

Chapter 2

THE COURT'S POWER OVER PERSONS AND PROPERTY

§ 2.02 JURISDICTION OVER PERSONS AND PROPERTY

[C] Modern Expansions and Contractions of the Minimum Contacts Doctrine

[1] Commercial Defendants: “Purposeful Availing,” “Reasonable Anticipation,” and “Convenience”

[At page 85, add to the **NOTES AND QUESTIONS** new Note (1-A):]

(1-A) *Purposeful Availment and eBay*. After purchasing a 1964 Ford Galaxie on eBay, the plaintiff sued the Wisconsin sellers in federal court in California, alleging that the car failed to meet the advertised description. Applying the California limits-of-due-process long-arm statute, the Ninth Circuit affirmed dismissal of the complaint for lack of personal jurisdiction, holding that “the lone transaction for the sale of one item” did not demonstrate that the sellers purposefully availed themselves of the privilege of doing business in California. The court emphasized that this was a “one-shot deal,” and the concurring opinion observed that “a defendant does not establish minimum contacts nationwide by listing an item for sale on eBay,” but instead must do “something more” such as “individually targeting residents of a particular state” to satisfy the purposeful availment standard. See *Boschetto v. Hansing*, 539 F.3d 1011 (9th Cir. 2008).

§ 2.03 NOTICE REQUIREMENTS AND SERVICE OF PROCESS

[A] Due Process Notice Standards

[At page 125, add the following to the end of Note (7) of the **NOTES AND QUESTIONS**:]

Do new technologies offer alternatives to service by publication in a newspaper? Although not yet approved by U.S. courts, an Australian court, in a circumstance where the defendant could not be found, authorized posting on Facebook as substituted service of a default judgment. See *Australian Court Serves Documents Via Facebook*, SYDNEY MORNING HERALD, Dec. 12, 2008. A New Zealand court also has permitted service of court documents through a Facebook posting. See Paul Chapman, *Facebook Can Be Used to Serve Legal Papers, Rules New Zealand Judge*, DAILY TELEGRAPH (U.K.), Mar. 16, 2009.

0002

[ST: 1] [ED: 10000] [REL: 2009]

Composed: Wed Jul 15 08:34:20 EDT 2009

XPP 8.1C.1 Patch #5 LS000000 nlp 061 [PW=468pt PD=684pt TW=348pt TD=588pt]

VER: [LS000000-Local:15 Jul 09 08:29][MX-SECNDARY: 01 Jul 09 10:33][TT: 25 Jun 09 10:01 loc=usa unit=00061-supp03]

0

Chapter 5

PLEADINGS

§ 5.03 THE COMPLAINT IN FEDERAL COURT

[A] “Notice Pleading”: The Standard for Specificity

[At page 307, add to NOTES AND QUESTIONS new Note (5):]

(5) In 2009, the U.S. Supreme Court decided *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), which again took aim at the pleading standard, this time in the context of a *Bivens* action filed by a 9/11 detainee. By a 5-4 majority, the Court concluded that the pleading was insufficient under Rule 8 and *Twombly*. In particular, the majority faulted the pleading as being too conclusory (a point disputed by the dissent), stating “pleadings that . . . are no more than conclusions are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.” The majority further observed: “Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” The majority also expressly rejected the suggestion that *Twombly* applied only to antitrust cases. Early reactions to *Iqbal* have noted the opinion’s inconsistency with *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002) [discussed in the text at page 323, Note (3)] and with Form 11 of the Official Forms [found in Part I of this Supplement]. Does *Iqbal* signal a revival of Code pleading distinctions [see text at pages 291–94] between facts and conclusions thought to be discarded with the adoption of the Federal Rules? How should lawyers practicing in federal court react to *Iqbal* and *Twombly* in drafting their pleadings?

