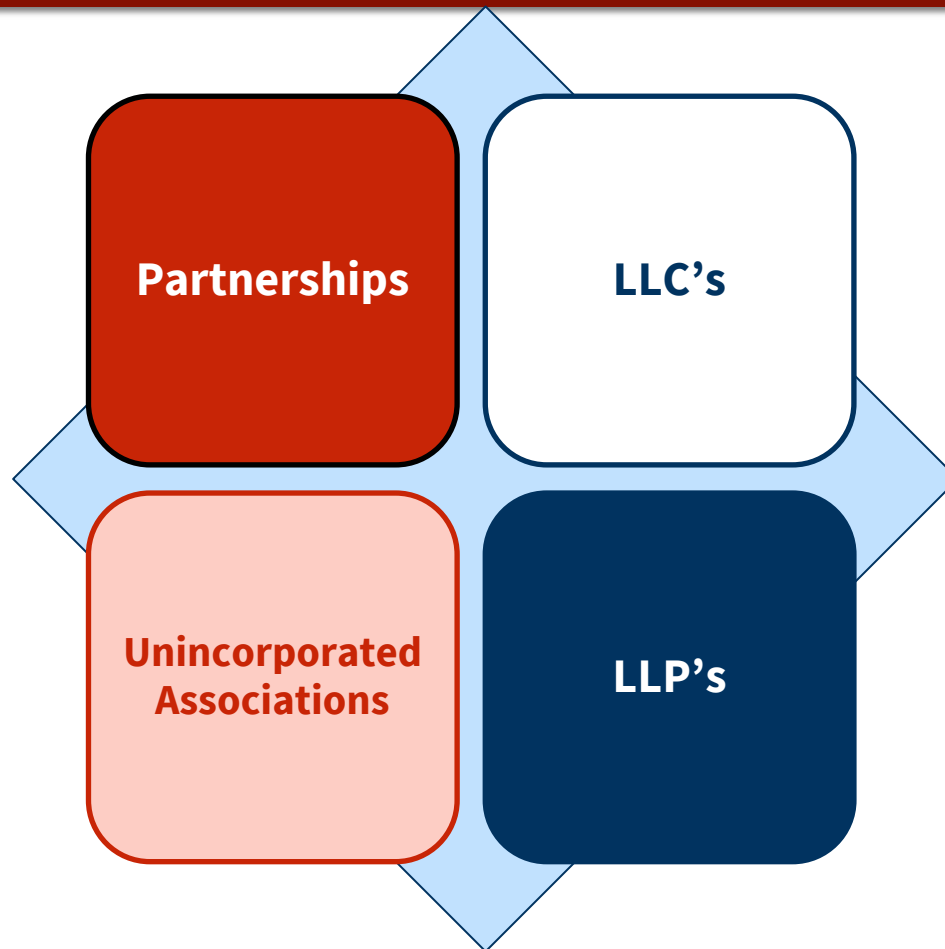
Citizenship Rules

Individuals

Corporations



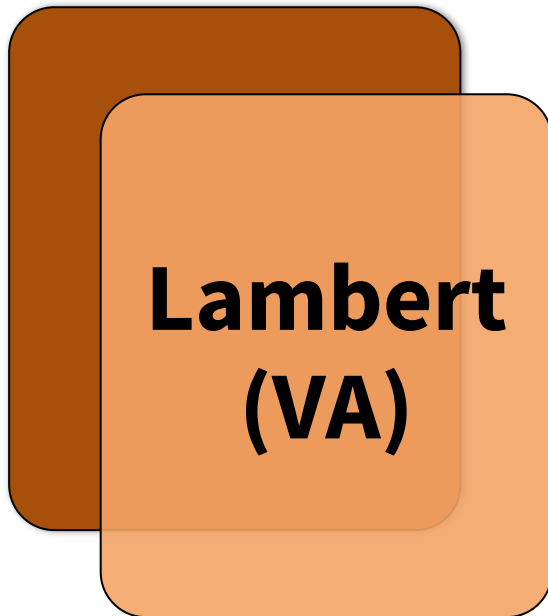
All Non-Corporate Entities



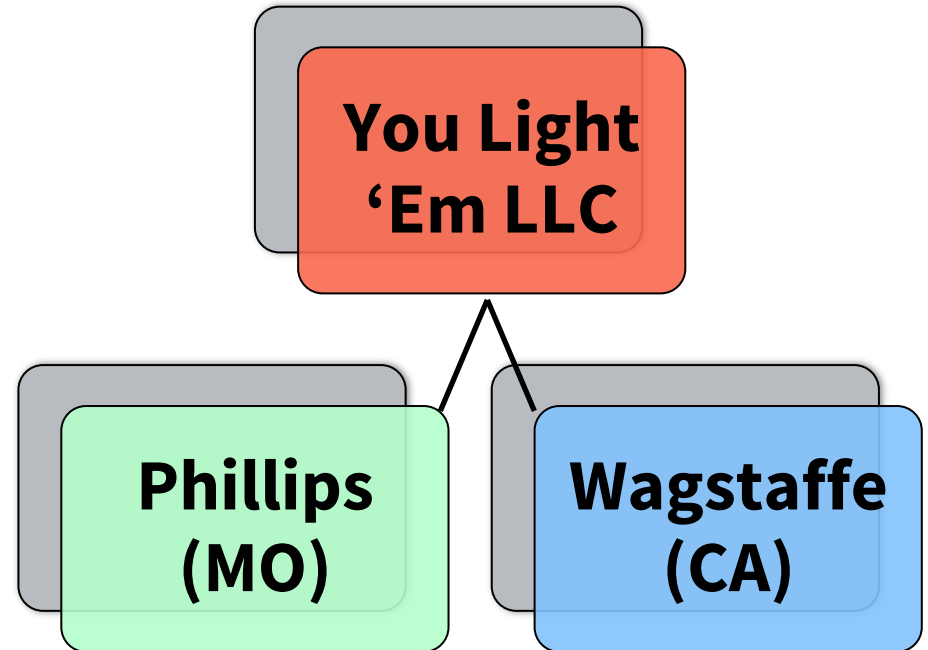
See Jet Midwest Int'l Co., Ltd. v. Jet Midwest Group, LLC (8th Cir. 2019) 932 F.3d 1102—citizenship of LLC is citizenship of all its members

Diversity Drilling

Plaintiff

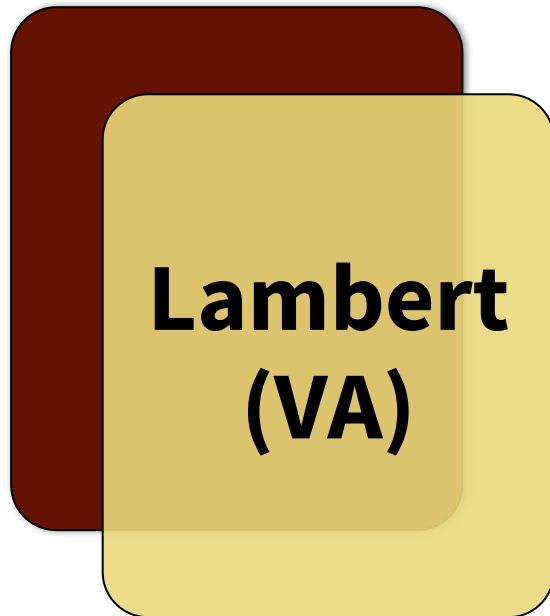


Defendants

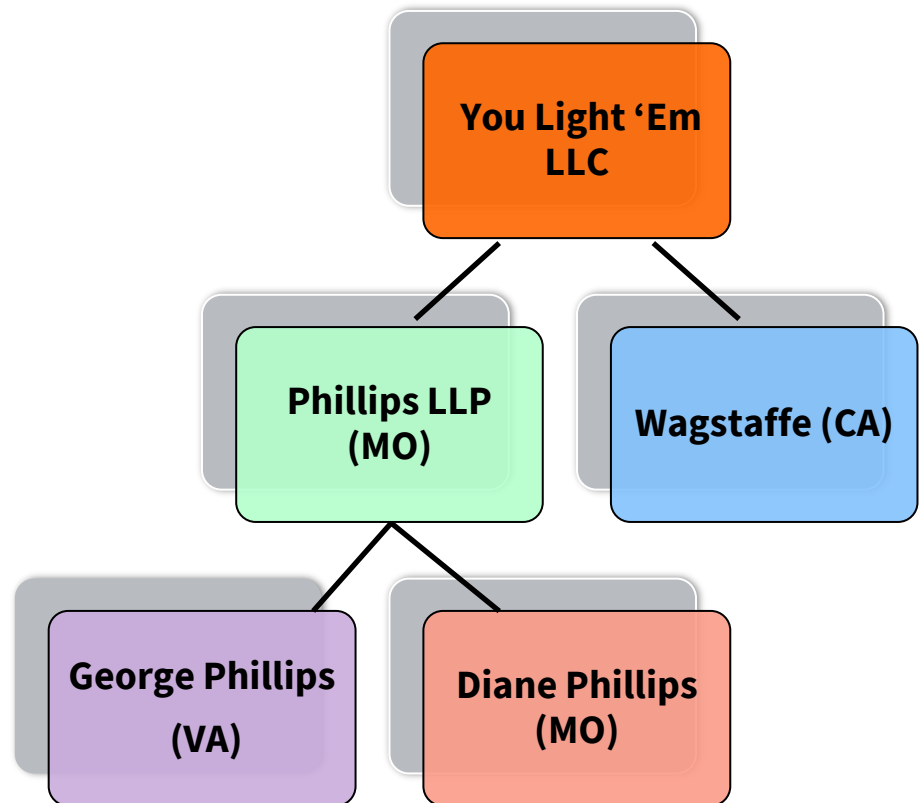


Diversity Drilling

Plaintiff



Defendants



Cf. Corporation's PPB

- Corporation's principal place of business is where it **controls, coordinates and directs** corporate activities (“nerve center”)

See Hertz Corp. v. Friend (2010) 559 U.S. 77 – PPB not where majority of business done; *Jet Midwest Int'l Co. v. Jet Midwest Group, LLC* (8th Cir. 2019) 932 F.3d 1102—Hong Kong “limited company” is treated as equivalent to a “corporation”; *3123 SMB LLC v. Horn* (9th Cir. 2018) 880 F.3d 461--newly formed holding company's nerve center is location where board meetings to be held

Cf. Trust's Citizenship

Business Trust

**“Trust” entities
created by statute**

**Citizenship of
All Members –
SH's**

***Americold Realty
Trust v. ConAgra
Foods, Inc. (2016)*
136 S.Ct. 1012**

Traditional Trust

**Traditional fiduciary
established by private
trust document**

**Citizenship of
Trustee**

***Alper v. Marsh, USA,
Inc. (E.D. Mo. 2018)*
2018 U.S. Dist. LEXIS
60514**

Miner's Tips



- **Assess citizenship of all parties**
- **Drill down down “factor tree”**
- **“Show me the money”**

Golden Nugget #5: Removal to Federal Court?



