FEDERAL CIVIL PROCEDURE BEFORE TRIAL 2026 UPDATE

This 2026 softbound Update completely replaces the 2025 Update.

This Update went to press in March 2026. Some of the new cases were not final and may be affected by later developments. Additionally, unless specifically noted, this Update does not include case, legislative or rules developments taking effect after our press date. Counsel should check subsequent case histories and independently confirm the current state of the law, including any developments that may affect the analysis in this Practice Guide.

Thank You! Your comments and suggestions regarding this Practice Guide are invaluable. *Please keep them coming!*

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2026 UPDATE HIGHLIGHTS

CHAPTER 1

PRELIMINARY CONSIDERATIONS

Federal Versus State Law

Borrowing state laws

- [1:491] **Marine insurance contracts:** Whether a contract is deemed a "maritime" contract depends on the nature and character of the contract (i.e., whether the contract references maritime services or transactions), not where it was formed or performed. [*Offshore Oil Services, Inc. v. Island Operating Co., Inc.* (5th Cir. 2025) 150 F4th 677, 683-684—master services agreement for work performed on offshore oil and gas production platform was nonmaritime contract where contractual responsibilities did not involve vessels or traditional maritime work]

Federal Preemption of State Law

Categories of preemption

- [1:591] **Express preemption:** Federal *regulations* that express an intent to supersede state law enjoy the same preemptive effect as federal *statutes*. [*King v. Navy Fed. Credit Union* (9th Cir. 2025) 148 F4th 628, 632]

Federal statutes that *expressly* preempt state law

- [1:680.8] **National Credit Union Administration (NCUA) regulations:** Federal regulation (12 CFR §701.35(c)) expressly preempted state law claims challenging account fees imposed by federal credit unions. [*King v. Navy Fed. Credit Union* (9th Cir. 2025) 148 F4th 628, 632-634]

Federal statutes that *impliedly* preempt state law

- [1:699] **National Bank Act (NBA):** The NBA may preempt a state consumer financial law regulating national banks if the state law "discriminates against national banks as compared to state banks," or "prevents or significantly interferes with the exercise by the national bank of its powers." [*Cantero v. Bank of America, N.A.* (2024) 602 US 205, 213-214, 144 S.Ct. 1290, 1297 (citing 12 USC §25b(b)(1)(A), (B))] To determine whether a state law "significantly interferes" with the national bank's powers, the court should assess the nature and degree of state law interference and compare it to the interference described in the Supreme Court's seminal banking precedents identified in *Barnett Bank of Marion County, N.A. v. Nelson* (1996) 517 US 25, 116 S.Ct. 1103. [*Cantero v. Bank of America, N.A.*, supra, 602 US at 219-220, 144 S.Ct. at 1300-1301 (noting Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 incorporated interference standard from *Barnett Bank*)]

[1:701.3] **Application—state law not preempted by**

NBA: State law requiring banks to pay interest on mortgage-escrow accounts was not preempted under the NBA. State law was found to be generally consistent with the federal banking scheme, and its enforcement was deemed to have minimal practical effect on the exercise of federal banking power. [*Conti v. Citizens Bank* (1st Cir. 2025) 157 F4th 10, 28 (applying Supreme Court's standard as articulated in *Cantero v. Bank of America, N.A.* (2024) 602 US 205, 144 S.Ct. 1290); see also *Kivett v. Flagstar Bank, FSB* (9th Cir. 2025) 154 F4th 640, 647-649]

Conflict preemption

- [1:749] **Compare—effect of identical laws:** When state law mirrors federal law, it effectively adopts federal law as its own; no conflict exists warranting preemption. [*Zyla Life Sciences, LLC v. Wells Pharma of Houston, LLC* (5th Cir. 2025) 134 F4th 326, 332]

