



# Mining Federal “Golden Nuggets”

Hot, New, Must-Know Cases

November 10, 2021

**Quadrennial Federal Practice Seminar: ED-MO**

 **WagstaffeLxNx**

[wagstaffe@wvbrlaw.com](mailto:wagstaffe@wvbrlaw.com)





# Mining Federal “Golden Nuggets”

Hot, New, Must-Know Cases

November 10, 2021

**Quadrennial Federal Practice Seminar: ED-MO**

 [WagstaffeLxNx](#)

[wagstaffe@wvbrlaw.com](mailto:wagstaffe@wvbrlaw.com)



# 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**

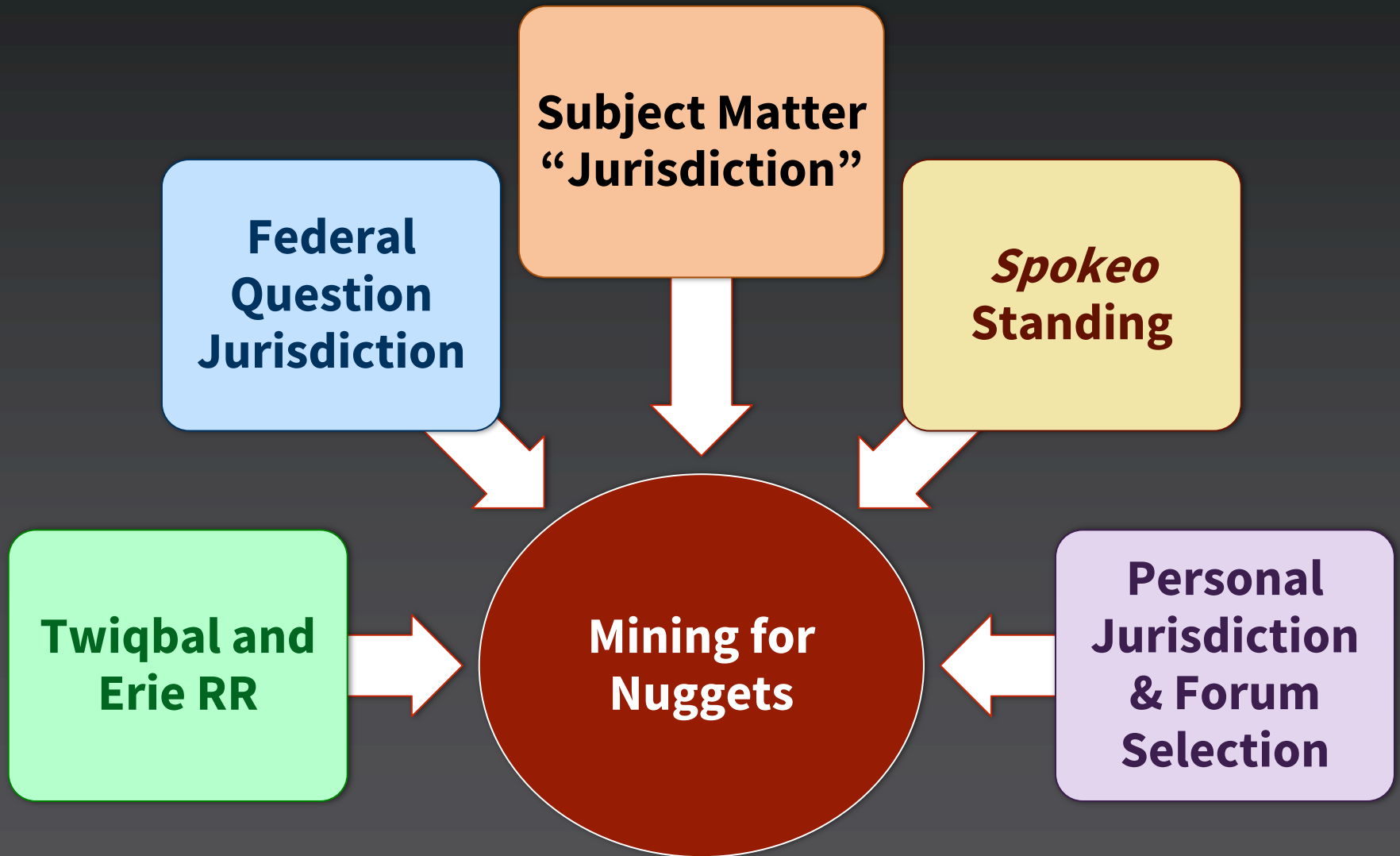


**The Wagstaffe Group  
Practice Guide: Fed. Civ.  
Pro. Before Trial  
& Current Awareness  
(LexisNexis 2021)**

**ED 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?**

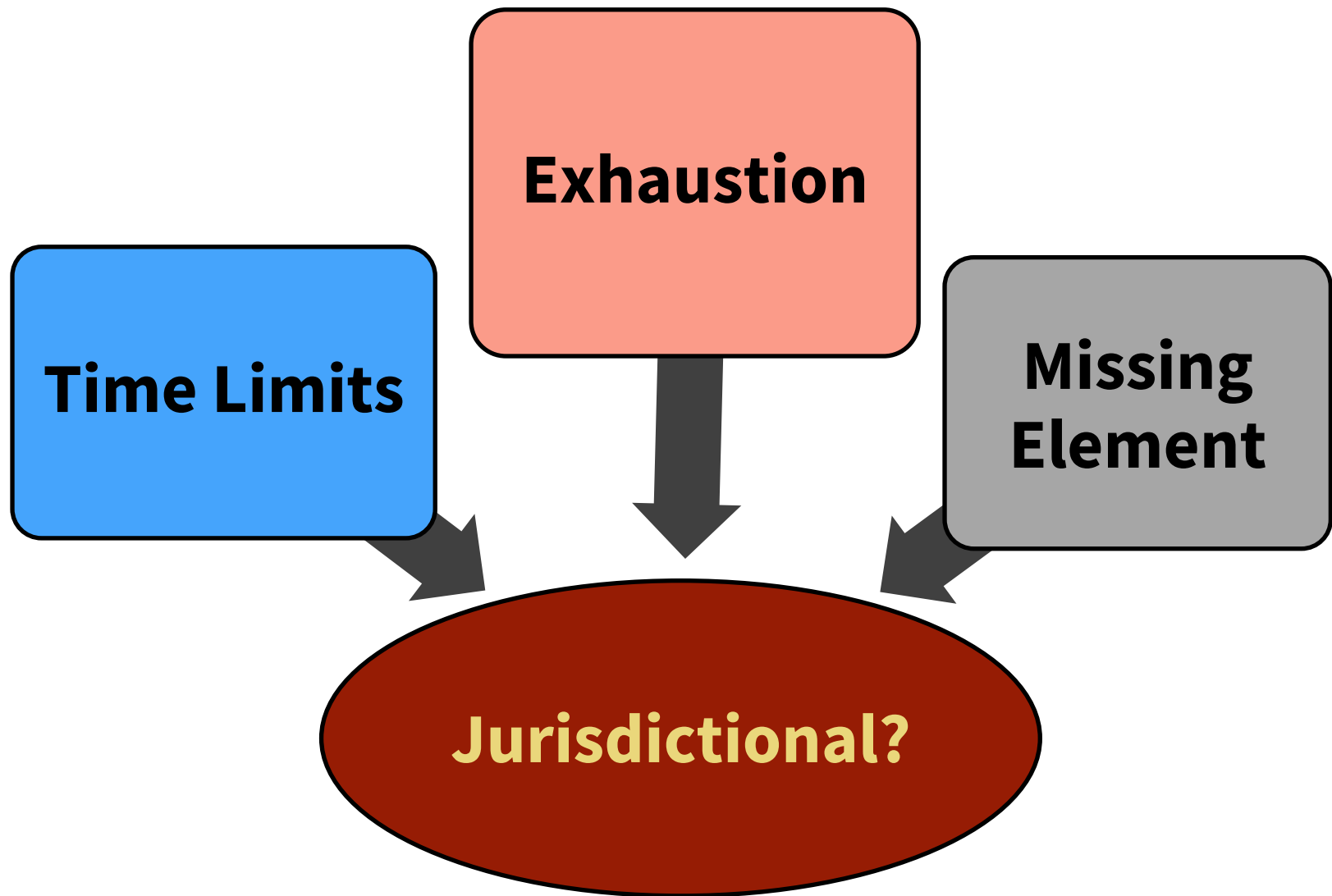


# Not Jurisdictional

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



*See Boechler, P.C. v. Comm’r of IRC—cert. granted (Sept. 30, 2021)—is IRC 30-day time limit to petition for review in Tax Court jurisdictional (26 U.S.C. § 6630(d)(1))*