*Burrell v. Bayer
Corp.*
(4th Cir. 2019)
918 F.3d 372

Removal Jurisdiction?

**Suit against Bayer
for damages from
female sterilization
device**

**Removed as
“substantial
federal question”
since device
regulated by FDA
subject to federal
Medical Device Act
(21 U.S.C. § 360(c))**

**Motion to
remand for
lack of
jurisdiction?**



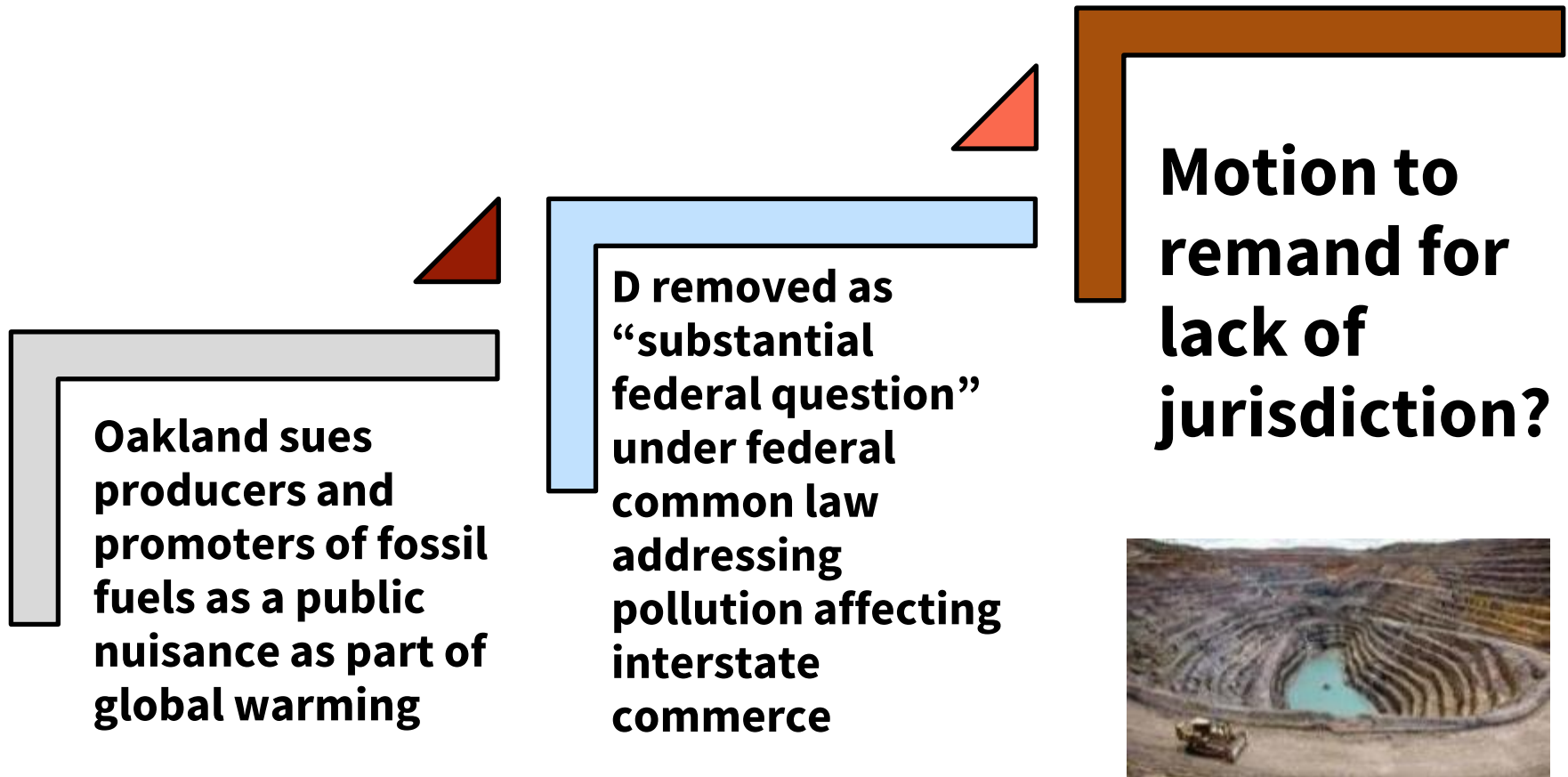
GRANT

***Burrell v. Bayer Corp.* (4th Cir. 2019) 918 F.3d 372**

- **No private right of action under federal statute and preemption only defensive and no *Grable* “substantial federal question”**

See also Dalton v. JJSC Properties, LLC (8th Cir. 2020) 967 F.3d 909--if plaintiff lacks standing to sue, court must remand action to federal court even if claim arises under federal law; *Ellis v. RK Endeavors Springfield, LLC* (W.D. Mo. 2020) 2020 U.S. Dist. LEXIS 2218 (Bough, J.)—no removal of truck driver’s state claims based on selling oil containing THC simply because they involved federal interest in transportation of hemp; but see *Wulschleger v. Royal Canin U.S.A., Inc.* (8th Cir. 2020) 953 F.3d 519—removal jurisdiction proper as to state law unfair practices claim based on buying D’s products based on deception that FDA approved products

Removal Jurisdiction?



GRANT

***City of Oakland v. BP PLC* (9th Cir. 2020) 960 F.3d 570**

- **Climate change liability not removable as state claims do not arise under federal law**

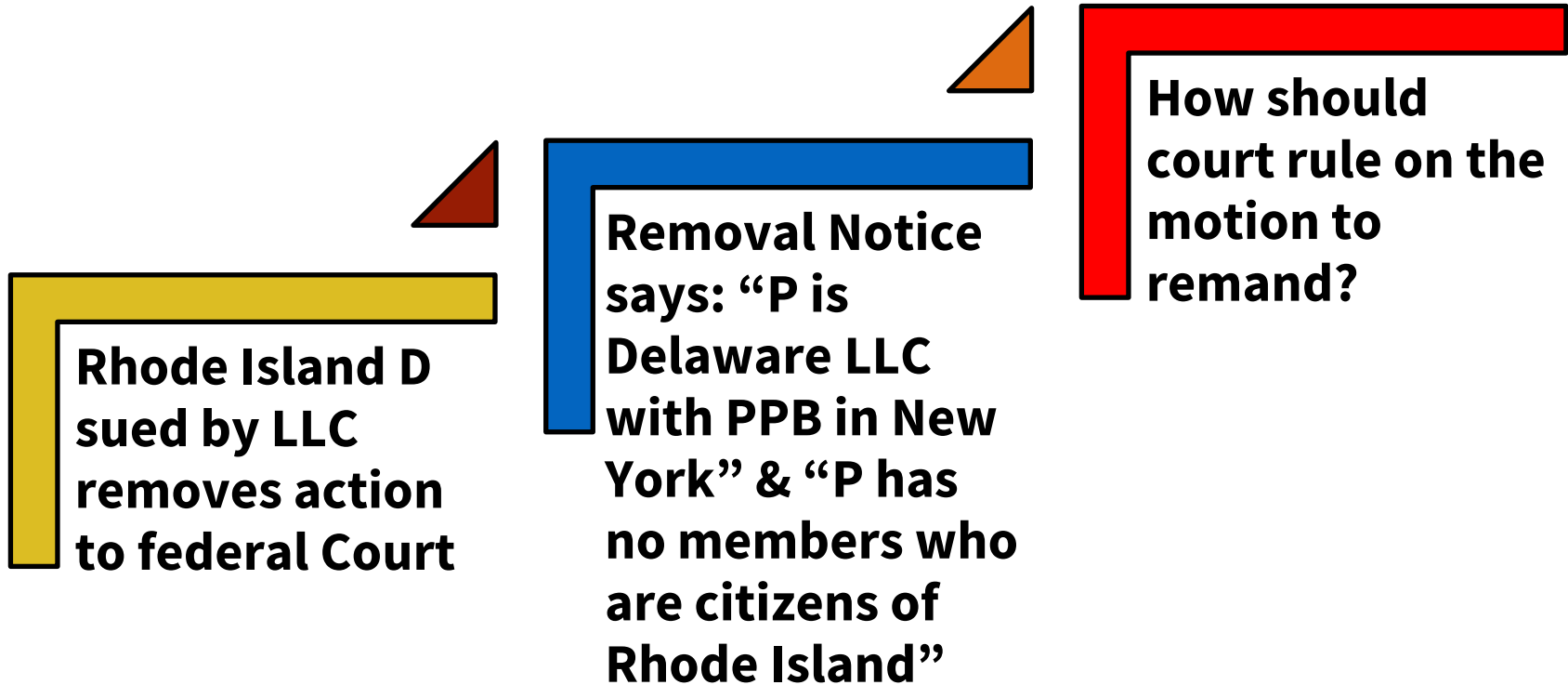
See also Bd. of Cnty. Com'rs v. Suncor Energy (USA) (10th Cir. 2020) 965 F.3d 792 (same); *Lester E. Cox Med.Ctrs. v. Amneal Pharmaceuticals, LLC* (W.D. Mo. 2020) 2020 U.S. Dist. LEXIS 10390 (Ketchmark, J.)—state claims relating to opioid fraud not removable simply because federal government has strong interest in controlled substances



Plaintiff is Jedi Master of Claims Alleged

- *Solomon v. Kansas City Public Schools* (W.D. Mo. 2020) 2020 U.S. Dist. LEXIS 33519 (Ketchmark, J.)--disability discrimination by student under Missouri law not removable simply because student on Individual Education Plan (IEP)

Removal – Citizenship Proof?