CHAPTER 2A

FEDERAL JURISDICTION: INTRODUCTION

Limited Subject Matter Jurisdiction

Jurisdictional versus nonjurisdictional defects

- [2:44.5] **Application—defects held nonjurisdictional:** Provision in Immigration and Nationality Act (INA) that stripped lower courts from enjoining or restricting the federal government from implementing or enforcing laws that govern the inspection, apprehension, examination or removal of noncitizens does not limit district court's jurisdiction and authority to issue classwide injunctive relief on claims alleging that Border Patrol agents did not comply with INA provision prohibiting warrantless search without probable flight risk. [*United Farm Workers v. Noem* (ED CA 2025) 785 F.Supp.3d 672, 699-702]

CHAPTER 2B

FEDERAL QUESTION JURISDICTION

Sources of Federal Question Jurisdiction

Federal Tort Claims Act

- [2:349.7] **Discretionary function exception to tort liability:** The discretionary function exception did not apply to claim by national park visitor injured by stepping in a hole in park's grassy recreational area. The government's failure to maintain the hole did not involve employees balancing public policy but was a matter of routine maintenance. [*Chang v. United States* (9th Cir. 2025) 139 F4th 1087, 1094-1095]

Foreign Sovereign Immunities Act

- [2:382.1] **Compared to common law immunity:** Dismissal of suit against former governor of Nigerian state affirmed, where

Torture Victim Protection Act did not implicitly waive foreign official immunity. [*Does 1-5 v. Obiano* (5th Cir. 2025) 138 F4th 955, 960-961]

CHAPTER 2C

DIVERSITY JURISDICTION

Party Joinder Requirements

Suits by trustees

- [2:1604] **No collusive appointment:** Where the trustee has no real powers or control, and has been appointed solely to create diversity, the appointment may be treated as "collusive" and disregarded for diversity purposes. [*Fugedi v. Initram, Inc.* (5th Cir. 2025) 150 F4th 690, 693]

Amount in Controversy

Declaratory relief action

- [2:1844] **Amount in controversy determined by potential liability:** See *Farmers Direct Property & Cas. Ins. Co. v. Perez* (9th Cir. 2025) 130 F4th 748, 753-755—amount in controversy is arguably satisfied by considering potential excess liability from underlying claim, insurer's future defense costs, or both.

Petition to confirm or vacate arbitration award

- [2:1868] **Amount in controversy determined by amount of arbitration award ("award approach"):** See *Tesla Motors, Inc. v. Balan* (9th Cir. 2025) 134 F4th 558, 561—petition to confirm zero-dollar award did not meet amount in controversy requirement because court could not "look through" petition to underlying dispute.

Pleading and Proving Diversity

Jurisdictional allegations required

- [2:2039.2] **Party's citizenship cannot be judicially noticed?** *See ¶8:507 of these Highlights.*

CHAPTER 2D

REMOVAL JURISDICTION

What Cases and Claims are Removable

Complete preemption of state law claims

- [2:2710] **Claims against ERISA fiduciary:** See *Aldridge v. Regions Bank* (6th Cir. 2025) 144 F4th 828, 841-843—ERISA preempted employees' state law claims against plan administrator for benefits lost after employer's bankruptcy.

Statutes Authorizing Removal

Class Action Fairness Act

- [2:3041.1] **Valuation of amount in controversy:** Defendant

removed a CAFA putative class action (759 class members) from state court. Plaintiff sought recovery for alleged wage and hour violations, but the complaint did not identify an amount in controversy or frequency of the alleged violations. In establishing grounds for removal, Defendant estimated the amount in controversy exceeded $5,000,000 by multiplying minimum wage and overtime rates by an assumed number of weekly violations for each class member, over a projected four-year period. The district court remanded the case, finding Defendant did not provide evidence or a basis for its assumptions. The Court of Appeal vacated the remand order, finding that the district court had not considered whether Defendant's assumptions were reasonable based on the complaint. [*Perez v. Rose Hills Co.* (9th Cir. 2025) 131 F4th 804, 806-807, 810]

Waiver of Right to Remove

Waiver by agreement

- [2:3208] **View requiring "clear and unequivocal" waiver:** Some courts require that any contractual waiver of the right to remove be "clear and unequivocal." Mere consent to jurisdiction of a state court does *not* necessarily waive the right to remove. [See *Gulf Coast Pharmaceuticals Plus, L.L.C. v. RFT Consulting, Inc.* (5th Cir. 2025) 152 F4th 615, 617—contract provision "venue shall only be proper in Harrison County, Mississippi" was not a waiver of right to remove]