# 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?**



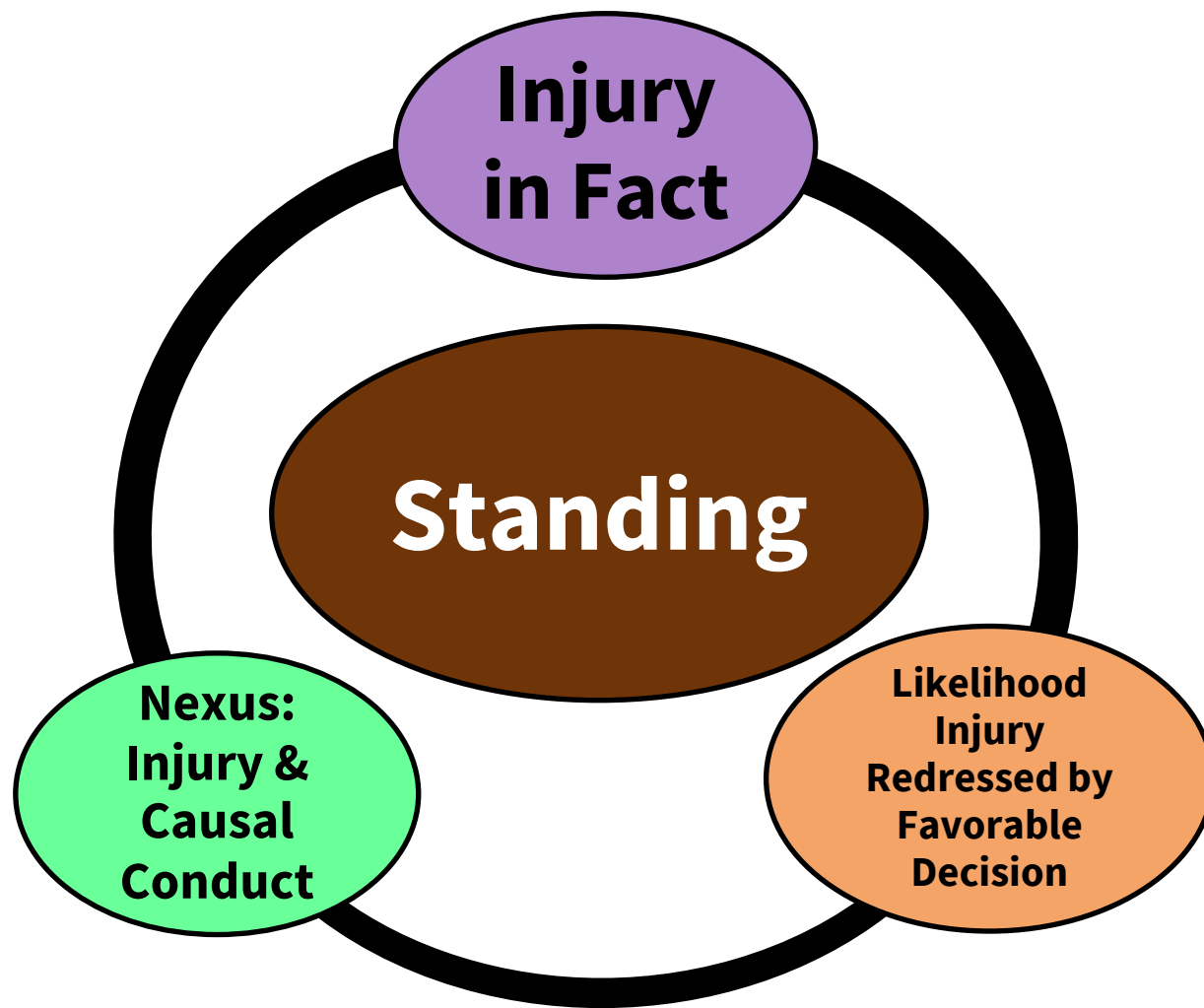
# GRANT

## ***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* (2021) 141 S.Ct. 2104—lack of standing under Affordable Care Act; *Missouri v. Biden* (ED MO 2021) (Fleissig, J.)—state lacks standing to challenge executive order; **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; *Mackey v. Belden, Inc.* (ED MO 2021) (Ross, J.)—standing for data breach in which plaintiffs suffered identity invasion injury ; TWG § 24-III[[A]][1], 24.11





*Yeransian v. B. Riley FBR, Inc.* (8<sup>th</sup> 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; *Young America's Found. V. Kaler* (8<sup>th</sup> Cir. Oct. 3, 2021)—no standing to challenge venue restriction on conservative speaker since no nexus between challenged school policy and location decision

# 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*** **(7<sup>th</sup> 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* (8<sup>th</sup> Cir. 2018) 902 F.3d 873—disclosure violations of FCRA without injury means no standing; *Flecha v. Mediacredit, Inc.* (5<sup>th</sup> Cir. 2020) 946 F.3d 762—class members receiving false dunning letter lack FDCPA standing if ignored as junk mail; *Dalton v. JJSC Properties, LLC* (8<sup>th</sup> 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; **cf.** *Cranor v. 5 Star Nutrition, LLC* (5<sup>th</sup> 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

# Standing & Class Actions

## BIG DATA



***TransUnion LLC v. Ramirez* (2021)  
141 S.Ct. 2190--  
even if FCRA  
violation in credit  
report that falsely  
classified  
individuals as on  
terrorist watch  
list, class  
members whose  
credit records not  
accessed lack  
standing;  
certification can  
be reexamined on  
remand**



***Johannesson v. Polaris Industries, Inc.* (8<sup>th</sup> Cir. 2021) 9  
F.4<sup>th</sup> 981—class  
action based on  
excessive heat in  
ATV's causing fires  
cannot be certified  
when class as  
defined contains  
members who lack  
standing (i.e.,  
panels on their ATV  
did not melt so  
defect not  
manifest)**

# **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)**

# Four Doorways to Federal Court



**Front Door**

Arising Under



**Visitors'  
Door**

Complete  
Diversity



**Back Door**

Removal =  
Origin. Juris.



**Side Door**

Same Trans.



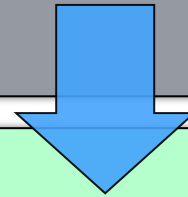
# Golden Nugget #3: The Missing Federal Claim



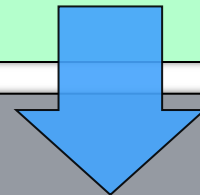
***Gunn v. Minton***  
**(2013) 568 U.S. 251**

# 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 *Phillips v. Neshor Pharmaceuticals, LLC* (ED MO 2021) (Clark, J.)—mere reference to federal law (FLSA) in state employment cause of action does not create federal question jurisdiction; **cf.** *Wullschleger v. Royal Canin USA, Inc.* (8<sup>th</sup> Cir. 2020) 953 F.3d 519—claim citing state antitrust law but explicitly claiming violation of FDCA raised substantial federal question; TWG § 6-VI[A][1], 6.290

# Cf. Insubstantial Federal Claim



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

***Carr v. Tillery* (7<sup>th</sup> Cir. 2010) 591 F.3d 909**

# 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* (8<sup>th</sup> Cir. 2020) 984 F.3d 564—no *Bivens* claim for rogue law-enforcement alleged lies and manipulation landing plaintiffs in jail; *Jefferson v. Repko* (ED MO 2020) (Sippel, J.)—no *Bivens* claim for alleged wrongful denial of veteran's benefits; ; TWG § VI[C][4], 6.234

# Miner's Tips



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

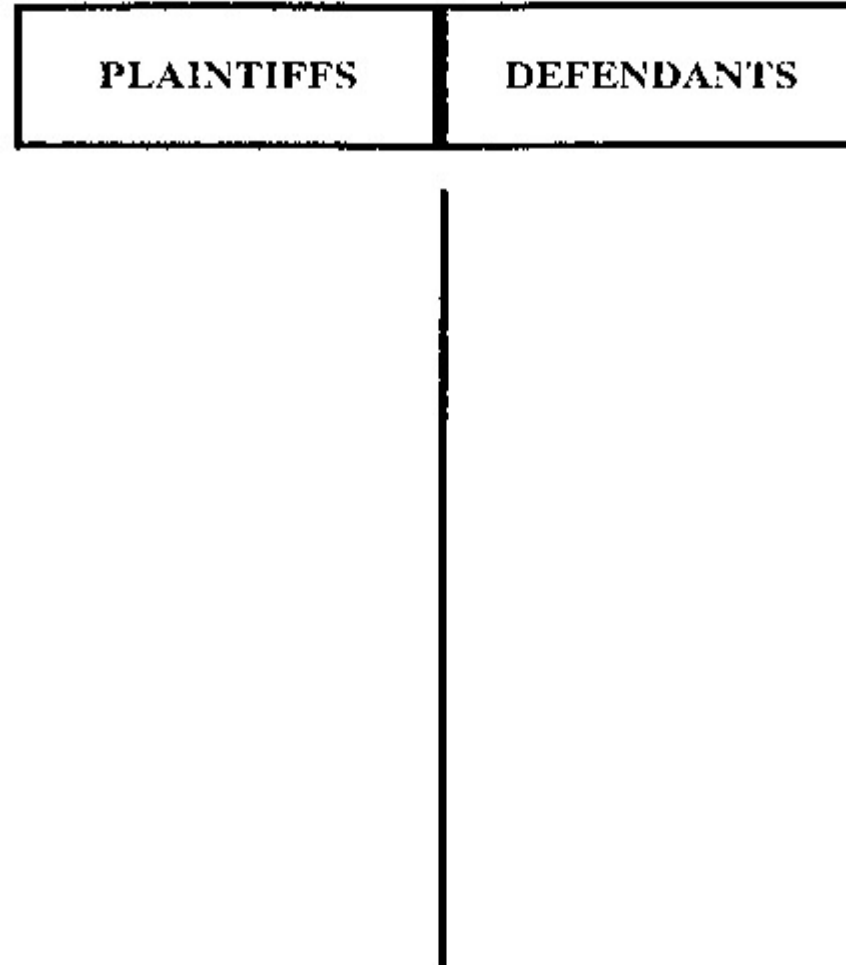


# **Golden Nugget #4: Diversity: Go to Kindergarten**



**Case Off the  
Docket By Monday**

# Diversity Algebra



# Complete Diversity

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

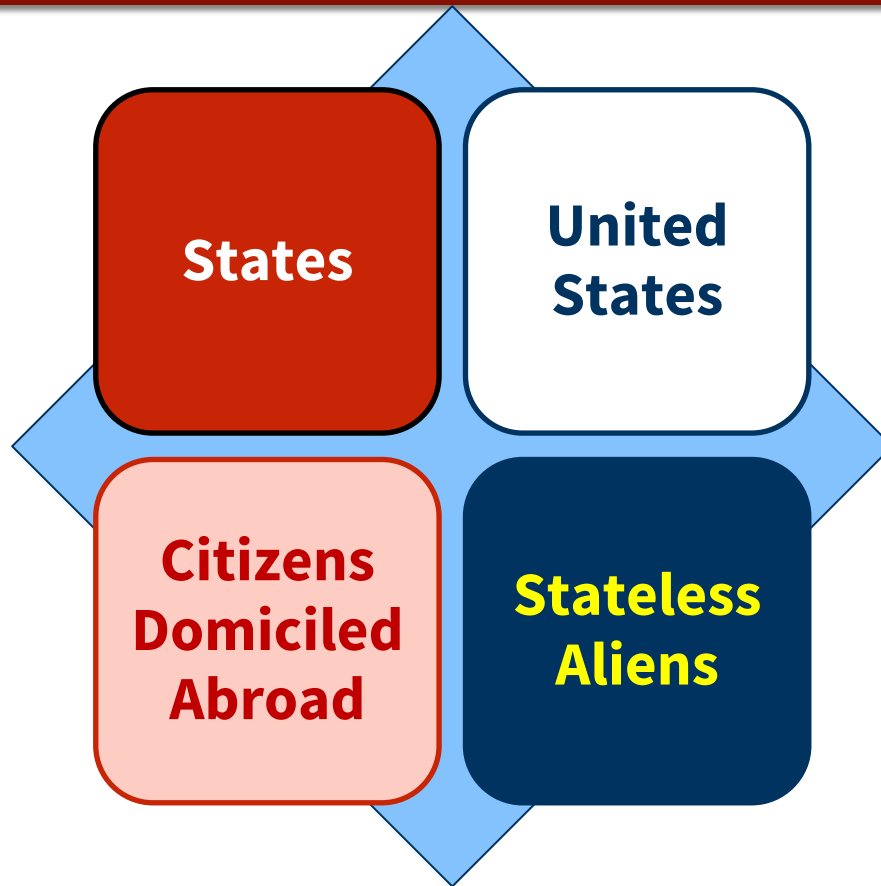
28 U.S.C. Sec. 1332; see e.g.,

# No Complete Diversity

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

28 U.S.C. Sec. 1332; see, e.g. *Eckerberg v. Inter-State Studio & Publishing Co.* (8<sup>th</sup> Cir.2017) 860 F.3d 1079 – that military person assigned to various places did not change his original Florida domicile