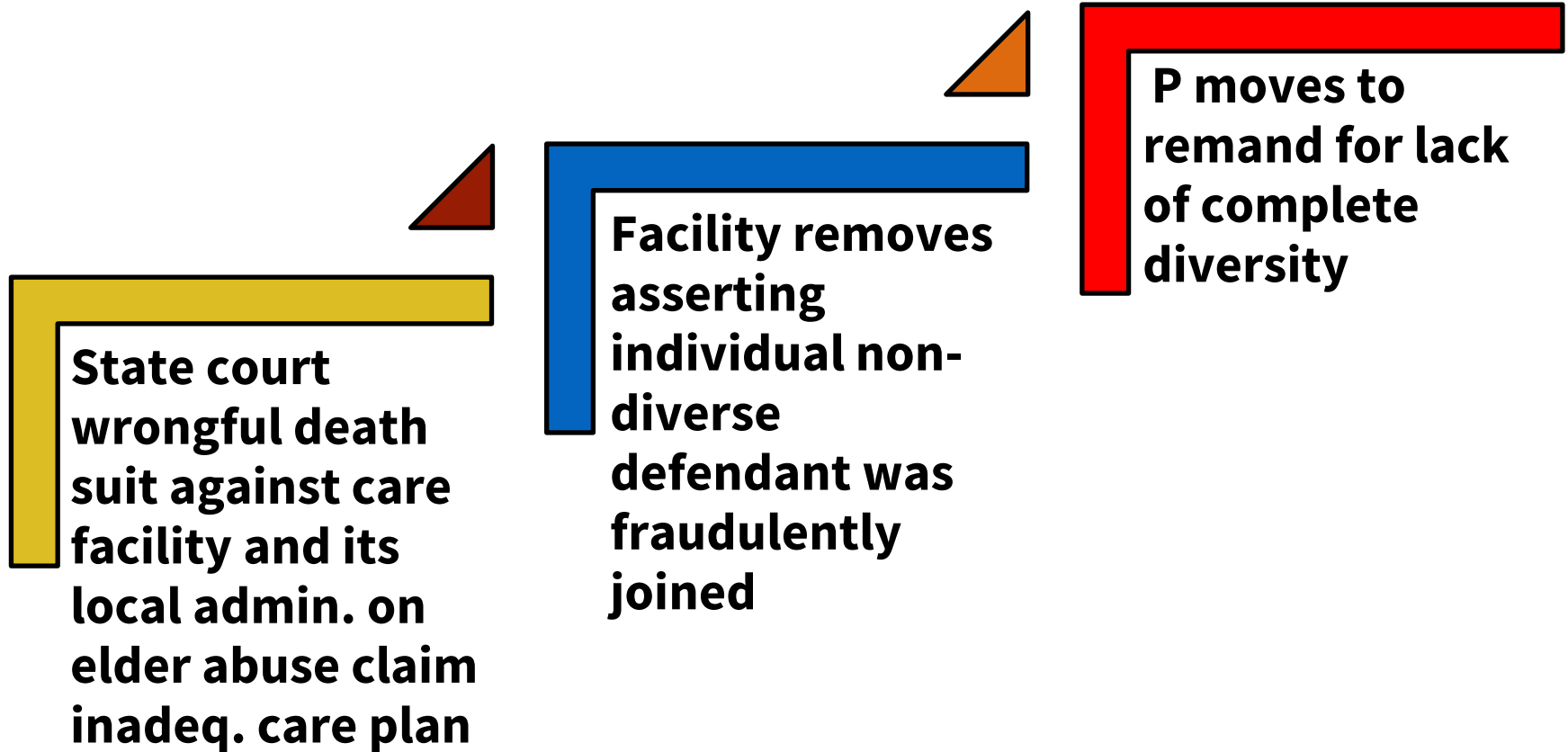
GRANT

***D.B. Zwirn Special Opportunities Fund v. Mehrota* (1st Cir. 2011) 661 F.3d 124**

- **Yes, if, in fact, no diversity jurisdiction**

See Midcap Media Finance, L.L.C. v. Pathway Data, Inc. (5th Cir. 2019) 929 F.3d 310—individuals: must prove domicile not “residence”; corporations: must prove state(s) of incorporation and PPB; *West v. Louisville Gas & Elec. Co.* (7th Cir. 2020) 951 F.3d 827—identities and citizenship of all partners or LLC members must be revealed; *Mensah v. Owners Ins. Co.* (8th Cir. 2020) 951 F.3d 941—remand since requested uninsured motorist amount \$61,718.67; cf *Turtine v. Peterson* (8th Cir. 2020) 959 F.3d 873—plausible defamation claims concern more than \$75,000

Sham Joinder Rule: Remand?



GRANT

Grancare, LLC v. Thrower, By and Through Mills **(9th Cir. 2018) 889 F.3d 543**

- **Defendant not “sham” if there is a possible basis for recovery (not a Rule 12(b)(6) test)**
- **Administrator could be personally liable (i.e., colorable claim for failure to provide due care)**

See *Waste Mgt., Inc. v. AIG Specialty Ins. Co.* (5th Cir. 2020) 974 F.3d 528—court finds claims adjuster sham party due to conclusory allegations and failure to allege plausible claim; *Murphy v. Aurora Loan Services, LLC* (8th Cir. 2012) 699 F.3d 1027--fraudulent joinder upheld when negligent misrepresentation claim against law firm barred by established immunity from suit state law protection

Local Defendant – Removal Bar

PLAINTIFFS	DEFENDANTS
------------	------------

P (TX.)

D-1 (NY)

D-2 (MO)

28 U.S.C. Sec. 1441(b)(2)

Local Defendant Bar

***Holbein v. TAW Enterprises, Inc.* (8th Cir. 2020) 983 F.3d 1049**

- **Statutory bar (28 U.S.C. §1441(b)(2)) applies to served defendants and precludes removal (if raised within 30 days of removal—not “jurisdictional”)**

See also Texas Brine Co. v. American Ass’n, Inc. (5th Cir. 2020) 955 F.3d 482—local defendant can remove *before* service (“snap removal”); *Encompass Insurance Co. v. Stone Mansion Restaurant* (3d Cir. 2018) 902 F.3d 147—same; *Gibbons v. Bristol-Myers Squibb Co.* (2d Cir. 2019) 919 F.3d 699—same; *Tillman v. BNSF Railway Co.* (E.D. Mo. 2021)—same; contra *Gentile v. Biogen Idec, Inc.* (D. Mass. 2013) 934 F.Supp.2d 313

Why Issue an OSC?



Miner's Tips



Golden Nugget #6: Decline Supplemental Jx



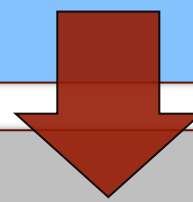
***Robinson v. Town of
Marshfield (1st Cir. 2020)***
950 F.3d 21

Supplemental Jurisdiction

Fire Chief sues town under ADEA and state law claims for defamation and retaliation based on retaliation for reporting gender discrimination



Court granted summary judgment for town based on unrebutted evidence termination was for morale and performance reasons



Question: Retain supplemental jurisdiction over state law claims?