Effect of Postremoval Changes in Case

Stipulation to dismiss federal claims with prejudice

- [2:3616] **Federal court loses jurisdiction:** A joint stipulation to dismiss all federal claims with prejudice destroys the district court's subject matter jurisdiction as well as its supplemental jurisdiction, and the court must remand the case. [*Walker v. State of Arizona* (9th Cir. 2025) 158 F4th 971, 982-983—district court lost supplemental jurisdiction over state-law claims after parties filed joint stipulation to dismiss federal claims, requiring remand]

Remand to State Court

Grounds for motion to remand

- [2:3693] **Remand based on lack of equitable jurisdiction:** Where a federal court determines it lacks equitable jurisdiction in a case removed from state court, it may remand the case to state court; it is not required to dismiss the case. However, a defendant can defeat remand by *waiving* the adequate-remedy-at-law issue and thus permit the sole claim of equitable relief to proceed. This is true even if the court sua sponte raises the adequate-remedy-at-law issue. [*Ruiz v. Bradford Exchange, Ltd.* (9th Cir. 2025) 153 F4th 907, 913-917]
- [2:3703] **Declaratory relief abstention—mixed actions for coercive claims and declaratory relief:** When a coercive

claim has been joined with a declaratory relief claim, there is a circuit split on whether the court can abstain from exercising jurisdiction. [See *Fire-Dex, LLC v. Admiral Ins. Co.* (6th Cir. 2025) 139 F4th 519, 529-533 (describing circuit split)]

Appellate Review of Remand Ruling

Order granting remand motion

- [2:3908.1] **Entire remand order reviewable where defendant relies on Federal Officer Removal Statute (28 USC §1442):** See *Childs v. San Diego Family Housing, LLC* (9th Cir. 2025) 150 F4th 1151, 1156—where federal officer removal statute was one ground asserted for removal, Court of Appeal had jurisdiction to review entire remand order, including removal based on federal enclave jurisdiction.

CHAPTER 2E

SPECIAL JURISDICTIONAL LIMITATIONS

Plaintiff's Standing to Sue

Multiple plaintiffs

[2:4115] **Standing of any single plaintiff sufficient:** See *National Grocers v. Rollins* (9th Cir. 2025) 157 F4th 1143, 1156—where plaintiffs sought non-monetary relief under APA and scope of relief available did not differ among plaintiffs, standing requirement for coplaintiffs was satisfied where one plaintiff had Article III standing as to each claim at issue.

Injury in fact requirement

- [2:4150a] **Statutory violation not necessarily injury in fact:** See *Popa v. Microsoft Corp.* (9th Cir. 2025) 153 F4th 784, 792—plaintiff could not establish injury in fact based on website operator's alleged violation of state privacy statute where plaintiff suffered no concrete harm.
- [2:4216] **Organizational standing for injury to members:** Advocacy groups representing segments of the gasoline fuel supply chain had associational standing to challenge EPA's rule for calculating vehicle fuel economy, alleging the rule created a backdoor increase in the federal fuel economy standard thereby decreasing demand for their gasoline products. The second and third elements of organizational standing were met because the groups' mission was protecting its members' economic interests, and individual members' participation was unnecessary because the groups only sought declaratory and equitable relief. Regarding the first element—individual members' standing—the Court concluded the decreased gasoline demand caused by the EPA's rule injured members, and vacatur of the rule would redress that harm. [*Texas Corn Producers v. United States Environmental Protection Agency* (5th Cir. 2025) 141 F4th 687, 695-701]

Causation

- [2:4236.4] **Causal connection between plaintiff's injury**

and defendant's conduct required: No injury in fact existed where Plaintiffs challenged Washington statutes regulating rights and privileges of minors, where Plaintiffs alleged they were injured by being forced to alter their parenting styles for fear their children would run away to seek gender-affirming care. Alteration of parenting styles was a voluntary action in response to the possibility of the statutes' impact on parents, not due to any actual requirement they imposed. Plaintiffs could not create standing by self-inflicting harm based on "fears of hypothetical future harm." [*International Partners for Ethical Care Inc. v. Ferguson* (9th Cir. 2025) 146 F4th 841, 848-849]