# Citizens – Not



*Page v. Democratic Nat'l Comm.* (7<sup>th</sup> Cir. 2021) 2 F.4<sup>th</sup> 630—no diversity if law firm partnership with “stateless” partners domiciled abroad; *Mitchell v. Bailey* (5<sup>th</sup> Cir. 2020) 982 F.3d 937--Indian Tribe a stateless entity; *Eckerberg v. Inter-State Studio & Publishing Co.* (8<sup>th</sup> Cir.2017) 860 F.3d 1079--military person assigned to various places did not change his original Florida domicile ; TWG § 7-III[A][2][a], 7.36



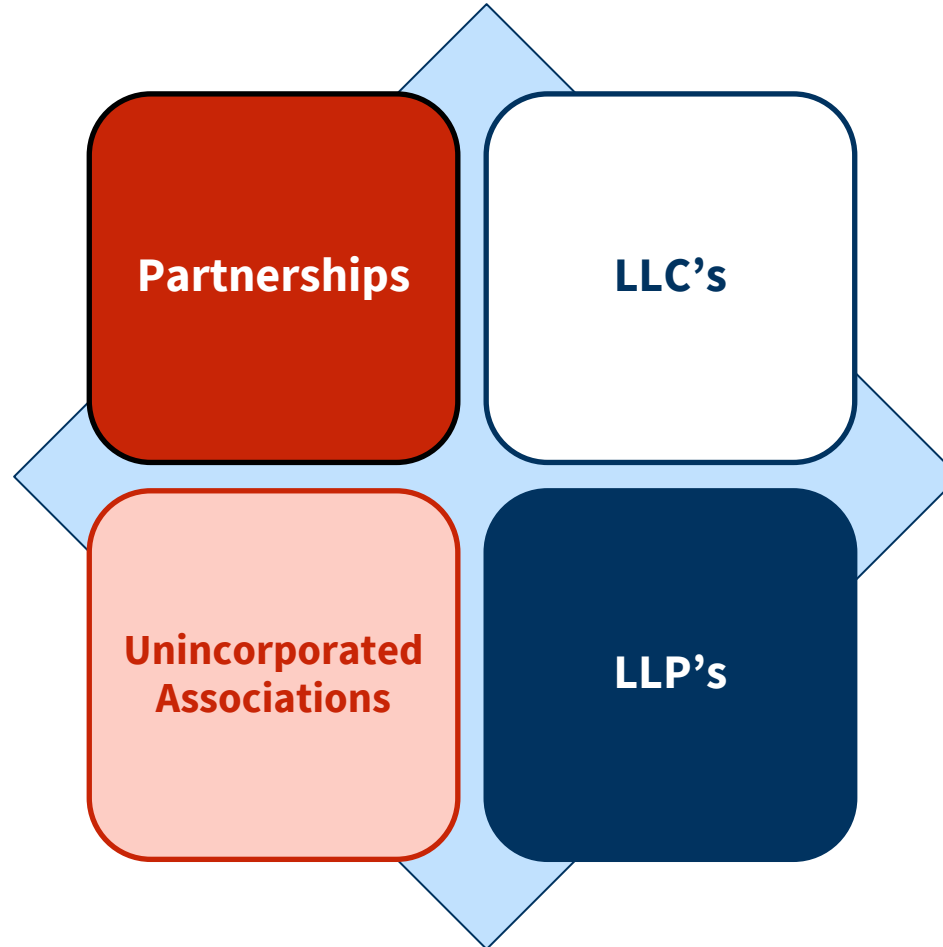
# Citizenship Rules

**Individuals**

**Corporations**



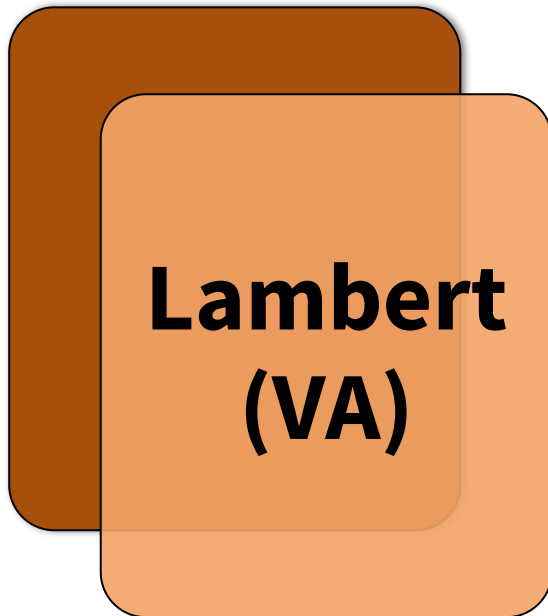
# All Non-Corporate Entities



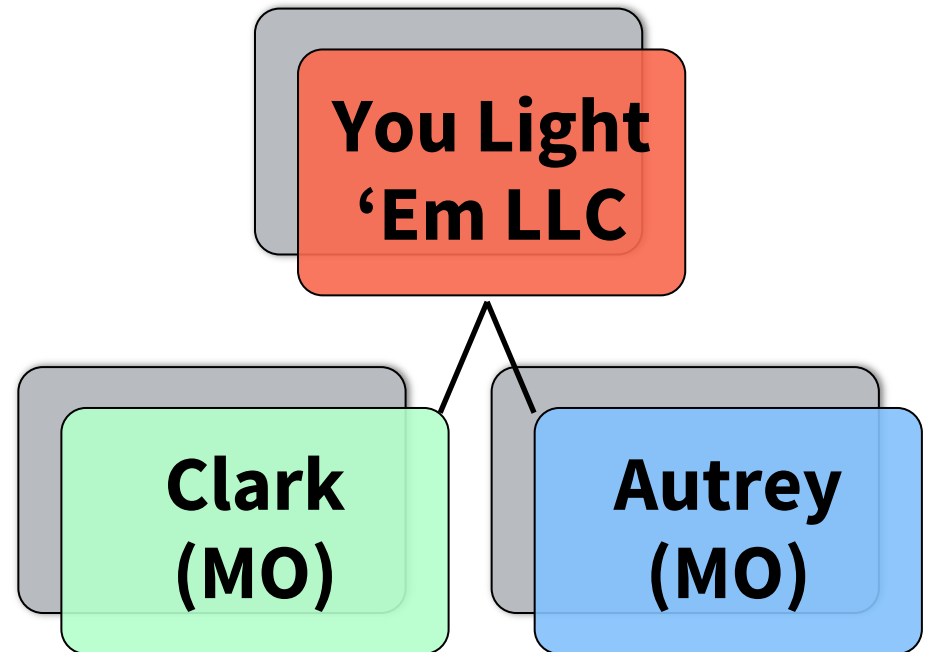
*See Jet Midwest Int'l Co., Ltd. v. Jet Midwest Group, LLC* (8<sup>th</sup> Cir. 2019) 932 F.3d 1102—citizenship of LLC is citizenship of all its members

# Diversity Drilling

**Plaintiff**

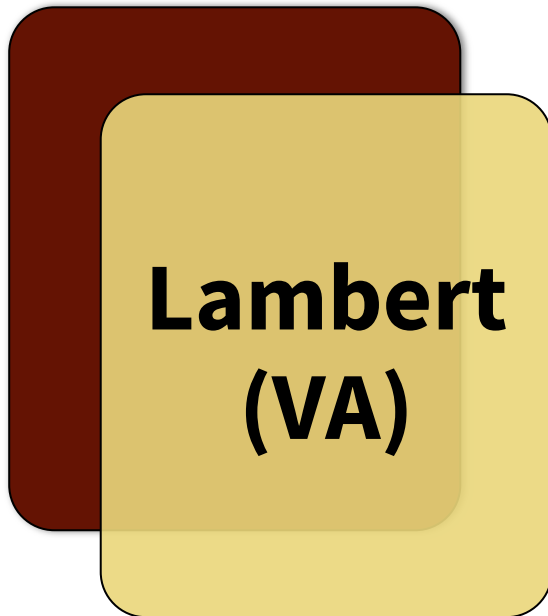


**Defendants**

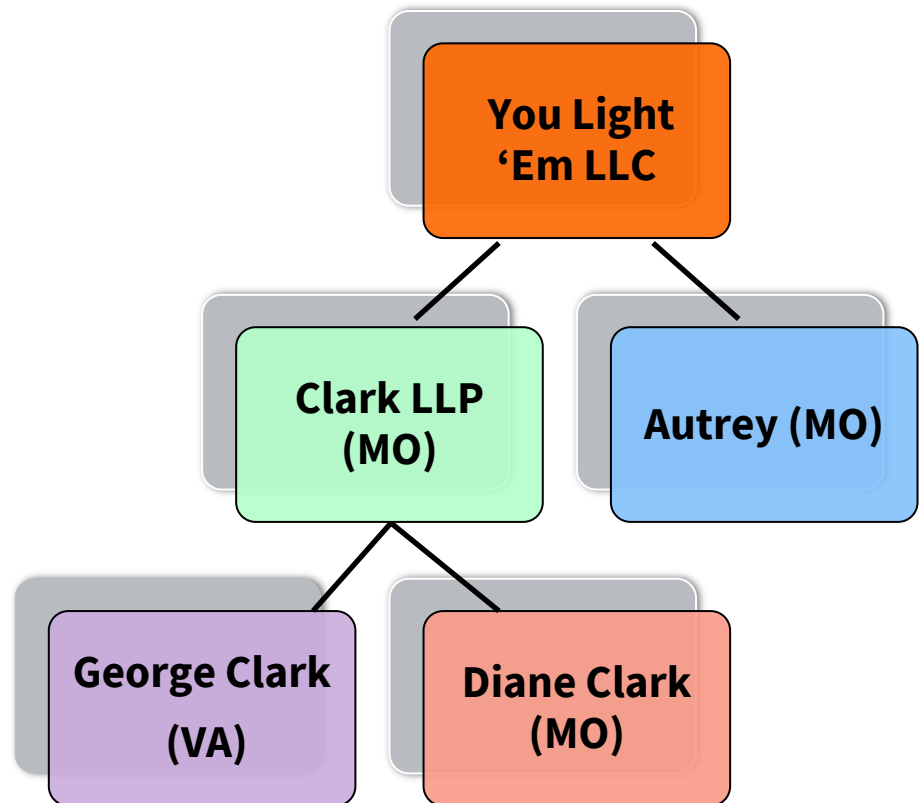


# Diversity Drilling

## 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* (8<sup>th</sup> Cir. 2019) 932 F.3d 1102—Hong Kong “limited company” is treated as equivalent to a “corporation”; *3123 SMB LLC v. Horn* (9<sup>th</sup> 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.* (ED MO 2018) 2018 U.S. Dist. LEXIS 60514 (Perry, J.); TWG § 7-III[E]