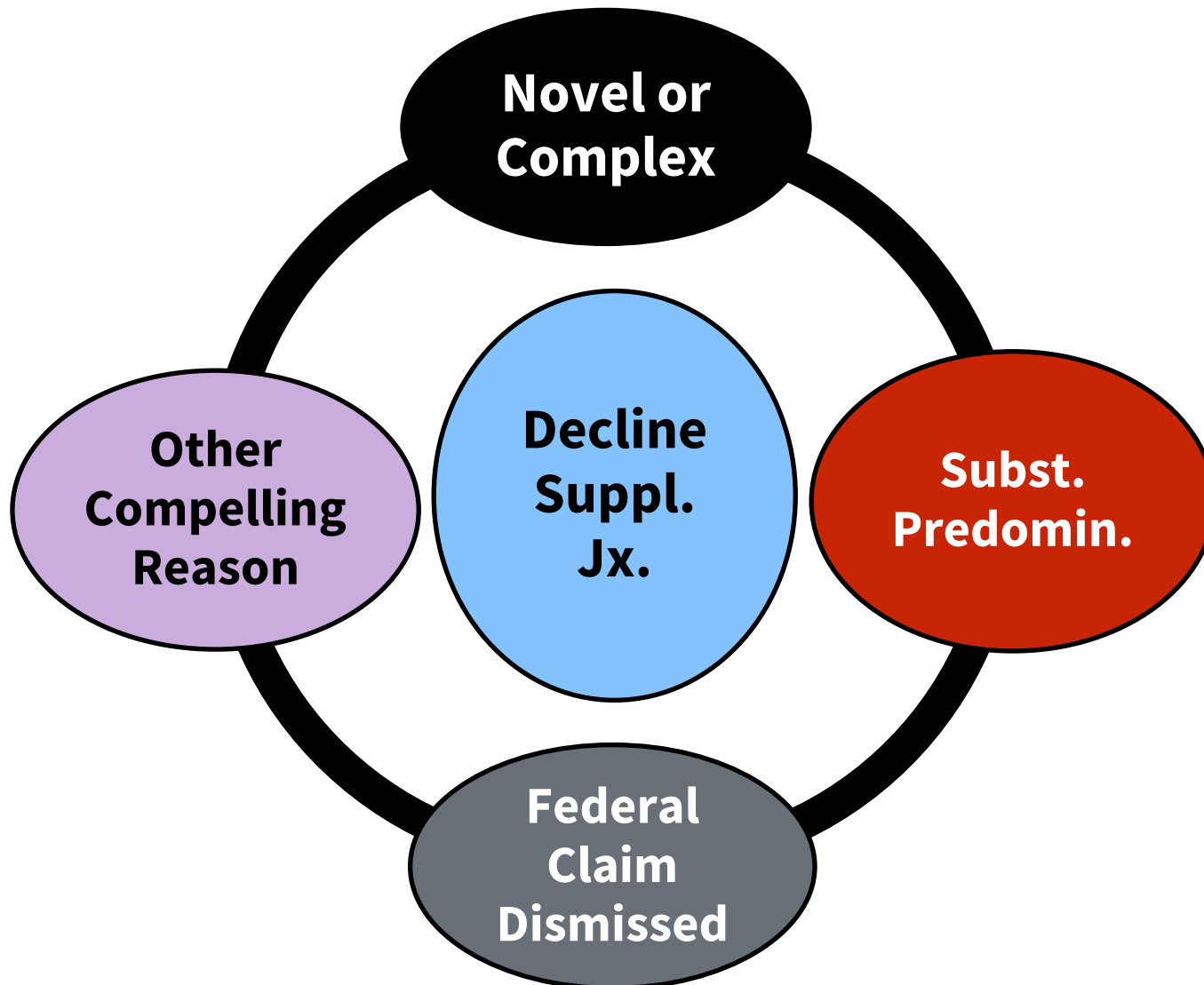
DECLINE

***Robinson v. Town of Marshfield* (1st Cir. 2020) 950 F.3d 21**

- **After court grants SJ on federal claims, it should decline supplemental jurisdiction when disputed facts on state claim**

King v. City of Crestwood (8th Cir. 2018) 899 F.3d 643--abuse of discretion to retain supplemental claims; see also *Nuevos Destinos, LLC v. Peck* (8th Cir. June 9, 2021) 2021 U.S. App. LEXIS 17156—once federal question and supplemental claims dismissed, amending to add diversity ground rejected

28 U.S.C. Sec. 1367(c)



Miner's Tips



- **Test same transaction conclusions**
- **Wear state judicial hat only when it fits**
- **Dismiss or remand if federal claim independently disposed before trial**

Golden Nugget #7: Personal Jurisdiction



***Ford Motor Co. v.
Montana 8th Judicial Dist.
(2021) 141 S.Ct. 1017***

Personal Jurisdiction Exploring



Ford Motor Co. (Mich.) assembled Explorer in Kentucky, sold it to dealership in Washington who sold it to Oregon resident

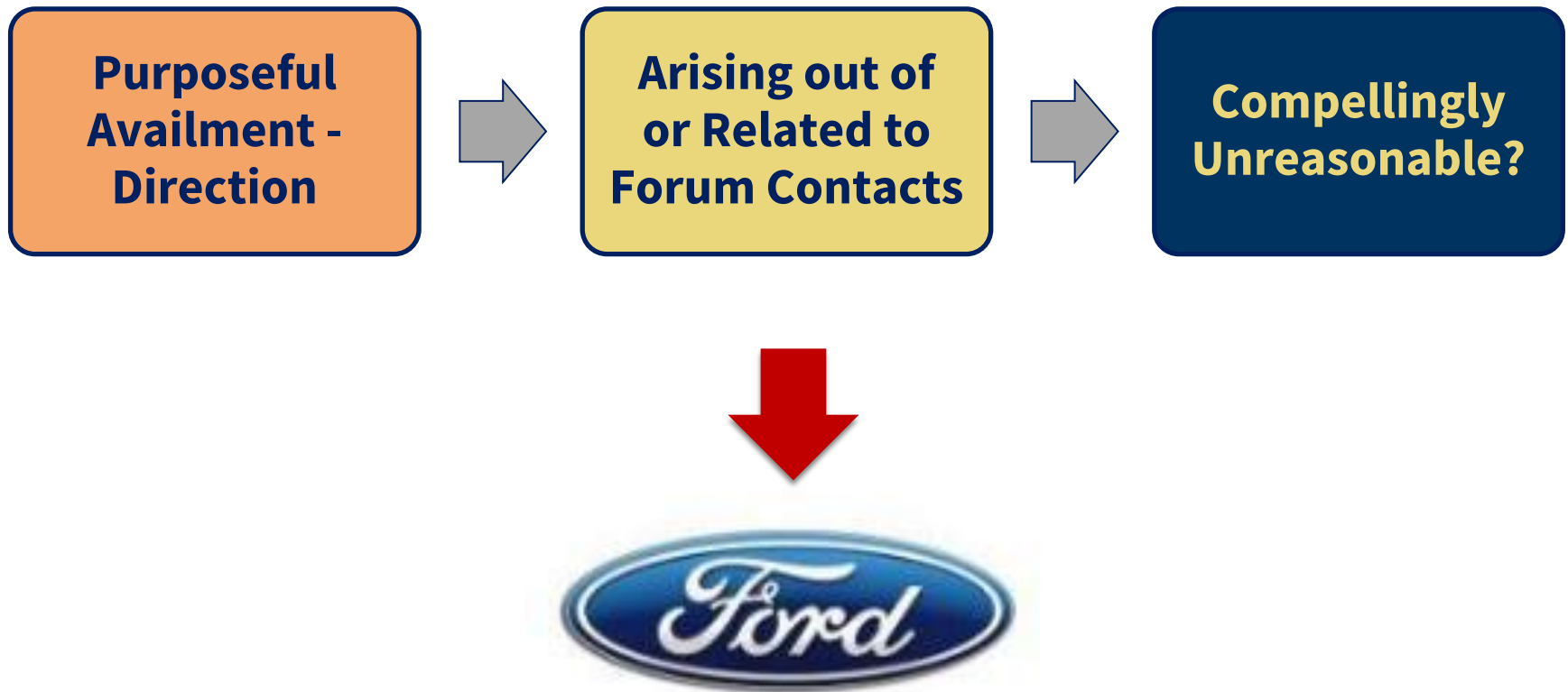
Explorer purchased and brought to Montana where accident caused death P reps. allege death due to design defect in vehicle

Ford owns multiple Montana dealerships, pervasively advertises Explorer in Montana as safe and stable, and sells Explorers in all 50 states

Motion to dismiss for lack of personal jurisdiction?



Specific Jurisdiction 3-Step



DENY

Ford Motor Co. v. Montana 8th Judicial Dist. (2021) 141 S.Ct. 1017

- **Specific jurisdiction if P's claims arise out of or relate to the D's forum contacts ("case-linked"). Here, Ford "systematically served" the market, creating "strong relationship" among the defendant, the forum and the litigation.**

See also *AMA Multimedia, LLC v. Wanat* (9th Cir. 2020) 970 F.3d 1201—no personal jurisdiction for infringement claims despite geotagging ads for forum residents; *Pederson v. Frost* (8th Cir. 2020) 951 F.3d 977--no personal jurisdiction over out-of-state defendants defrauding plaintiff from out-of-state; compare *Whaley v. Esebag* (8th Cir. 2020) 946 F.3d 447—personal jurisdiction upheld when certain underlying meetings occurred in forum; *Myers v. Casino Queen, Inc.* (8th Cir. 2012) 689 F.3d 904—personal jurisdiction proper over out-of-state casino harming patrons solicited to gamble at establishment

International Shoe & Modern Formulation



Due Process Requires Defendant have certain minimum contacts with forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice

Personal Jurisdiction Exploring

P exposed to asbestos 25 yrs. ago while living/working in Mass.

P moves to Florida, diagnosed w/ mesothelioma and sues Union Carbide for prior exposure & failure to warn

Union Carbide (NY-inc./PPB TX) registered in FL to do business, has agent for SOP, distributor, plant, terminal & asbestos sales there

Motion to dismiss for lack of personal jurisdiction?