Redressability

- [2:4242.3] **Relief must be likely to redress injury:** Fuel producers challenged EPA's approval of California regulations that would require automakers to manufacture more electric vehicles and fewer gas-powered vehicles to decrease greenhouse-gas emissions. Fuel producers demonstrated injury in fact and causation because decreased purchases of gasoline resulting from the regulations constituted a monetary injury. Redressability was also satisfied because invalidating the regulations would likely result in more revenue. [*Diamond Alternative Energy, LLC v. Environmental Protection Agency* (2025) 606 US 100, 104, 113-114, 145 S.Ct. 2121, 2129, 2135]

Mootness Limitation

Cessation of challenged conduct

- [2:4303.1] **Statutory change raises presumption of mootness:** See *Coastal Environmental Rights Found. v. Naples Restaurant Group, LLC* (9th Cir. 2025) 158 F4th 1052, 1055—environmental group's lawsuit against restaurant, alleging restaurant's unpermitted fireworks show violated Clean Water Act, rendered moot after regional water quality control board issued permit authorizing fireworks.
- [2:4304] **Public official leaves office:** See *Garnier v. O'Connor-Ratcliff* (9th Cir. 2025) 136 F4th 1181, 1187—claim against public official who left office during litigation became moot.

Ripeness

Prudential considerations

- [2:4338.5] **Prudential factors not considered for private contractual disputes:** See *50 Exchange Terrace LLC v. Mount Vernon Specialty Ins. Co.* (9th Cir. 2025) 129 F4th 1186, 1188—action by insured brought while required appraisal was pending was not ripe and insured lacked standing based on Article III analysis.

First Amendment claims

- [2:4363] **Pre-enforcement challenge:** Because of the interests at stake in the First Amendment context, courts find that a plaintiff need not await consummation of threatened

injury before challenging a law restricting speech. For *pre-enforcement challenges* to laws regulating protected speech, courts examine (i) whether plaintiffs have articulated a concrete plan to violate the law; (ii) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and (iii) the history of past prosecution or enforcement under the challenged statute. [*Twitter, Inc. v. Paxton* (9th Cir. 2022) 56 F4th 1170, 1173-1174; see also *Mahmoud v. Taylor* (2025) 606 US 522, 560, 145 S.Ct. 2332, 2358—for First Amendment pre-enforcement challenge, plaintiff must show impending injury or substantial risk harm will occur]

- [2:4363] **Retaliation:** In a First Amendment *retaliation* case, where plaintiff challenges a state action taken against plaintiff for exercising First Amendment rights, the court's inquiry focuses on the three elements of Article III standing, and the injury in fact element can be satisfied by showing self-censorship or chilled speech. [*Twitter, Inc. v. Paxton* (9th Cir. 2022) 56 F4th 1170, 1174-1175—Twitter's claim that attorney general's investigation was in retaliation for Twitter exercising First Amendment rights was unripe where Twitter failed to allege any chilling effect on speech or other cognizable injury]

Abstention

***Younger* abstention**

- [2:4444] **Application in state civil enforcement proceedings:** *Younger* abstention applies to civil enforcement proceedings where: (i) state civil proceedings are ongoing; (ii) the proceedings are quasi-criminal enforcement actions; (iii) the proceedings implicate an important state interest; and (iv) the litigants have an opportunity to raise federal challenges to the state proceedings. [*Yelp Inc. v. Paxton* (9th Cir. 2025) 137 F4th 944, 950]
- [2:4494] **Extraordinary exceptions to *Younger* abstention:** First Amendment concerns did not trigger the extraordinary circumstances exception, where Washington Medical Commission brought disciplinary action against doctors who allegedly spread COVID-19 misinformation, and doctors and medical-freedom advocates responded with free speech and due process challenges. *Younger* abstention barred the federal court's consideration of challenges to the ongoing state enforcement proceedings, and doctors' argument that those proceedings were in bad faith for violating doctors' free speech was insufficient to invoke the exception. [*Stockton v. Brown* (9th Cir. 2025) 152 F4th 1124, 1138-1140]