# Miner's Tips



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

# Golden Nugget #5: Removal to Federal Court?



*Vlaming v. West  
Point School Bd.*  
(4<sup>th</sup> Cir. 2021)  
10 F.4th 300

# Removal Jurisdiction?

**School board fires teacher for refusing to comply with pronoun policy relating to student who underwent gender transition**

**Wrongful termination suit removed as federal question since school board raised defense that discrimination violated Title IX**

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



# GRANT

## ***Vlaming v. West Point School Bd.*** **(4<sup>th</sup> Cir. 2021) 10 F.4th 300**

- **No federal claim and Title IX is simply a federal defense**

*Burrell v. Bayer Corp.* (4<sup>th</sup> Cir. 2019) 918 F.3d 372—no removal of products liability claim simply because it's regulated by FDA; *Estate of Cornell v. Bayview Loan Servicing, LLC* (6<sup>th</sup> Cir. 2018) 908 F.3d 1008—no removal of state law claim barring due on sale clauses simply because federal Garn-St. Germain Act referenced in complaint (12 U.S.C. § 1701j-3; see also *Badgerow v. Walters*, Supreme Court No. 20-1143, cert. granted (May 17, 2021)—whether removal jurisdiction exists on petition to vacate arbitration if underlying claim was federal question; TWG § 8-V[B], 8.52

# Removal Jurisdiction?

**Oakland sues  
producers and  
promoters of fossil  
fuels as a public  
nuisance as part of  
global warming**

**D removed as  
“substantial  
federal question”  
under federal  
common law  
addressing  
pollution affecting  
interstate  
commerce**

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



# GRANT

## ***City of Oakland v. BP PLC*** **(9<sup>th</sup> 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)* (10<sup>th</sup> Cir. 2020) 965 F.3d 792 (same); See also *Dalton v. JJSC Properties, LLC* (8<sup>th</sup> 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; *Lester E. Cox Med.Ctrs. v. Amneal Pharmaceuticals, LLC* (WD MO 2020)(Ketchmark, J.)—state claims relating to opioid fraud not removable simply because federal government has strong interest in controlled substances; TWG § 8-V[B][2], 8.53

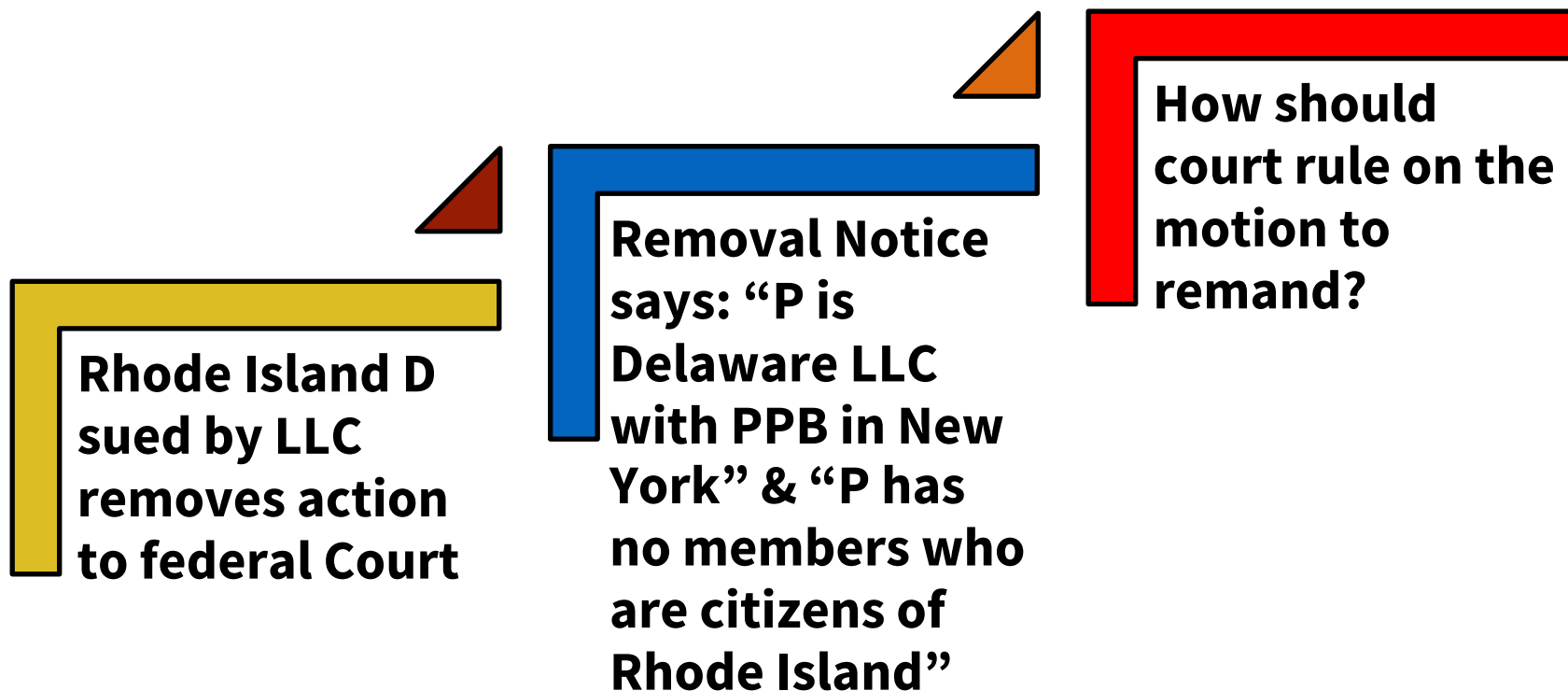


# Plaintiff is Jedi Master of Claims Alleged

- *Sally v. Panera Bread Co.* (ED MO. 2021) (Schelp, J.)—false advertising claim under Missouri law does not removable simply because student could have alleged federal claim



# Removal – Citizenship Proof?



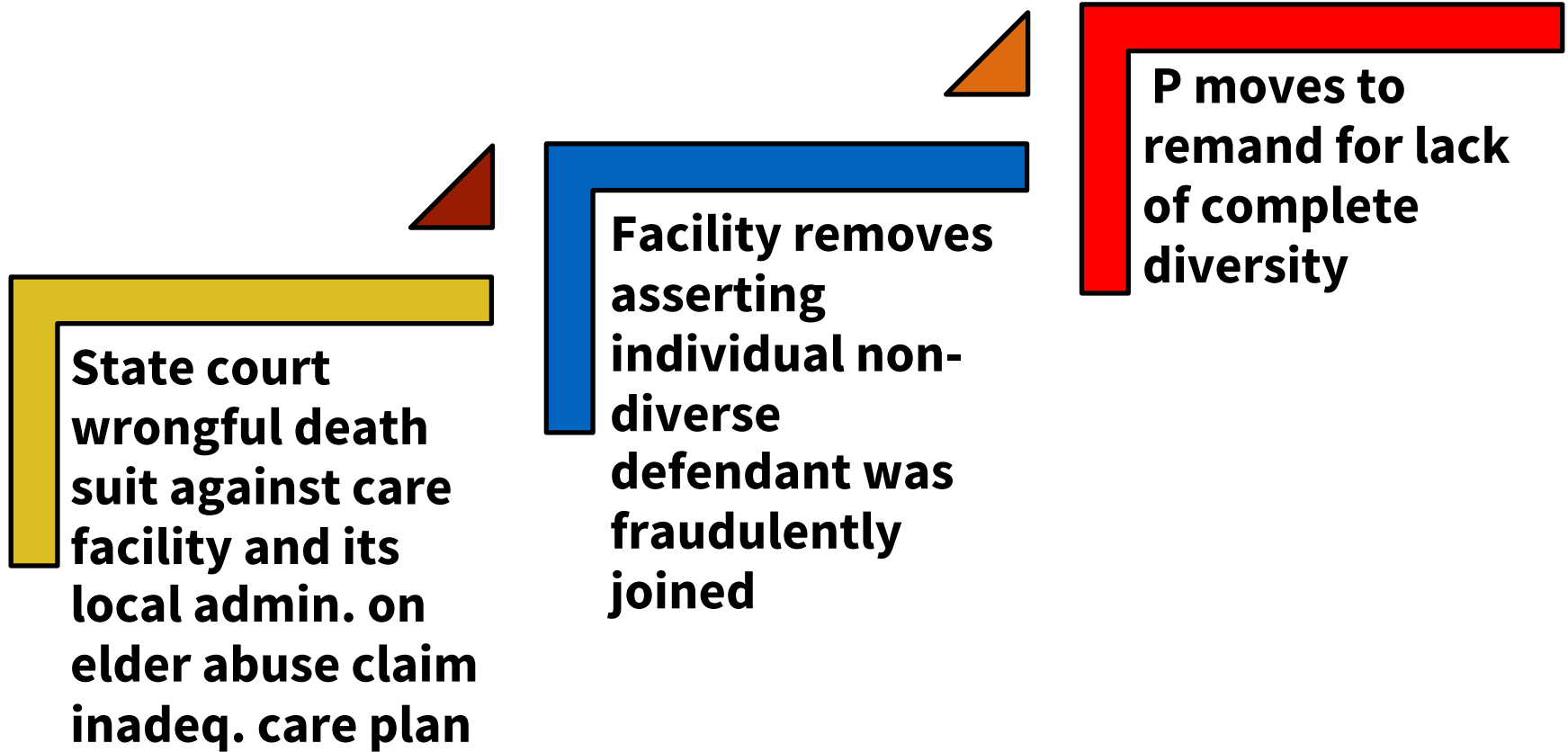
# GRANT

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

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

See *Midcap Media Finance, L.L.C. v. Pathway Data, Inc.* (5<sup>th</sup> 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.* (7<sup>th</sup> Cir. 2020) 951 F.3d 827—identities and citizenship of all partners or LLC members must be revealed; *Mensah v. Owners Ins. Co.* (8<sup>th</sup> Cir. 2020) 951 F.3d 941—remand since requested uninsured motorist amount \$61,718.67; **cf.** *Turtine v. Peterson* (8<sup>th</sup> Cir. 2020) 959 F.3d 873—plausible defamation claims concern more than \$75,000; *Crawford v. Thyssenkrup Materials, N.A.* (ED MO 2021) (Schelp, J.)—amount in controversy on removal cannot include unrecoverable claims to punitive damages; TWG § 8-VI[B][1], 8.203