GRANT

***Waite v. All Acquisition Corp.* (11th Cir. 2018) 901 F.3d 1307**

- **No general jurisdiction since UC not “at home” in Florida and no specific jurisdiction since UC’s Florida contacts not specifically related to asbestos liability**

Frank v. PNK (Charles) L.L.C. (5th Cir. 2020) 947 F.3d 331—no general jurisdiction over Louisiana casino as to injuries suffered there by Texan despite advertising and cultivating Texan patrons; *Fidrych v. Marriott Int’l* (4th Cir. 2020) 952 F.3d 124—making reservations online insufficient for personal jurisdiction over out-of-state hotel; contra *Nandjou v. Marriott Int’l, Inc.* (1st Cir. 2021) 985 F.3d 135; *Kaliannan v. Liang* (8th Cir. June 18, 2021) 2021 U.S. App. LEXIS 18156--personal jurisdiction exists over foreign party for convincing out-of-state residents to purchase fraudulent securities in real estate in forum

**For Limited Personal Jurisdiction, Count the Minimum
Contact “Rocks” Related to the Cause of Action Itself
(i.e., don’t count the unrelated trade show attendance)**

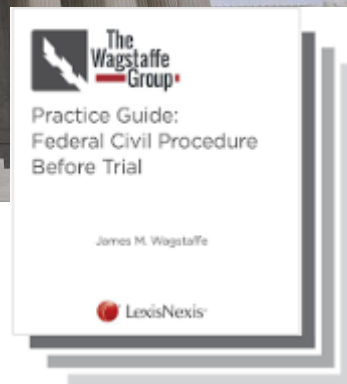


Miner's Tips



- **Count the contacts as “rocks on a pile”**
- **Look solely at D’s forum-based contacts**
- **Keep a close eye on electronic contacts**

Changing the Playing Field

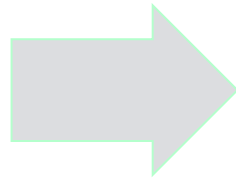


Forum Selection Clauses

Mandatory
or
Permissive



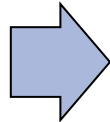
Signator
and
Scope



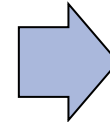
Forum
Selection
Clause
Issues



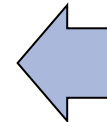
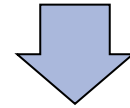
Atlantic Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49 (2014)



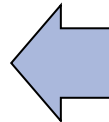
**Atlantic Marine
Constr. Co. (VA)**



**Contracts with
Army Corps of
Engineers**



**Subcontracts
with J-Crew
Management (TX)**



Ford Hood, Texas

**Circuit
Court City
of Norfolk,
Virginia**

or

**U.S. Dist.
Court E.D.
Va.**



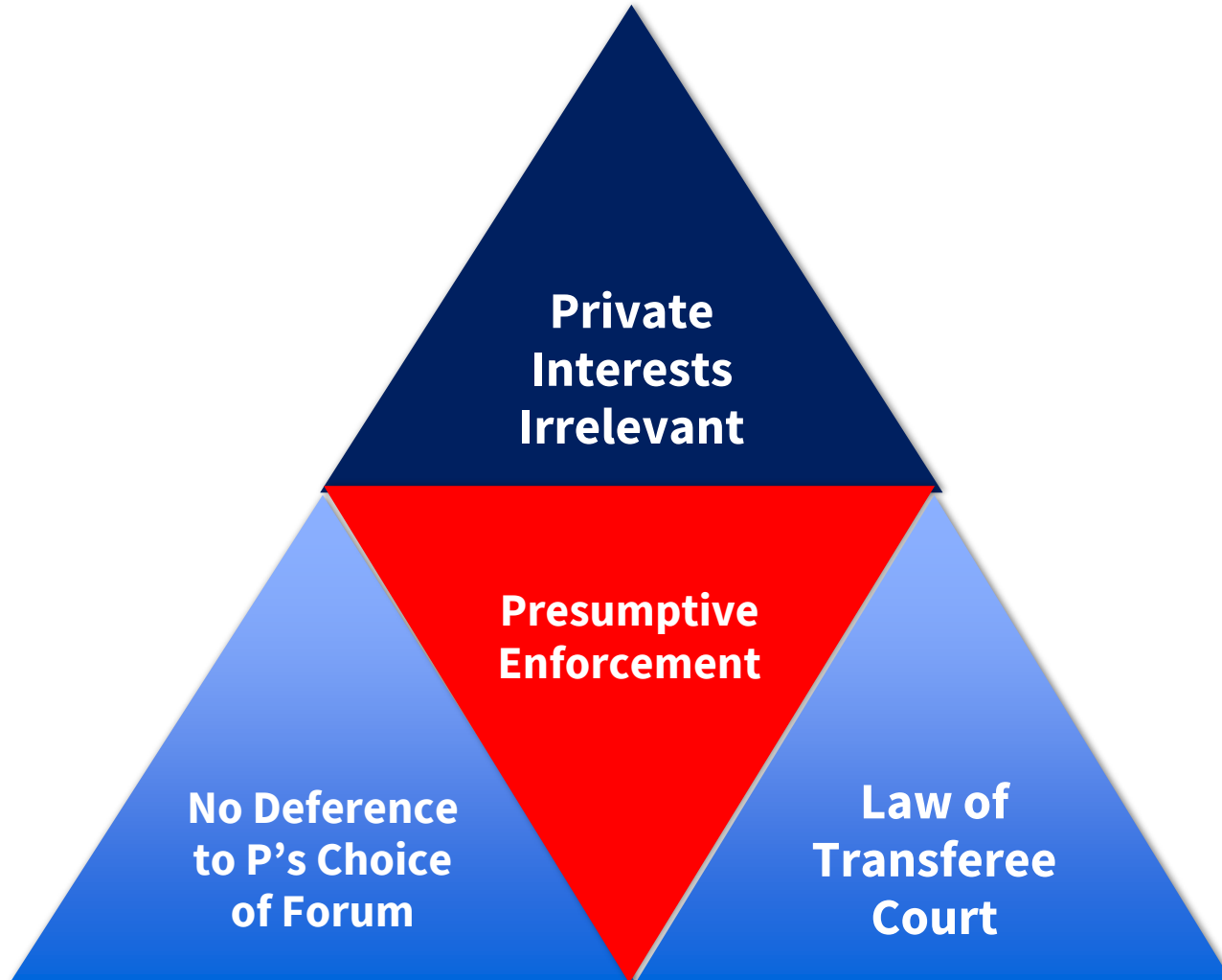
**Mandatory
Forum Selection
for All Disputes
Between Parties**