Limitations Affecting Matters Subject to Administrative Regulation

Federal court review under Administrative Procedure Act

- [2:4605] **Standard of review:** When an agency interprets a statute, judicial review of the agency's interpretation is de novo, but when an agency exercises discretion granted by

a statute, judicial review is under the Administrative Procedure Act's deferential arbitrary and capricious standard. [*Seven County Infrastructure Coalition v. Eagle County, Colorado* (2025) 605 US 168, 179-180, 145 S.Ct. 1497, 1511; *Sierra Club v. Federal Energy Regulatory Comm'n* (DC Cir. 2025) 153 F4th 1295, 1303, 1304]

- [2:4606] **Limitation—when court may defer to agency's interpretation of regulation:** A court may defer to an agency's interpretation of its own regulation when the following criteria are met: the regulation is genuinely ambiguous; the interpretation is reasonable; and the interpretation is entitled to controlling weight. [*Cascadia Wildlands v. United States Bureau of Land Mgmt.* (9th Cir. 2025) 153 F4th 869, 894]

- [2:4608] **Application:** Environmental groups petitioned for review of Federal Energy Regulatory Commission's (FERC) orders approving natural gas pipeline, alleging violations of National Environmental Policy Act (NEPA). The Court affirmed the lower court's denial of the petitions, noting that NEPA is a procedural statute that requires agencies to prepare an environment impact statement when a federal action affects the human environment, and that NEPA does not impose any substantive environmental obligations or restrictions. Deference is a "bedrock principle of judicial review" in NEPA cases, meaning that "NEPA does not authorize a court to interject itself" into the agency's discretion, as long as the agency's choices "fall within a broad zone of reasonableness." The Court denied the petitions because FERC reasonably exercised its duties under NEPA. [*Sierra Club v. Federal Energy Regulatory Comm'n* (DC Cir. 2025) 153 F4th 1295, 1303, 1305 (internal citations omitted)]

- [2:4610] **Former "*Chevron* deference" overturned:** See *City & County of San Francisco, Calif. v. Environmental Protection Agency* (2025) 604 US 334, 355, 145 S.Ct. 704, 720 (reaffirming rejection of earlier *Chevron* deference position: "we are not obligated to accept administrative guidance that conflicts with the statutory language it purports to implement").

- [2:4640] **Where matter is committed entirely to agency discretion:** Judicial review under APA was permissible where meaningful standards existed for court to evaluate agency's decision despite broad discretionary authority granted to agency. [*Johnson v. United States* (9th Cir. 2025) 145 F4th 1158, 1163-1164]

"*Rooker-Feldman* Doctrine" Bar to Review of State Court Judgments

Fraud in state court proceeding

- [2:4990] **Federal suit not barred:** See *Miroth v. County of Trinity* (9th Cir. 2025) 136 F4th 1141, 1151—*Rooker-Feldman* doctrine did not bar parents' civil rights lawsuit against county officials who allegedly committed fraud in state court proceedings to terminate parents' rights.

CHAPTER 3

PERSONAL JURISDICTION

"Minimum Contacts" Doctrine—Specific Personal Jurisdiction

[3:137.1] **Cause of action related to local activity—"but for" test:** Same-sex couple purchased an airline ticket in Saudi Arabia to fly to California. Couple brought action in federal court in California against Airline alleging breach of contract and tort claims for public disclosure of marital status and sexual orientation. Exercise of specific personal jurisdiction over Airline was proper; i.e., "but for" entering into contract of carriage, the couple would not have had to disclose their relationship to the Airline, and the subsequent disclosure by Airline would not have happened. Even though tortious conduct commenced in Saudi Arabia, it continued into California on flight. [*Doe v. Deutsche Lufthansa* (9th Cir. 2025) 157 F4th 1103, 1112-1113]