# Sham Joinder Rule: Remand?



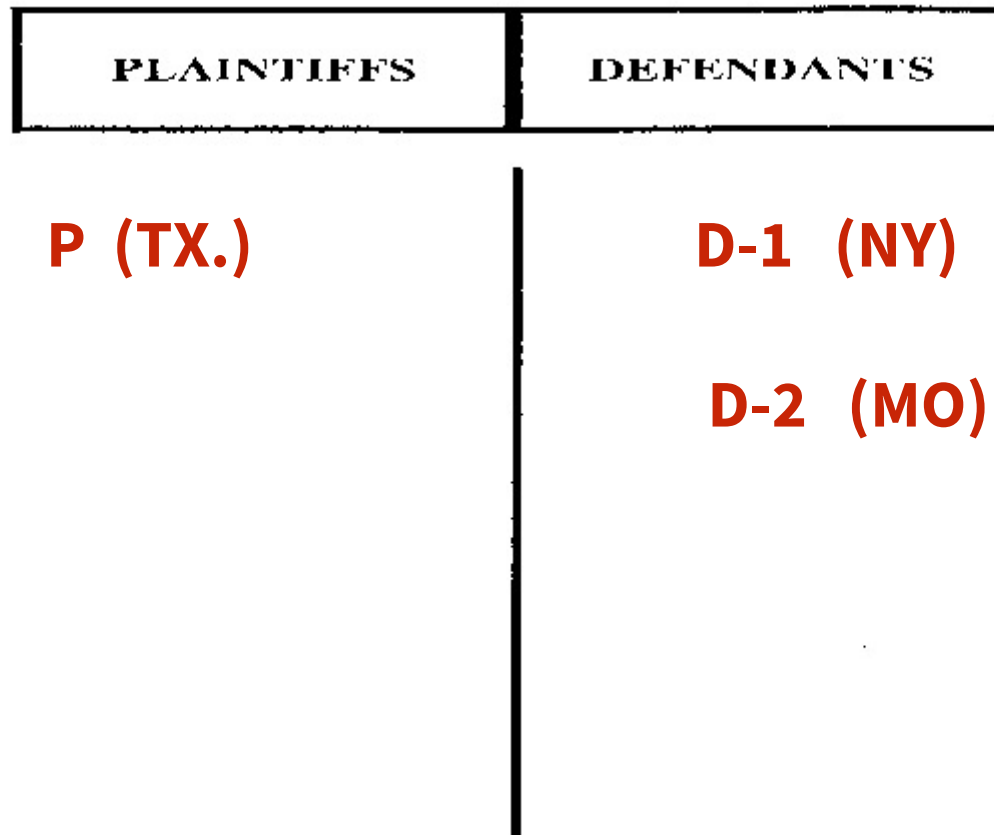
# GRANT

## ***Grancare, LLC v. Thrower, By and Through Mills*** **(9<sup>th</sup> 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.* (5<sup>th</sup> 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* (8<sup>th</sup> 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; *Henson v. Union Pac. R.R. Co.* (8<sup>th</sup> Cir. July 8, 2021) 2021 U.S. App. LEXIS 20202—if only conclusory allegations against individual defendant in employment discrimination suit, found to be fraudulently joined

# Local Defendant – Removal Bar



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

# Local Defendant Bar

## ***Holbein v. TAW Enterprises, Inc.*** **(8<sup>th</sup> 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.* (5<sup>th</sup> 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.* (ED MO 2021) (Limbaugh, J.)—same; contra *Gentile v. Biogen Idec, Inc.* (D. Mass. 2013) 934 F.Supp.2d 313; TWG § 8-VI[E][4], 8.272

# Why Issue an OSC?





# Miner's Tips



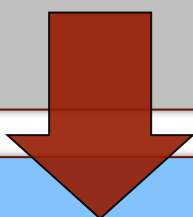
# Golden Nugget #6: Decline Supplemental Jx



***Robinson v. Town of  
Marshfield*** (1<sup>st</sup> 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?**

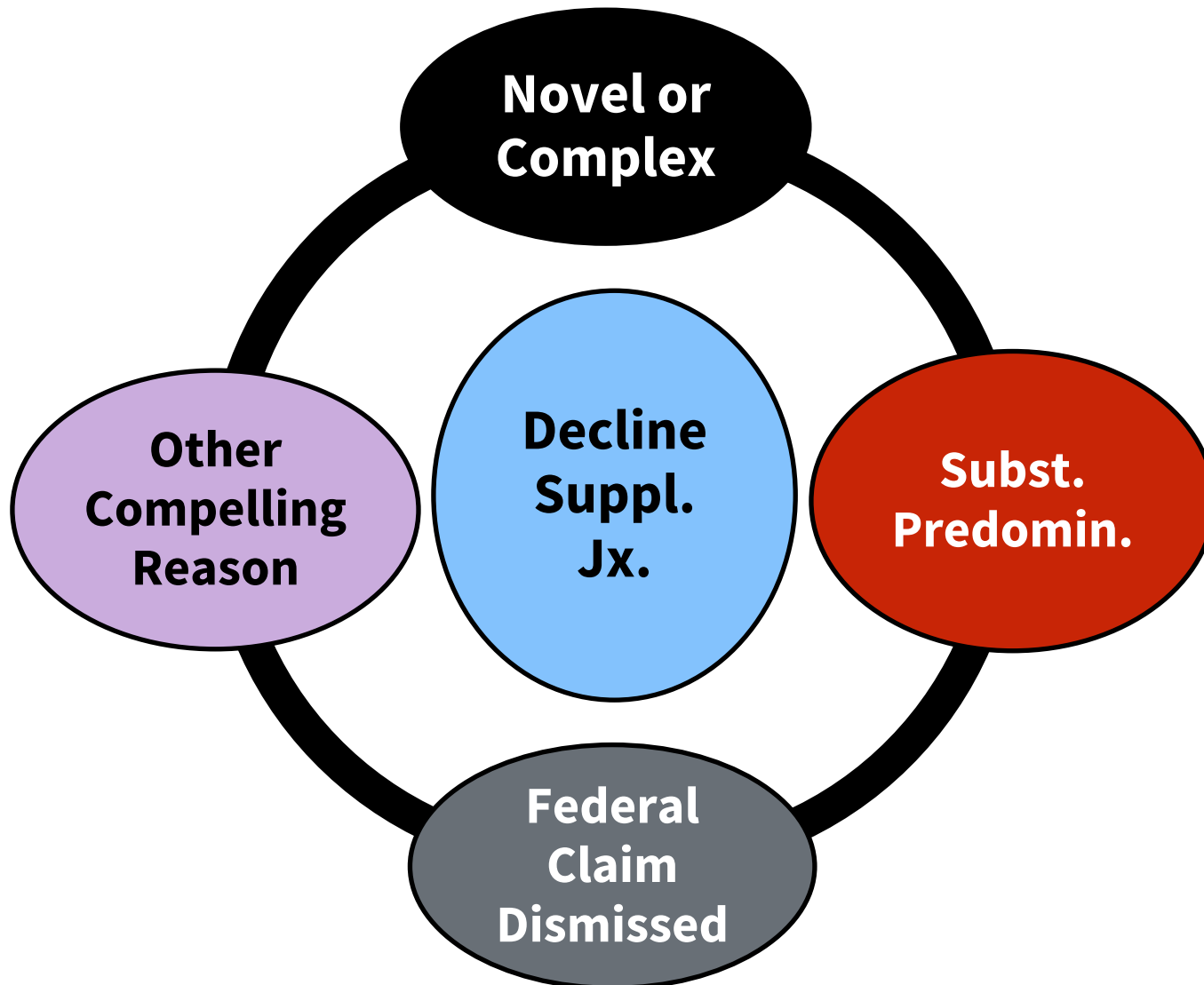
# DECLINE

## ***Robinson v. Town of Marshfield* (1<sup>st</sup> 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* (8<sup>th</sup> Cir. 2018) 899 F.3d 643--abuse of discretion to retain supplemental claims; see also *Nuevos Destinos, LLC v. Peck* (8<sup>th</sup> Cir. 2021) 999 F.3d 641—once federal question and supplemental claims dismissed, amending to add diversity ground rejected; TWG § 9-VI[E], 9.130

# 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 8<sup>th</sup> 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**