Fort Hood to Norfolk, VA



1,523 Miles

Impact of Atlantic Marine



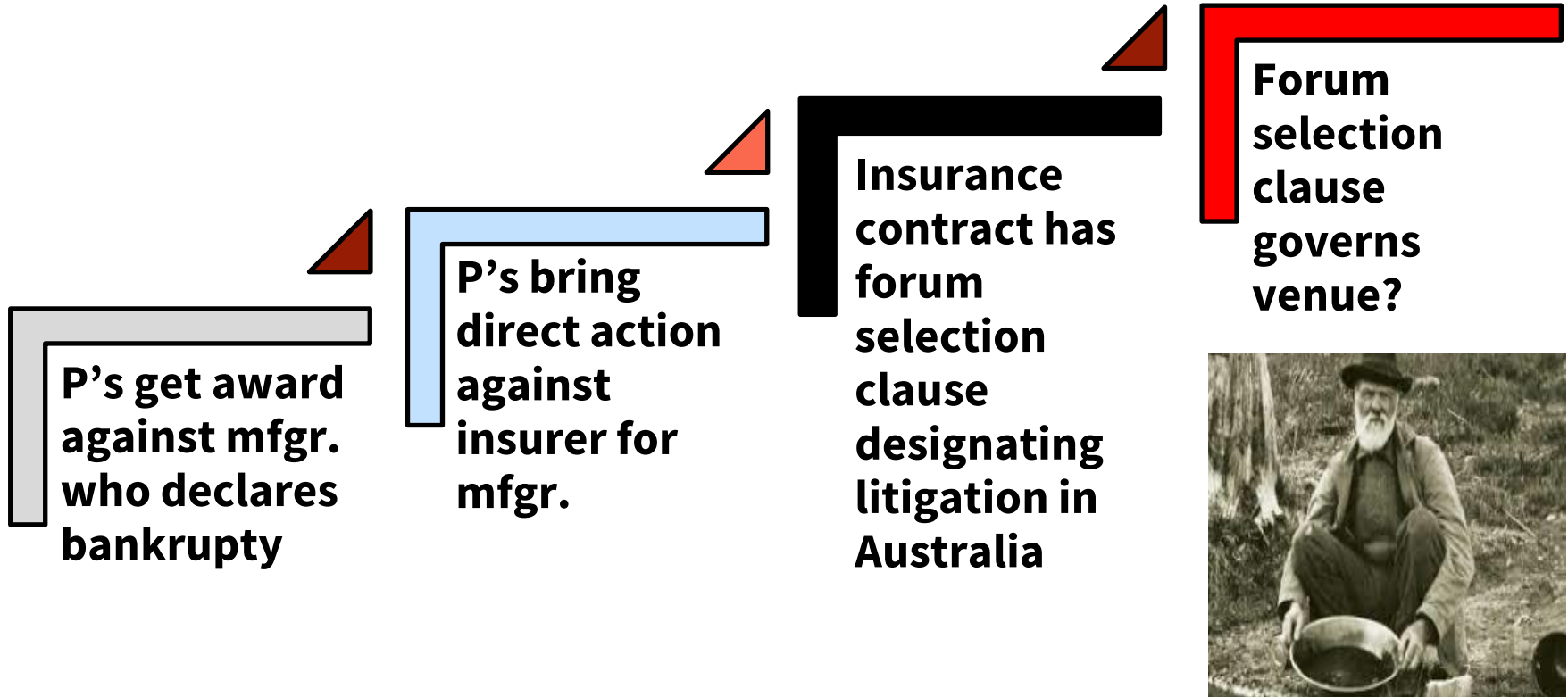
Golden Nugget #8: Choosing a Mine



***Lewis v. Liberty Mutual
Ins. Co.***

(9th Cir. 2020) 953 F.3d 1160

Forum Selection Clause Exploring



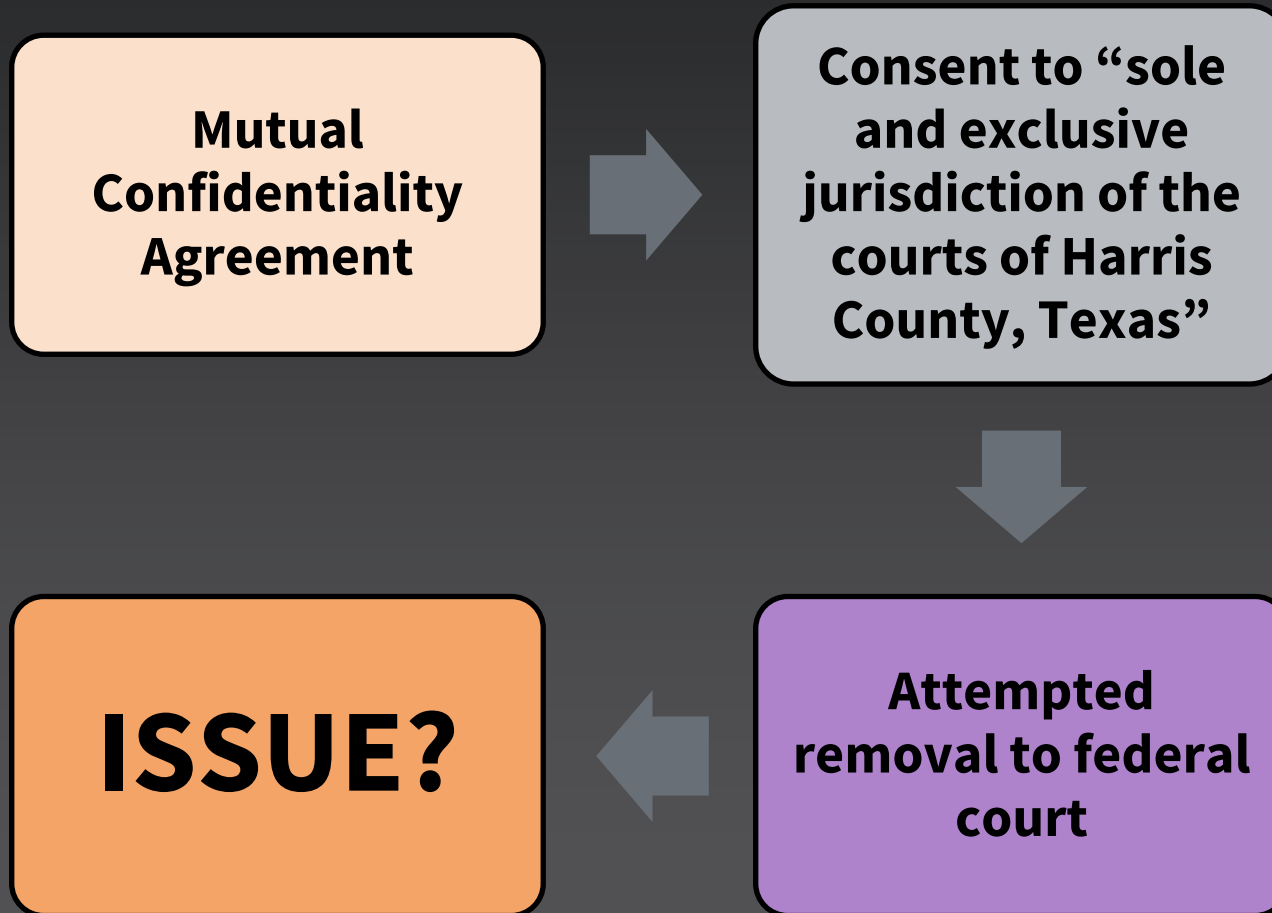
YES

***Lewis v. Liberty Mutual Ins. Co.* (9th Cir. 2020) 953 F.3d 1160**

- **Forum clause applies to party suing derivatively through contract**

See DeRoy v. Carnival Corp. (11th Cir. 2020) 963 F.3d 1302—forum selection clause can limit venue solely to designated *federal court* forum if jurisdiction exists; *Sierra Frac Sand, LLC v. CDE Global Ltd.* (5th Cir. 2020) 960 F.3d 200—forum clause in incorporated terms and conditions governs; *Becker v. U.S. Dist. Ct.* (9th Cir. 2021) 993 F.3d 731—forum clause in ERISA plan relocates California employee to Minnesota where plan administered; *Howmedica Osteonics Corp.* (3d Cir. 2017) 867 F.3d 390—clause analyzed involving non-signatories

Waiver of Removal By Contract?



RULE

***Grand View v. Helix Electric* (5th Cir. 2017) 847 F.3d 255**

- **Valid and enforceable clause unequivocally selecting state court as exclusive venue waives party's right to remove**
- *City of Albany v. CH2M Hill, Inc.* (9th Cir. 2019) 924 F.3d 1306—forum clause selecting state county where no federal court located bars removal; *Azima v. RAK Inv. Authority* (D.C. Cir. 2019) 926 F.3d 870– forum clause selecting England for litigation enforceable; *Sofamor Danek, Inc. v. Gannon* (8th Cir. 2019) 913 F.3d 704—defendant waived right to remove by entering into related agreement stating claims “arising out of or related to this Agreement must be litigated in Minnesota state court”; *Autoridad de Energia Electrica v. Vitol S.A.* (1st Cir. 2017) 859 F.3d 140—waiver for one defendant waives for all; TWG §8-VII[A][2]

Miner's Tips



- **Always, always read the forum selection clause**
- **Remember, such clauses are presumptively enforceable (and trump private interests)**
- **Forum clause can preclude (or require) federal court venue**

Golden Nugget #9

Twiqbal



***Wysong Corp. v.
Apri Inc.***

**(6th Cir. 2018)
889 F.3d 267**

A Twiqbal Case

**Lanham Act
claim - false
advertising of
dog food**

**Ads display
photos of
prime cuts of
meat, chicken
& fish**

**MTD:
Implausible
per judicial
experience &
common sense**



GRANT

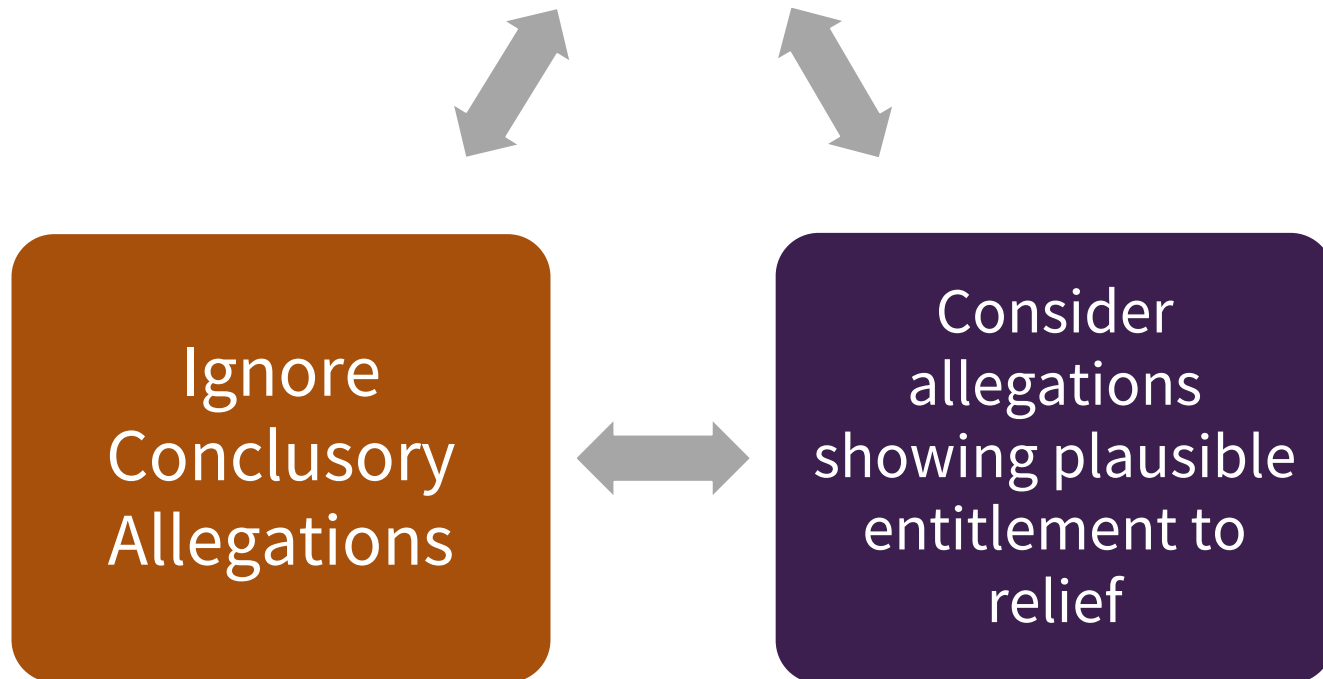
***Wysong Corp. v. Apri, Inc.* (6th Cir. 2018)
889 F.3d 267**

“The defendant’s product is dog food. Common sense dictates that reasonable consumers are unlikely to expect that dog food is made from the same meat as people eat.”