0004

[ST: 1] [ED: 10000] [REL: 2009]

Composed: Wed Jul 15 08:34:20 EDT 2009

XPP 8.1C.1 Patch #5 LS000000 nllp 061 [PW=468pt PD=684pt TW=348pt TD=588pt]

VER: [LS000000-Local:15 Jul 09 08:29][MX-SECNDARY: 01 Jul 09 10:33][TT: 25 Jun 09 10:01 loc=usa unit=00061-supp03]

0

Chapter 6

MULTIPLE PARTIES AND CLAIMS

§ 6.02 ADDING OR SUBTRACTING SINGLE CLAIMS OR PARTIES

[E] Compulsory Joinder

[At page 408, add new Note (3) to the NOTES AND QUESTIONS:]

(3) An interesting Rule 19 decision involved competing claims to a \$35 million Merrill Lynch account created by former Philippine leader Ferdinand Marcos. The competing claimants included the Republic of the Philippines, a class of human rights victims, and others. Merrill Lynch filed an interpleader action to settle the competing claims. The Republic of the Philippines and another entity successfully asserted sovereign immunity, and then argued that the lawsuit should be dismissed under Rule 19(b). The U.S. Supreme Court agreed, noting that these parties were required entities under Rule 19(a), and holding that under Rule 19(b) the prejudice to these absent parties prevented the case from going forward. *See Republic of the Philippines v. Pimentel*, 128 S. Ct. 2180 (2008).

0006

[ST: 1] [ED: 10000] [REL: 2009]

Composed: Wed Jul 15 08:34:20 EDT 2009

XPP 8.1C.1 Patch #5 LS000000 nllp 061 [PW=468pt PD=684pt TW=348pt TD=588pt]

VER: [LS000000-Local:15 Jul 09 08:29][MX-SECNDARY: 01 Jul 09 10:33][TT: 25 Jun 09 10:01 loc=usa unit=00061-supp03]

0

Chapter 7

DISCOVERY AND DISCLOSURE

§ 7.02 THE SCOPE OF DISCOVERY

[D] Work Product and Related Exceptions

[1] Trial Preparation Materials

[At page 486, add to the NOTES AND QUESTIONS new Note (1-A):]

(1-A) *What Happens When Information is Disclosed Inadvertently? Federal Rule of Evidence 502*. In 2008, the President signed new FRE 502, aimed at guarding against the inadvertent disclosure of privileged information. FRE 502 generally provides that inadvertent disclosures do not waive the privilege so long as the holder of the privilege took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify any inadvertent disclosure.

§ 7.03 THE MECHANICS OF DISCOVERY

[B] The Discovery Devices

[4] Production of Documents and Tangible Things

[At page 541, add to the end of Note (1) in the NOTES AND QUESTIONS:]

In another prominent decision, *Qualcomm, Inc. v. Broadcom Corp.*, the federal magistrate judge imposed \$8.5 million in sanctions and referred to the State Bar six attorneys who, according to the judge, had failed to reasonably respond to requests to produce electronically stored information. The federal district court subsequently set aside the State Bar referral to permit the introduction of additional evidence. 2008 U.S. Dist. LEXIS 911, *vacated in part*, 2008 U.S. Dist. LEXIS 16897 (S.D. Cal. 2008). For a discussion of the intersection of ethics and e-discovery, see Bassett, *E-Pitfalls: Ethics and E-Discovery*, 36 N. KY. L. REV. 449 (2009).

0008

[ST: 1] [ED: 10000] [REL: 2009]

Composed: Wed Jul 15 08:34:20 EDT 2009

XPP 8.1C.1 Patch #5 LS000000 nlp 061 [PW=468pt PD=684pt TW=348pt TD=588pt]

VER: [LS000000-Local:15 Jul 09 08:29][MX-SECNDARY: 01 Jul 09 10:33][TT: 25 Jun 09 10:01 loc=usa unit=00061-supp03]

0

Chapter 14

REMEDIES, JUDGMENTS, AND THEIR ENFORCEMENT

§ 14.06 ENFORCEMENT OF JUDGMENTS

[C] Post-Judgment Garnishment

[At page 886, substitute the following for the existing **NOTES AND QUESTIONS:**]