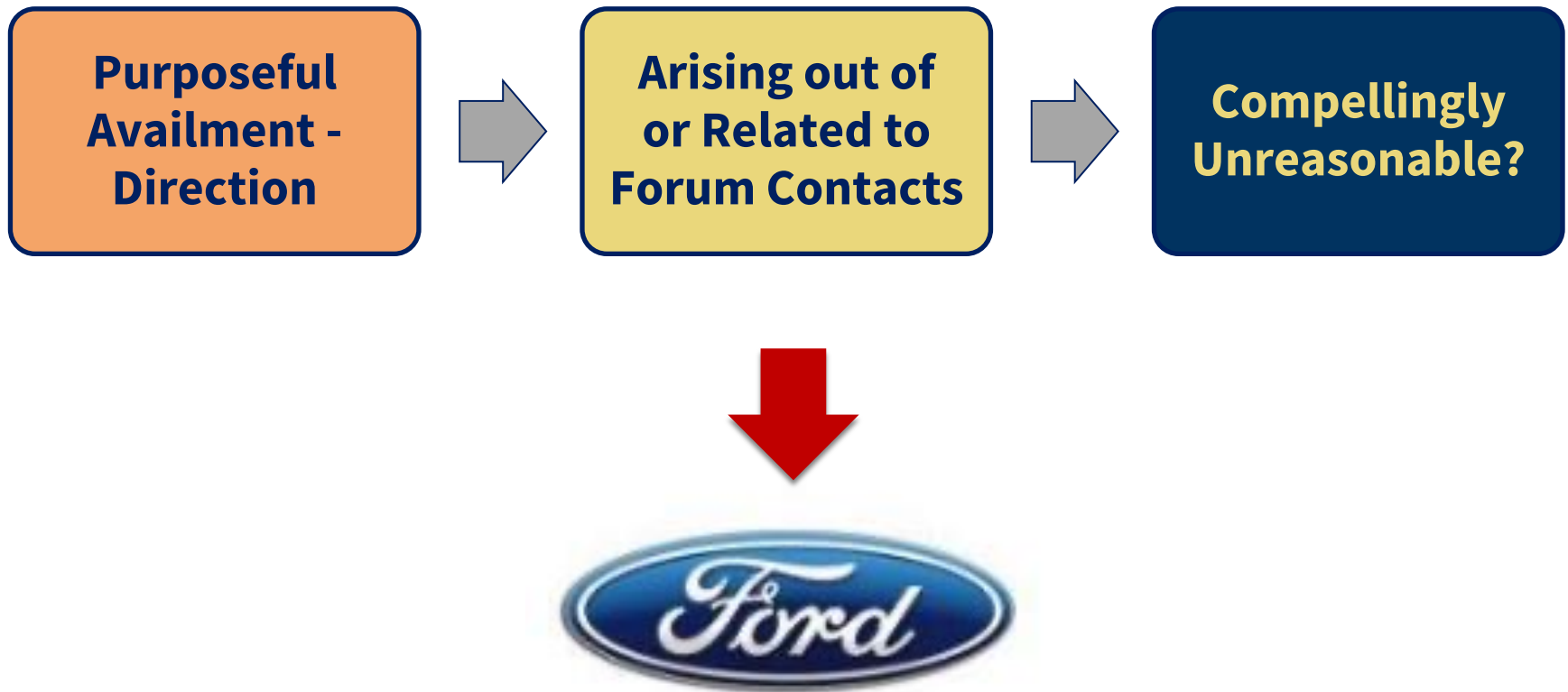
**Explorer purchased and brought to Montana where accident caused death P reps. allege death due to design defect in vehicle**

**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 8<sup>th</sup> 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 *Pederson v. Frost* (8<sup>th</sup> Cir. 2020) 951 F.3d 977--no personal jurisdiction over out-of-state defendants defrauding plaintiff from out-of-state; compare *Whaley v. Esebag* (8<sup>th</sup> Cir. 2020) 946 F.3d 447—personal jurisdiction upheld when certain underlying meetings occurred in forum; *Myers v. Casino Queen, Inc.* (8<sup>th</sup> Cir. 2012) 689 F.3d 904—personal jurisdiction proper over out-of-state casino harming patrons solicited to gamble at establishment ; TWG § 10-VIII[[A][1], 10.350

# 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.* (11<sup>th</sup> 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**

*Johnson v. Gawker Media, LLC* (ED MO 2016) (Shaw, J.)—no personal jurisdiction over out-of-state defendants for posting defamatory matters online; *Fidrych v. Marriott Int’l* (4<sup>th</sup> 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.* (1<sup>st</sup> Cir. 2021) 985 F.3d 135; *Kaliannan v. Liang* (8<sup>th</sup> Cir. 2021) 2 F.4<sup>th</sup> 727--personal jurisdiction exists over foreign party for convincing out-of-state residents to purchase fraudulent securities in real estate in forum ; TWG § 10-V[A], 10.101, § 10-VIII[B][2], 10.357

# 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)



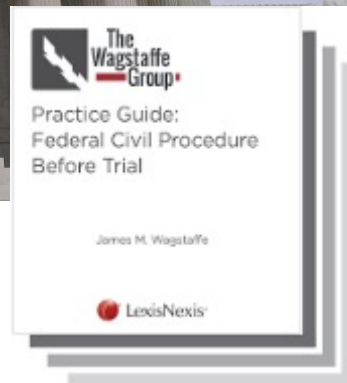
# Miner's Tips



- **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

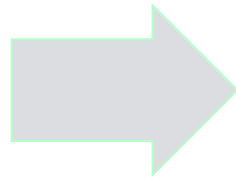


## Forum Selection Clauses

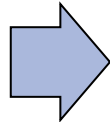
Mandatory  
or  
Permissive



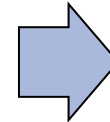
Signator  
and  
Scope



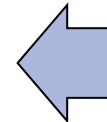
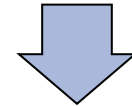
# ***Atlantic Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49 (2014)***



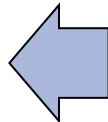
**Atlantic Marine  
Constr. Co. (VA)**



**Contracts with  
Army Corps of  
Engineers**



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



**Ford Hood, Texas**

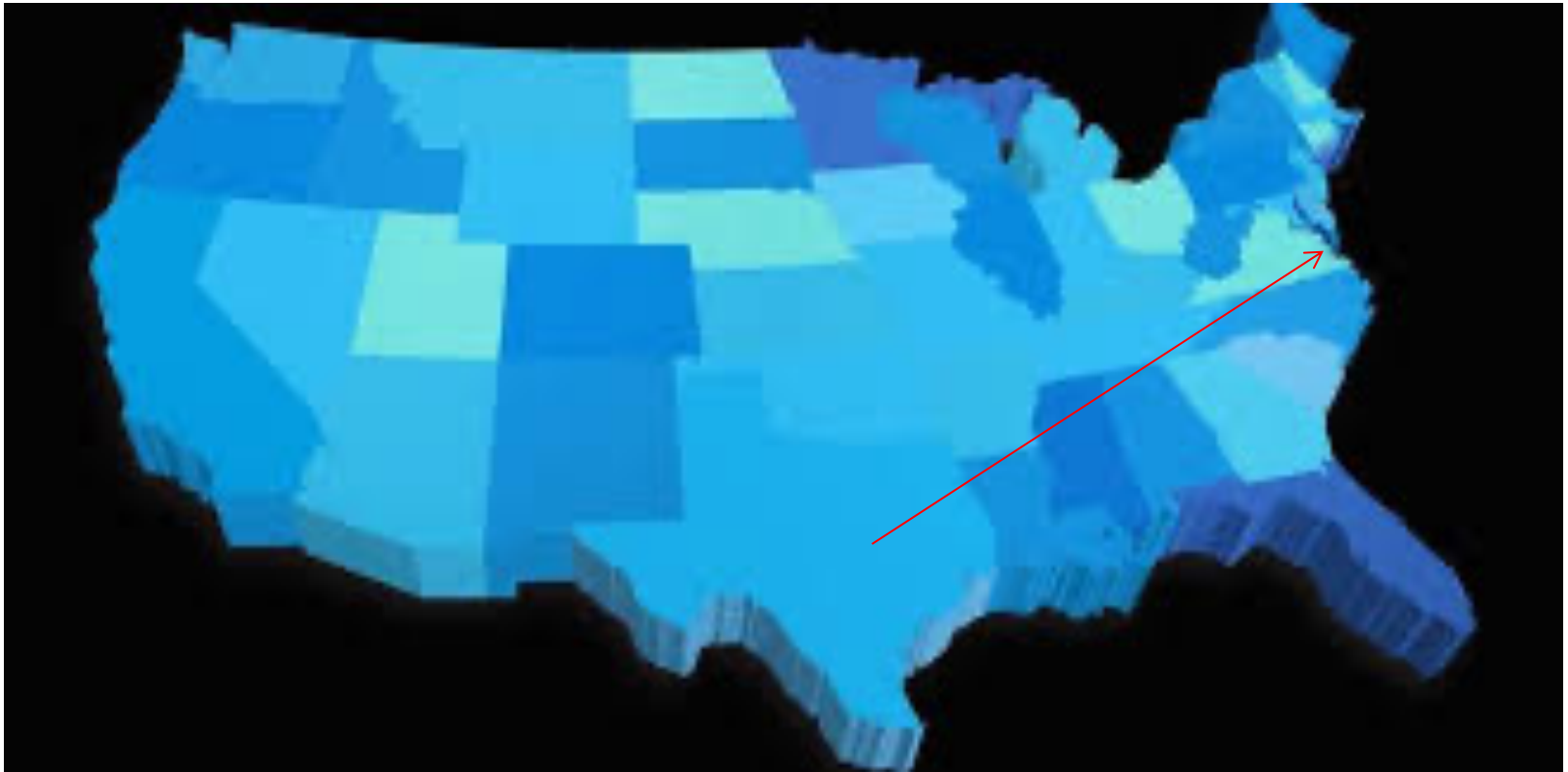
**Circuit  
Court City  
of Norfolk,  
Virginia**