See; *Tomasella v. Nestle USA* (1st Cir. 2020) 962 F.3d 60-- no plausible liability for ad omitting that worst form of child labor used to make chocolate product; *East Coast Test Prep LLC v. Allnurses.com, Inc.* (8th Cir. 2020) 971 F.3d 747—alleging “possibility” defendant “was wholly or partially responsible” for creating false posts not sufficient for trade libel claim

Twombly/Iqbal: Two-Step

TI - TWO STEP



“Hot” New Twiqbal Rulings

Sex discrimination and hostile work environment claims implausible since plaintiff's sex not motivating factor in termination and alleged incidents sporadic and not poisoning work environment--
***Warmington v. Board of Regents of the Univ. of Minnesota* (8th Cir. 2021) 2021 U.S. App. LEXIS 15326**

Allegations in ADA case against Tesla that it “failed to provide accessible service counters” was conclusory and did not meet Twiqbal pleading standards--
***Whitaker v. Tesla Motors, Inc.* (9th Cir. 2021) 985 F.3d 1173**

Conclusory allegation of “actual malice” in defamation suit insufficient--
***Nelson Auto Ctr. v. Multimedia Holdings Corp.* (8th Cir. 2021) 951 F.3d 952; see also *Walker v. Beaumont Indpt. Sch. Dist.* (5th Cir. 2019) 936 F.3d 72**



Find the Answers

Plausibility & Affirmative Defenses

- **Lawyer Question**: Does the plausibility standard of *Iqbal*/*Twombly* apply to affirmative defenses?
- **Search Query**: “affirmative defense /5 plausible”
- **Results**: Click highlighted “affirmative defense” and it takes you to ¶19.190 “Pleading Plausible Affirmative Defense” and a brief scroll up to ¶19.187 reflects the court decisions on this question.
- **Answer**: **GEOMC Co. v. Calmare Therapeutics, Inc. (2d Cir. 2019) 918 F.3d. 92—*Twombly*/*Iqbal* apply to pleading of affirmative defenses (e.g. comparative negligence, failure to join a necessary party)**



Miner's Tips



Conspiracy

Bad Faith

Alter Ego

**Qualified
Immunity**

Color of Law

Malice

Monell Policy

**Multiple
Defendants**

Retaliation

**Complex
Claims**

Golden Nugget #10

Erie: Substance or Procedure?



***Kilburn v. Autosort
Acquisitions, LLC***
(E.D. Mo. 2021) 2021
U.S. Dist. LEXIS
17404

State Tort Reform Statute Substantive?

**Plaintiff sues
defendants in
Perry County for
injuries sustained
in automobile
accident**

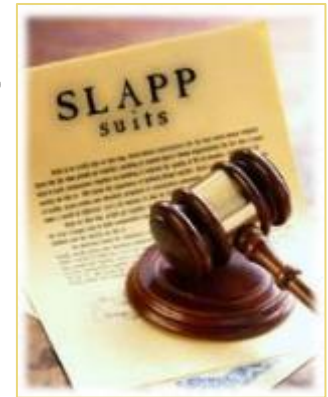
**D removes on
diversity grounds
and moves to strike
claim for punitive
damages under Mo.
Revised Statute §
510.261(5)—no
pleading of
punitives until
leave of court**

**Does punitive
damage pleading
tort reform
statute apply in
Federal Court?**

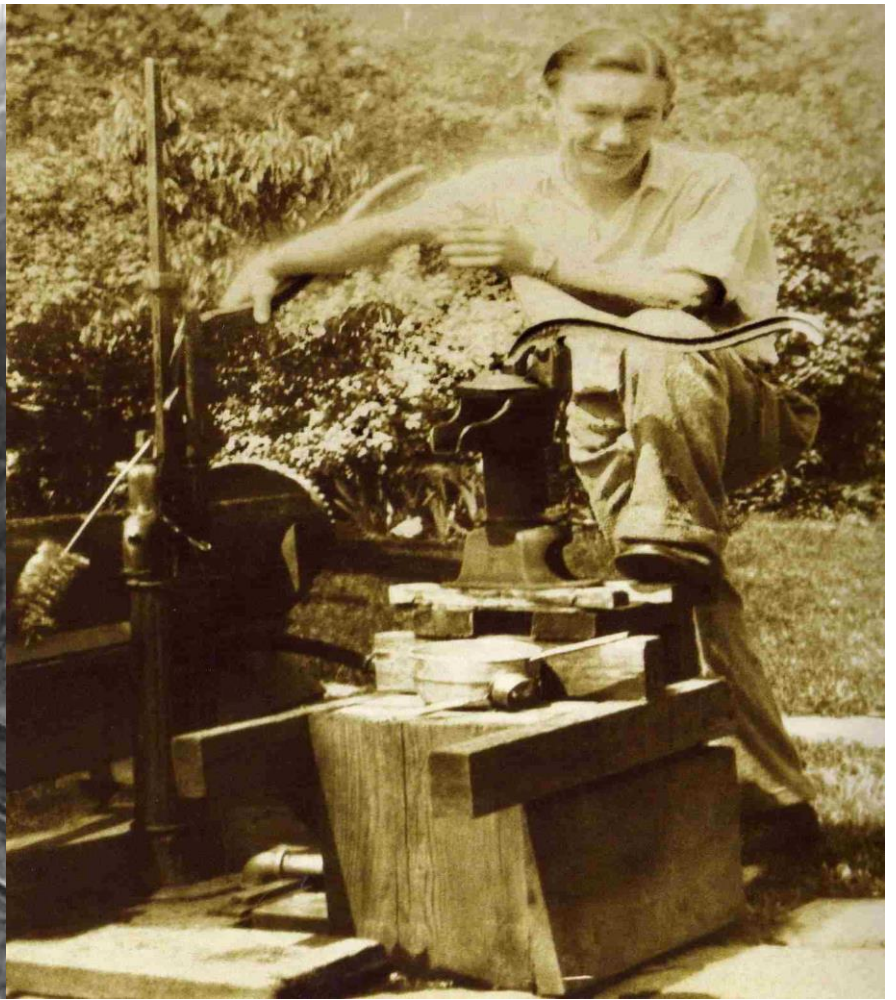


NO – DOESN'T APPLY

***Kilburn v. Autosort Acquisitions, LLC* (E.D. Mo. 2021) 2021 U.S. Dist. LEXIS 17404**



- **Fed. R. Civ. P. 8 is on point and covers the requirements for pleading punitive damages in federal court**



Erie Railroad & Harry Tompkins



**State
Substance**



**Federal
Procedure**



**Erie
Railroad
v.
Tompkins**

Location - Hughestown



ERIE RAILROAD CO. v. TOMPKINS

In a landmark decision, the U.S. Supreme Court ruled in 1938 that, in cases between citizens of different states, federal courts must apply state common law, not federal "general common law." Under Pennsylvania common law, Harry Tompkins of Hughestown lost his case against the Erie Railroad, a New York State company. Tompkins had been struck by an unsecured door of a passing train and severely injured near this spot on July 27, 1934.

PENNSYLVANIA HISTORICAL AND MUSEUM COMMISSION 1999

State Tort Reforms in Federal Court?

Certificate of Merits
(Mo. Rev. Stat. § 538.225)

Damage Caps

**Expert
Testimony
Requirements**

**Class Action
Limits**

Anti-SLAPP Statutes
(Mo. Rev. Stat. § 537.528(1))

ADR

**Sanctions
Reform**

Pleading Punitive Damages
(Missouri Rev. Stat. § 510.261.(5))

State Anti-SLAPP Statutes Apply in Federal Court?

YES

Planned Parenthood v. Center for Med. Progress (9th Cir. 2018); *Godin v. Schencks* (1st Cir. 2010) 629 F.3d 79; *Bongino v. Daily Beast* (S.D. Fla. 2020) 477 F.Supp.3d 1310 (Fl. Stat.); *Caranchini v. Peck* (D. Kan. 2018) 355 F.Supp.3d 1052 (KN statute)

NO

La Liberte v. Reid (2d Cir. 2020) 966 F.3d 79; *Klocke v. Watson* (5th Cir. 2019) 936 F.3d 240; *Abbas v. Foreign Policy Group* (D.C. Cir. 2015) 783 F.3d 1328; *Carbone v. CNN* (11th Cir. 2018) 910 F.3d 1345; *Los Lobos Renewable Power v. Americulture* (10th Cir. 2018) 885 F.3d 659; *Nunes v. Lizza* (N.D. IA 2020) 476 F.Supp.3d 824; *Jiang v. Porter* (E.D. Mo. 2016)

Certificates of Merit Required?

YES

***Weasel v. St. Elexius Med. Ctr.* (8th Cir. 2001) 230 F.3d 348; *Liggon-Redding v. Estate of Sugarman* (3d Cir. 2011) 659 F.3d 258; *Hahn v. Walsh* (7th Cir. 2014) 762 F.3d 617; *Hardy v. United States* (W.D. Mo. 2021) 2021 U.S. Dist. LEXIS 22874 (Wimes, J.)**

NO

***Estate of C.A. v. Grier* (S.D. Tex. 1990) 52 F.Supp.2d 763 ; *Serocki v. Meritcare Health System* (D. S.D. 2004) 312 F.Supp. 1201; see also *Gallivan v. U.S.* (6th Cir. 2019) 943 F.3d 291; *Bard Water Dist. v. James Davey & Assoc.* (9th Cir. 2016) 671 Fed. App'x 506**

No Punitives Without Leave of Court?

YES

***Ahmad v. Panera Bread Co.* (E.D. Mo. 2021) 2021 U.S. Dist. LEXIS 102984—punitives not counted on removal per statute; see also *HSBC Bank v. Lombardo* (D. Me. 2020) 2020 U.S. Dist. LEXIS 194419--state statute requiring pre-filing specialized mediation substantive)**

NO

***Rardon v. Falcon Safety Prods* (W.D. Mo. 2021) 2021 U.S. Dist. LEXIS 99117 (Phillips, C.J.); *Kilburn v. Autosport Acquisitions* (E.D. Mo. 2021) 2021 U.S. Dist. LEXIS 17404**

State Procedure Serving Specific Substantive Goal

Intention to influence substantive outcome manifest



Goal defeated if not applied in federal diversity suit

MARCH 2019

Erie Railroad Rule on Brave New Track



As a civil procedure professor and practice guide author for some thirty years, I do indeed get it that law students and lawyers have trouble applying the tectonic rule enunciated in 1938 by the Supreme Court in *Erie R. Co. v. Tompkins*¹. And certainly it means more than remembering a high profile federal personal injury lawsuit revolving around Harry Tompkins' tragic loss of a limb in a depression-era railroad accident in Hughestown, Pennsylvania.