(1) *How Post-Judgment Garnishment Works.* The judgment creditor, as garnishor, serves the application on a third person, such as a bank or employer, who has funds payable to the judgment debtor. This third person is called the garnishee. In many states, garnishment proceedings technically are a separate suit, ancillary to the main action, in which the garnishee is the named defendant. The proceeding is in rem, but the judgment debtor must be provided with notice. The garnishee may have obligations to the judgment debtor to exercise due care to preserve his property (e.g., by filing an answer) and may be entitled to attorney fees. The result, in the banking situation, is that the judgment debtor's account effectively is frozen, up to the amount of the garnishment plus the bank's attorney fees, frequently causing unpaid checks and other losses to the judgment debtor.

(2) *The Employer's Position.* If the 25 percent limit insufficiently protects the debtor, notice that a court of equity can further reduce the percentage. The reaction of employer-garnishees, quite understandably, is that the process is a costly nuisance, creating potential liability for failure to withhold the right amounts, undesired and undeserved relationships with courts and lawyers, and complicated paperwork, all for an employee who didn't pay her debts. Most jurisdictions prohibit the employer from taking any adverse action toward the employee, motivated by the garnishment. Would you expect such a prohibition to be 100 percent effective? [Note that the question is one of motive for the termination or other action, and employees who neglect their debts to such a point as to suffer wage garnishment may have neglected other duties, too.] Wage garnishment is prohibited in some states, such as Texas, with exceptions for child support and spousal maintenance obligations. *See, e.g.,* Tex. Civ. Prac. & Rem. Code § 63.004; Tex. Const. art. 16, § 28.

0010

[ST: 1] [ED: 10000] [REL: 2009]

Composed: Wed Jul 15 08:34:20 EDT 2009

XPP 8.1C.1 Patch #5 LS000000 nlp 061 [PW=468pt PD=684pt TW=348pt TD=588pt]

VER: [LS000000-Local:15 Jul 09 08:29][MX-SECNDARY: 01 Jul 09 10:33][TT: 25 Jun 09 10:01 loc=usa unit=00061-supp03]

0

Chapter 15

ALTERNATE METHODS OF DISPUTE RESOLUTION

§ 15.04 ARBITRATION AND OTHER SUBSTITUTES FOR COURT ADJUDICATION

[A] The Nature of Arbitration

[At page 937, add the following to the end of Note (3) in the NOTES AND QUESTIONS:]

In *Hall Street Associates v. Mattel, Inc.*, 552 U.S. ___, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008), the U.S. Supreme Court held that the statutory grounds provided in the Federal Arbitration Act for confirming, vacating, or modifying arbitration awards were exclusive. Both the First and Fifth Circuits have subsequently concluded that an arbitrator’s “manifest disregard of the law” is no longer a ground for vacating an award because the “manifest disregard” standard is not statutory, but instead is an independent, nonstatutory ground for setting aside an arbitration award. See *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009).

[C] Compelling Arbitration: The Arbitration Agreement

[At page 940, add the following to the end of Note (1) in the NOTES AND QUESTIONS:]

The U.S. Supreme Court has explained that when federal courts are determining whether they have jurisdiction to compel arbitration, the courts should “look through” the petition to compel arbitration in order to examine the entirety of the parties’ underlying controversy as a whole. *Vaden v. Discover Bank*, 556 U.S. ___, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009). The Supreme Court also observed that federal courts must apply the well-pleaded complaint rule to ensure that federal jurisdiction exists — thus the complaint, and not merely the counterclaim, in the state action must establish a basis for federal jurisdiction in order for the federal district court to exercise jurisdiction over a petition to compel arbitration of litigation that is pending in state court.

0012

[ST: 1] [ED: 10000] [REL: 2009]

Composed: Wed Jul 15 08:34:20 EDT 2009

XPP 8.1C.1 Patch #5 LS000000 nlp 061 [PW=468pt PD=684pt TW=348pt TD=588pt]

VER: [LS000000-Local:15 Jul 09 08:29][MX-SECNDARY: 01 Jul 09 10:33][TT: 25 Jun 09 10:01 loc=usa unit=00061-supp03]

0