**or**

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

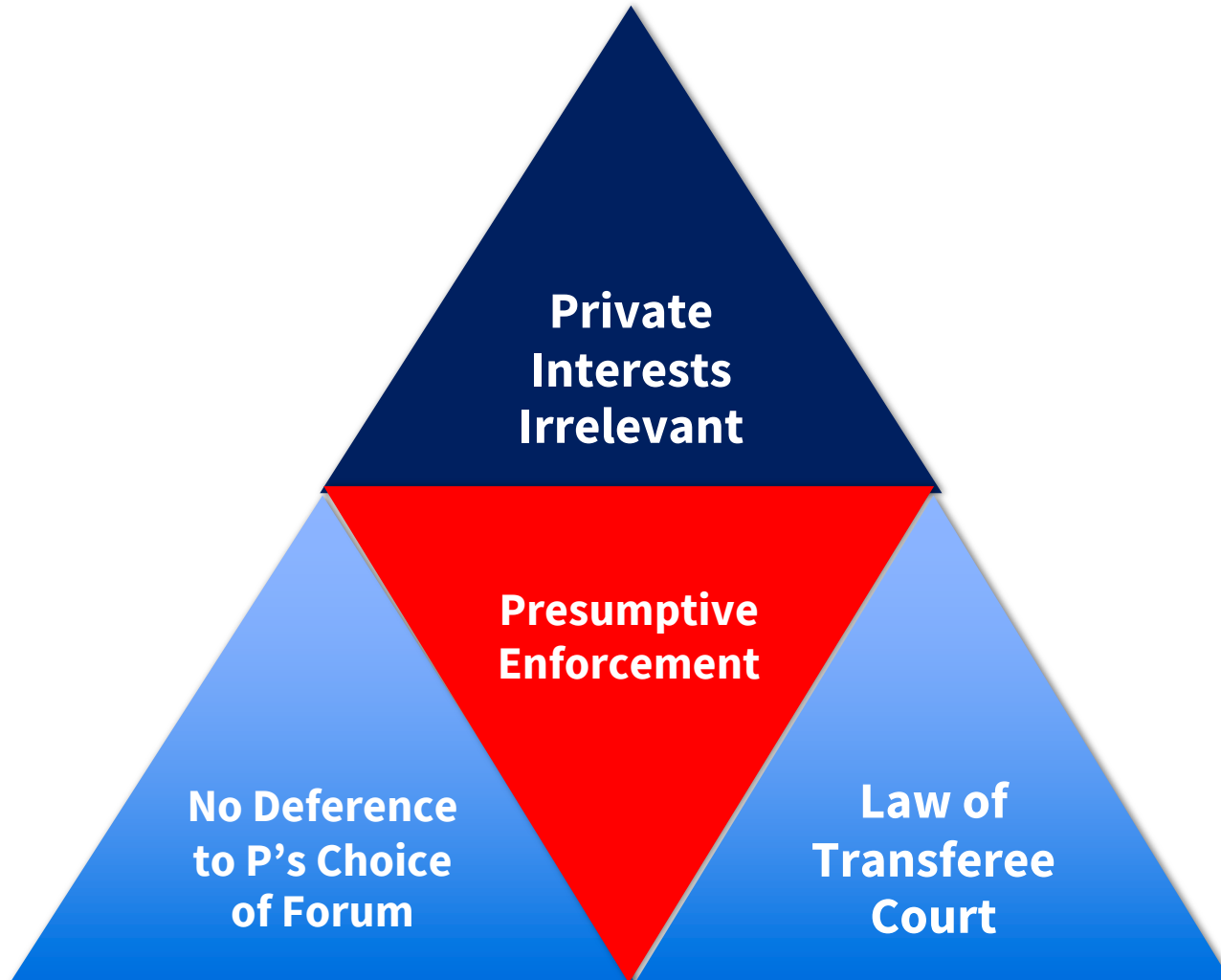
**Mandatory  
Forum Selection  
for All Disputes  
Between Parties**

# Fort Hood to Norfolk, VA



**1,523 Miles**

# Impact of Atlantic Marine



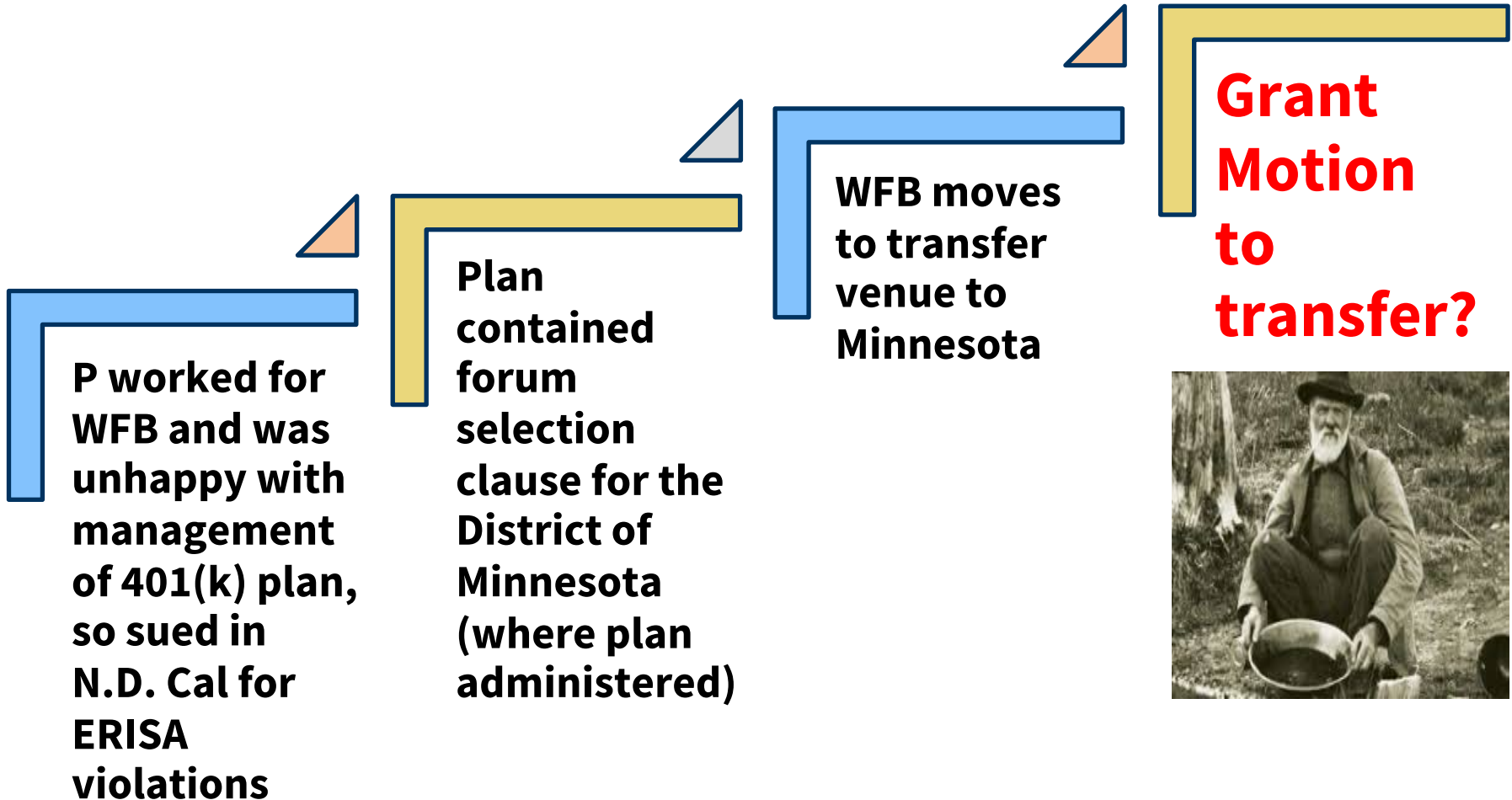
# Golden Nugget #8: Choosing a Mine



***Becker v. U.S. Dist. Court***

**(9<sup>th</sup> Cir. 2021) 993 F.3d 731**

# Forum Selection Clause Exploring?





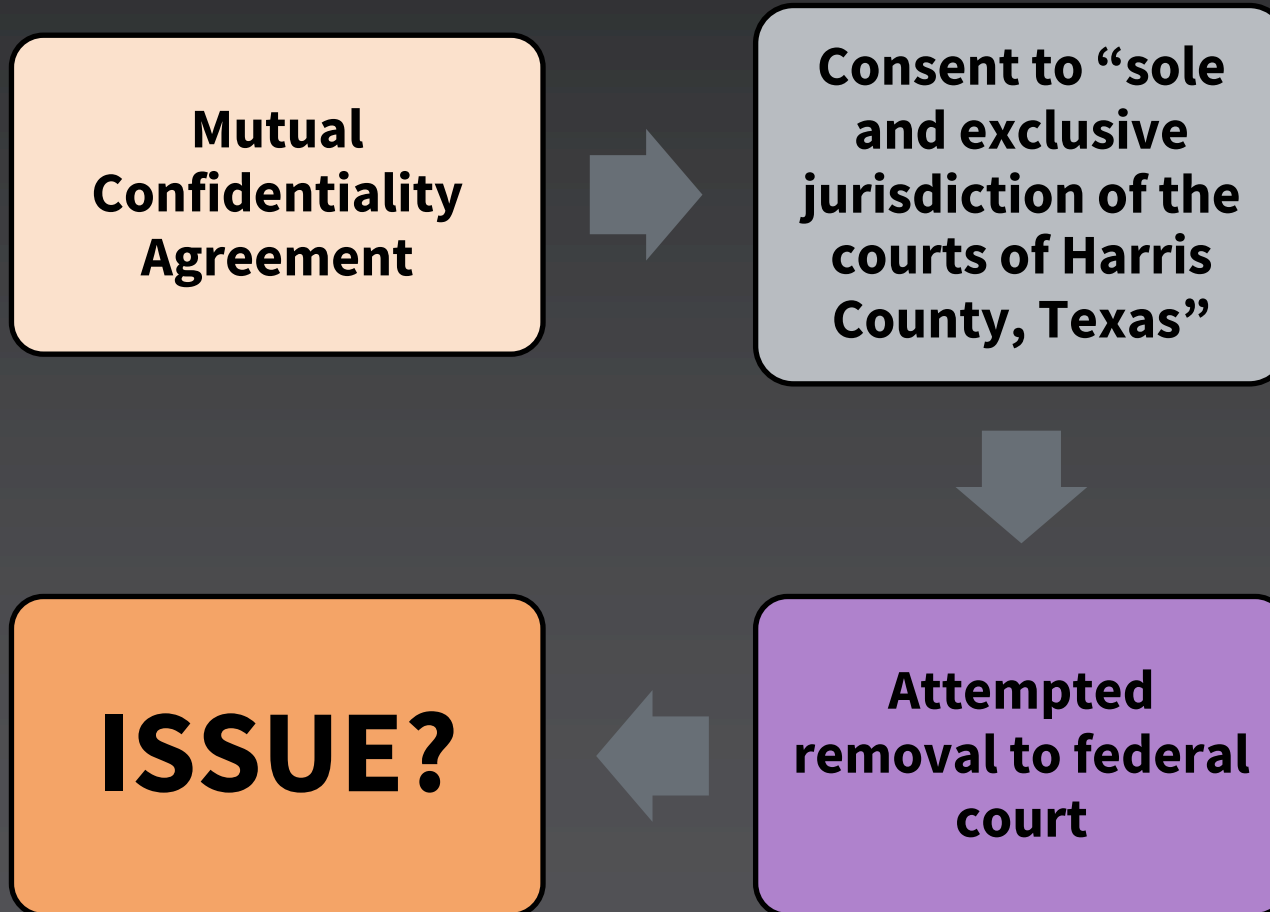
# YES

## ***Becker v. U.S. Dist. Court* (9<sup>th</sup> Cir. 2021) 993 F.3d 731**

- **Forum clause applies to party to an ERISA plan**

*See also* *Azima v. RAK Inv. Authority* (D.C. Cir. 2019) 926 F.3d 870—forum clause selecting England for litigation enforceable; *Howmedica Osteonics Corp.* (3d Cir. 2017) 867 F.3d 390—clause analyzed involving non-signatories; *Ingram Barge Co., LLC v. Zen-Noh Grain Corp.* (6<sup>th</sup> Cir. 2021) 3 F.4<sup>th</sup> 275—same; TWG § 8-VIII[A][2], 8.427, § 12-III[H], 12.41