In the last few years, the *Erie* rule has been on a high speed rail journey as it traverses the 21st Century phenomenon of state tort reform. From state house to state house across this country, local legislators are passing laws imposing seemingly procedural barriers to curb perceived threats of frivolous lawsuits. The question is whether they must be applied in federal court actions.

The *Erie* rule is deceptively simple: if there is a state law claim in federal court (via diversity or supplemental jurisdiction), the court will apply state substantive and federal procedural law. Simple perhaps – but the U.S. Supreme Court itself commented that the classification of a law as substantive or procedural can be “a challenging endeavor.”²

Every law student and lawyer should know that the *Erie* decision is in the Top Ten cases of all time, and for good reason. Disallowing federal courts to intuit general federal common law as part of an otherwise state law claim raised and raises vital issues of separation of powers, federalism, judicial administration, and all to say nothing of questions concerning the tactical manipulation of procedural and jurisdictional rules when initiating or removing actions.

Let's take an important and current example of state legislative tort reform in an area where the federal courts are completely split as to whether it applies in federal court: state anti-SLAPP statutes designed to authorize the prompt striking of unsupported lawsuits arising from a defendant's exercise of free speech or petitioning rights (e.g. defamation

claims).³ Since most of these statutes (enacted in some thirty states) allow for the shifting of attorney's fees and an immediate appeal, they present a powerful shield in the litigator's toolbox.

As stated, the federal circuits are deeply split as to whether the nominally “procedural” anti-SLAPP dismissal statutes nevertheless should be applied in federal court as part of manifest attempts by state legislatures to achieve substantive objectives.⁴ This important debate involves two competing analytic camps: one, reasoning that the state statutes reflect substantive commands, and the other concluding that Fed. R. Civ. P. 12 and 56 answer the same question (i.e., when and how a court dismisses a case before trial) and therefore must be applied notwithstanding contrary state rules.

Defining what is substantive and what is procedural is an illuminating first step. A law is substantive if it is bound up with the rights and obligations of state law (e.g. elements of a claim or defense, burden of proof, statutes of limitations, choice of law, damage caps, etc.). In contrast, a law is treated as procedural if it affects the manner and means of the claim's presentation, i.e., merely a form and mode of enforcing a state law (e.g. pleading standards, class action rules, discovery, dismissal for failure to prosecute, briefing rules, etc.).

But as law students have been telling me for decades, the definitions are easy to state and hard to apply. For example, many facially procedural rules such as the time limits for serving a complaint or requiring out-of-state defendants to post a bond can often be outcome determinative despite the obvious fact they are contained in self-described procedural rules. Comparatively, courts uniformly rule that the right to prejudgment interest is a substantive part of the damages analysis, yet obtaining post-judgment interest has long been held to be a procedural rule governed by the law of the sovereignty (state or federal) in which the judgment was obtained.⁵



Practice Guide: Federal Civil Procedure Before Trial

James M. Wagstaffe

Other Recent Developments



**Staying
Ahead**

Hot New Golden Nugget Rule 30(b)(6)



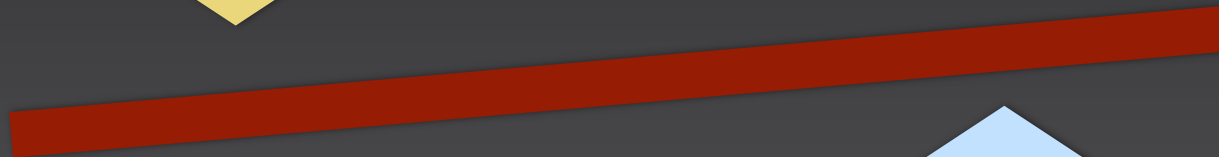
**Amendment
Effective:**

December 1, 2020

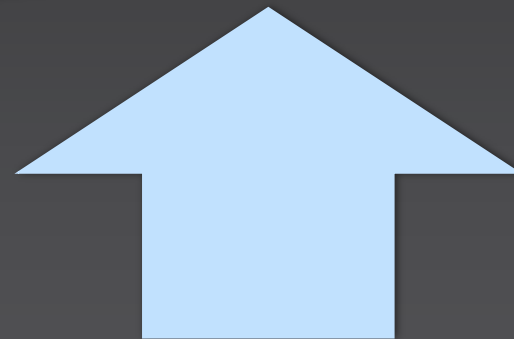
NEW RULES AND PRACTICES 2021



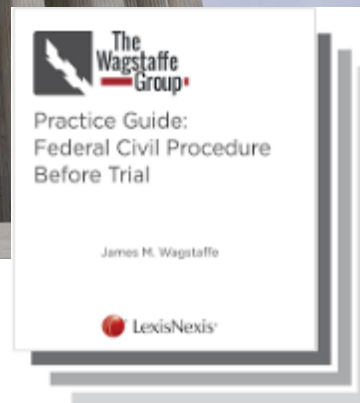
**Conferral
Mandate for
Corporate
Designee Depos**



**Re: Confer in Good Faith
About the Matters for
Examination**



Modern Mining



Virtual World Litigation

Appear Virtually



Courts

Arbitrations

Mediations

“7 Steps to Romancing the Virtual Classroom”

J. Wagstaffe ([LAW360](#) , May 2020)

Testify Virtually



Trials
(FRCP 43(a))

Depositions
(FRCP 30(b)(4))

See J. Wagstaffe, “Presenting Witnesses Virtually in 21st Century Trials” (LexisNexis Advance, Aug. 2019); M. Hindman, FJC Research Appendix on Remote Testimony (2017)

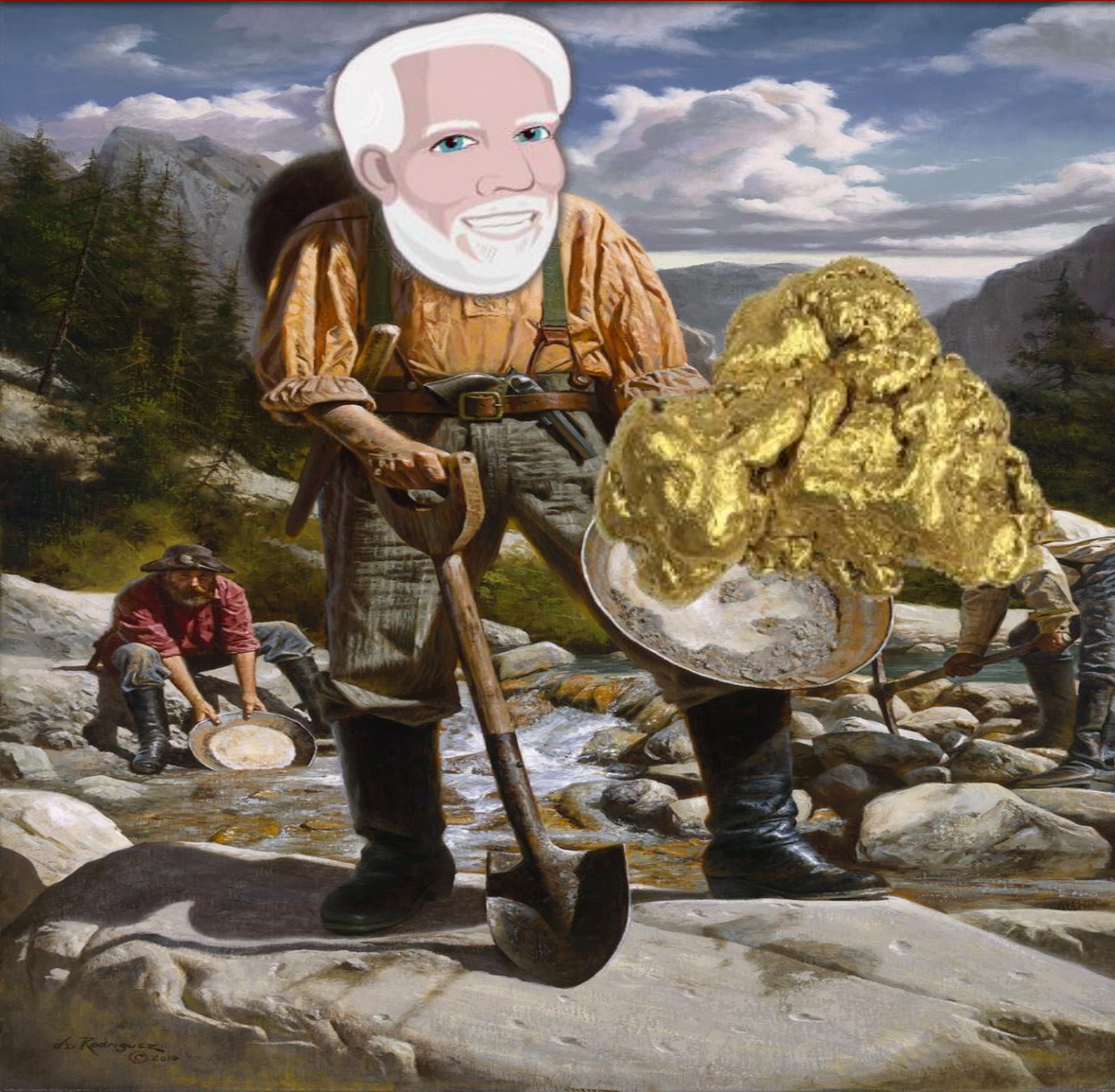
Miner's Tips



Don't Live in the Past



**Let TWG Help You Mine Your Next
Golden Nugget!!**



Use it/Cite it:
Many of You
Have it!

**The Wagstaffe
Group Practice
Guide
&
Current
Awareness**



Litigate with Confidence

- Online Platform  LexisNexis®
- TWG Current Awareness:
****Updated every 2 weeks****
- Daily Tweets  @JWagstaffeLxNx
- 2021 Monthly Articles – new trends,
new cases