# Waiver of Removal By Contract?



# RULE

## ***Grand View v. Helix Electric* (5<sup>th</sup> Cir. 2017) 847 F.3d 255**

- **Valid and enforceable clause unequivocally selecting state court as exclusive venue waives party's right to remove**
- *Sofamor Danek, Inc. v. Gannon* (8<sup>th</sup> 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”; *Smart Communications Collier Inc. v. Pope Cty. Sheriff's Office* (8<sup>th</sup> Cir. 2021)—clause designating forum in Arkansas courts compelled dismissal of original federal action; *Autoridad de Energia Electrica v. Vitol S.A.* (1<sup>st</sup> 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



*Wyson Corp. v.  
Apri Inc.*

(6<sup>th</sup> 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

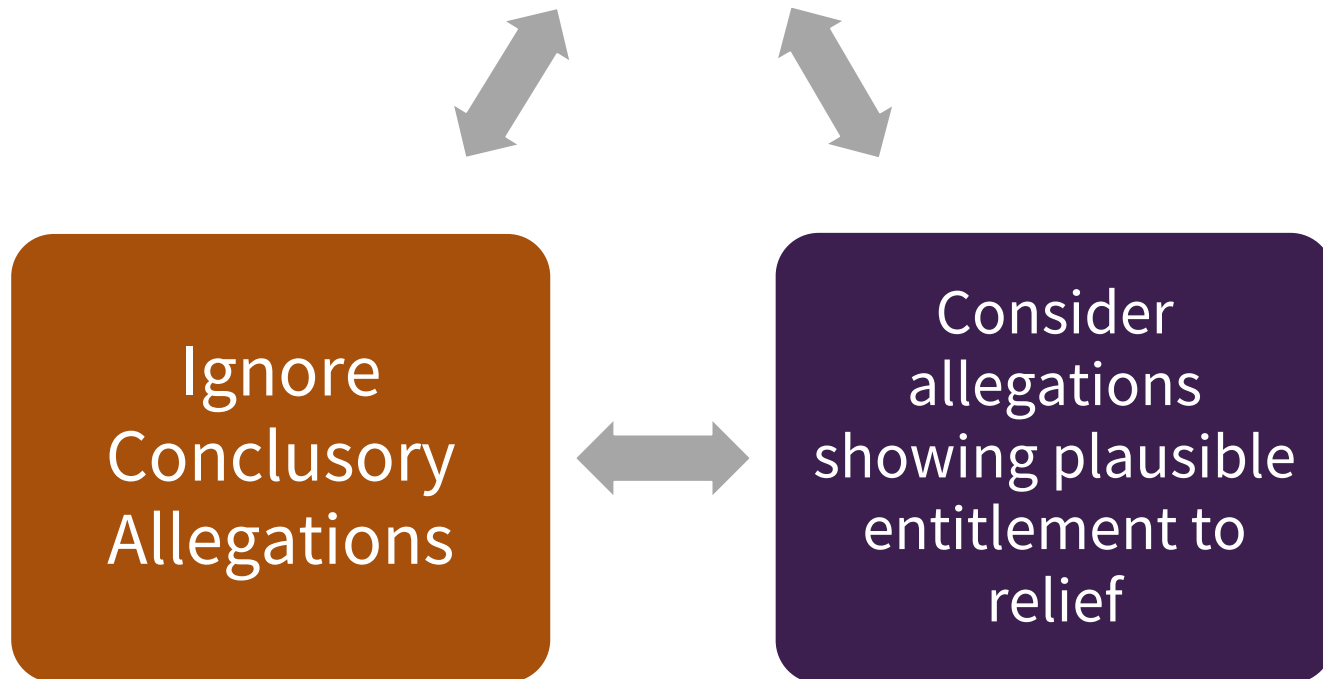
***Wysong Corp. v. Apri, Inc.* (6<sup>th</sup> Cir. 2018)  
889 F.3d 267**

**“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* (1<sup>st</sup> 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.* (8<sup>th</sup> Cir. 2020) 971 F.3d 747—alleging “possibility” defendant “was wholly or partially responsible” for creating false posts not sufficient for trade libel claim ; TWG § 17-X[A][1], 17.277, § 23-II[G][10], 23.78

# 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* (8<sup>th</sup> 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.* (9<sup>th</sup> Cir. 2021) 985 F.3d 1173**

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

(ED 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?**



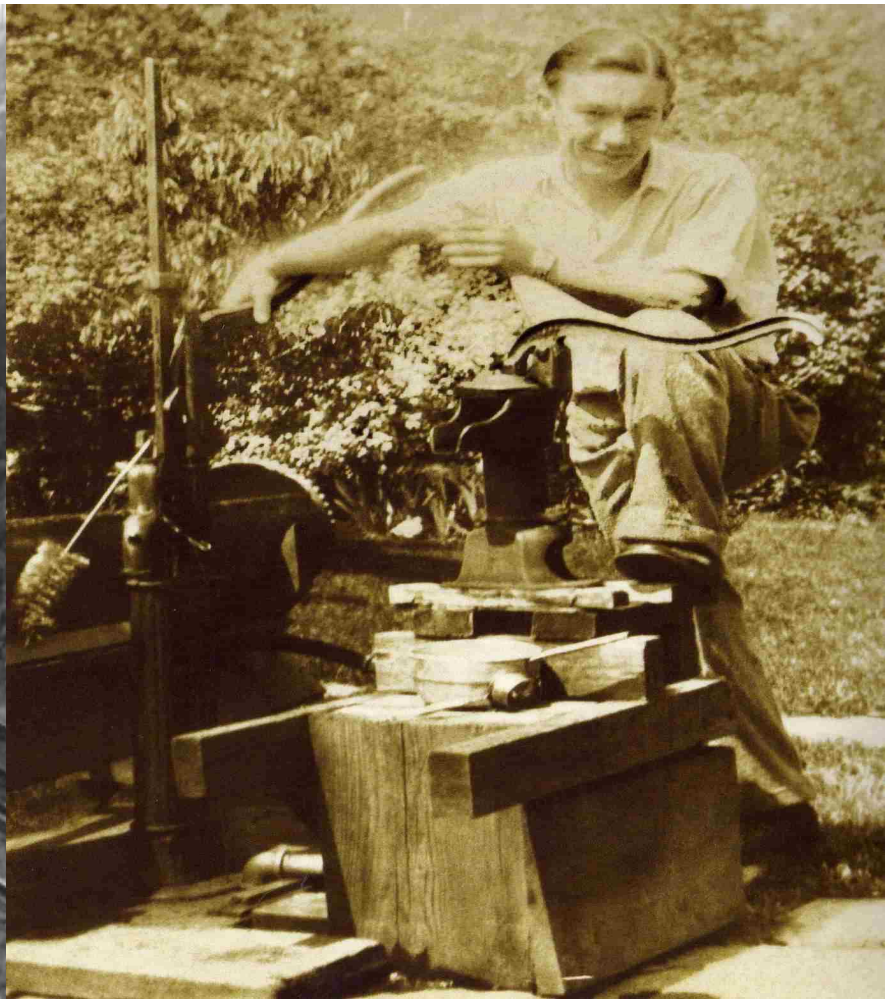
# NO – DOESN'T APPLY

***Kilburn v. Autosort Acquisitions, LLC*** (ED 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; **TWG § 2-III[J], 2.131**





**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* (9<sup>th</sup> Cir. 2018); *Godin v. Schencks* (1<sup>st</sup> 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* (5<sup>th</sup> Cir. 2019) 936 F.3d 240; *Abbas v. Foreign Policy Group* (D.C. Cir. 2015) 783 F.3d 1328; *Carbone v. CNN* (11<sup>th</sup> Cir. 2018) 910 F.3d 1345; *Los Lobos Renewable Power v. Americulture* (10<sup>th</sup> Cir. 2018) 885 F.3d 659; *Nunes v. Lizza* (N.D. IA 2020) 476 F.Supp.3d 824; *Jiang v. Porter* (ED Mo. 2016) (Jackson, J.)

# Certificates of Merit Required?

**YES**

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

**NO**

***Pledger v. Lynch* (4<sup>th</sup> Cir. July 21, 2021); *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.* (6<sup>th</sup> Cir. 2019) 943 F.3d 291;**



# No Punitives Without Leave of Court?

**YES**

***Ahmad v. Panera Bread Co.* (ED MO 2021) 2021 U.S. Dist. LEXIS 102984 (Perry, J.)—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* (WD MO 2021) 2021 U.S. Dist. LEXIS 99117 (Phillips, C.J.); *Kilburn v. Autosport Acquisitions* (ED MO 2021) 2021 U.S. Dist. LEXIS 17404 (Crites-Leoni, MJ)**

# 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*<sup>1</sup>. 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.”<sup>2</sup>

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).<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>



### Practice Guide: Federal Civil Procedure Before Trial

James M. Wagstaffe

LexisNexis®

# Other Recent Developments



**Staying  
Ahead**

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



**Amendment  
Effective:**

**December 1, 2020**

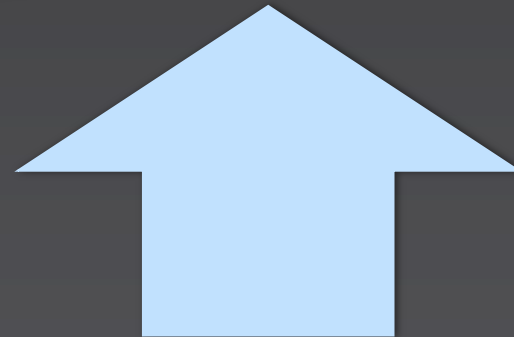
# NEW RULES AND PRACTICES 2021



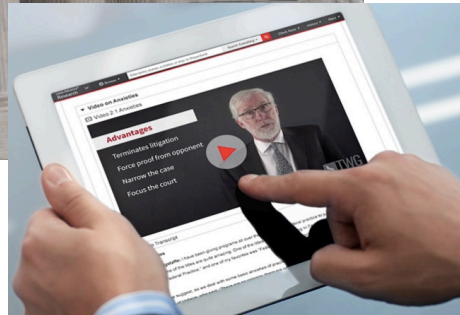
**Conferral  
Mandate for  
Corporate  
Designee Depos**



**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 21<sup>st</sup> 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