"Minimum contacts" through use of Internet

[3:89.10; 3:245-246] **National interactive ecommerce platforms:** An interactive ecommerce platform "expressly aims its wrongful conduct toward a forum state" for purposes of specific jurisdiction "when its contacts are its own choice and not random, isolated, or fortuitous, even if that platform cultivates a nationwide audience for commercial gain." [*Briskin v. Shopify, Inc.* (9th Cir. 2025) 135 F4th 739, 758 (en banc) (internal quotes omitted)]

Plaintiff, a California resident, brought privacy-related tort actions against Defendant, a payment processing ecommerce platform. While processing Plaintiff's payment for an online purchase, Defendant allegedly installed cookies on Plaintiff's computer that tracked Plaintiff's location and collected data on Plaintiff's shopping activity. Defendant expressly aimed its conduct at California through its extraction, maintenance, and commercial distribution of Plaintiff's personal data in violation of California laws. [*Briskin v. Shopify, Inc.* (9th Cir. 2025) 135 F4th 739, 757-758 (en banc) (rejecting differential targeting requirement, in which defendant targets 1 forum more than other forums) (overruling *Will Co., Ltd. v. Lee* (9th Cir. 2022) 47 F4th 917, 919, and *AMA Multimedia, LLC v. Wanat* (9th Cir. 2020) 970 F3d 1201); *see discussion at* ¶*3:89.1*]

CHAPTER 4

VENUE

Challenging Improper Venue

[4:693; 4:694] **Burden of Proof:** If venue is challenged, the majority of circuits place the burden of proof on the plaintiff to establish by a preponderance of the evidence that venue is proper in the selected forum. [See *Tobien v. Nationwide Gen. Ins. Co.* (6th Cir. 2025) 133 F4th 613, 619]

Multidistrict Litigation Rules

[4:931] **Judicial Panel on Multidistrict Litigation (JPMDL) has**

broad discretion: 28 USC §1407 requires that "unusually broad discretion" be granted to the JPMDL "to carry out its assigned functions." Review of a JPML order may only be sought by petition for an extraordinary writ pursuant to 28 USC §1651. [*Uber Techs., Inc. v. United States Judicial Panel on Multidistrict Litig.* (9th Cir. 2025) 131 F4th 661, 668 (internal quotes omitted); 28 USC §1407(e)]

[4:932.1] **Criteria for transfer:** Section 28 USC §1407 does not require that common factual questions predominate over individual ones. The statute "does not require a complete identity or even majority of common factual issues as a prerequisite to transfer." [*In re Aqueous Film-Forming Foams Products Liability Litig.* (JPML 2023) 669 F.Supp.3d 1375, 1380 (internal quotes omitted)]

CHAPTER 5

SERVICE OF PROCESS

Constitutional Requirements

Method chosen must be reasonably calculated to provide actual notice

- [5:8] **Actual notice not essential:** Application of the *Mullane* rule (*Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 US 306, 314-315, 70 S.Ct. 652, 657-658) as to whether the notice was reasonably calculated to inform those affected "will vary with [the] circumstances and conditions of a particular case." Thus, while actual notice may not be required to satisfy due process, "adequate notice requires something more than employing means that knowingly result in a failure to provide notice." [*United States v. Rivera-Valdes* (9th Cir. 2025) 157 F4th 978, 985 (internal quotes omitted)]

Mailed notice meets constitutional minimum where defendant's whereabouts ascertainable

- [5:12] **Effect of mail returned undelivered:** The federal government sent notice of a removal hearing to an immigrant by certified mail, but it was returned as unclaimed. Therefore, the immigrant did not receive actual notice of the removal hearing. After the government learned the mail service attempt had failed, it was obligated to take additional reasonable steps to provide notice. Although the government did not need to prove actual notice, "adequate notice requires something more than employing means that knowingly result in a failure to provide notice." Thus, the attempted notice was not "reasonably calculated" to notify the immigrant of the action. [*United States v. Rivera-Valdes* (9th Cir. 2025) 157 F4th 978, 981-982, 985, 993]

CHAPTER 6

DEFAULTS

Default Judgments

Limitations on default judgments—scope of relief

- [6:131.2] **Compare—unquantified damages pled in amount to be determined at trial:** FRCP 54(c) does not bar an award of actual damages in a default judgment where the complaint seeks unquantified actual damages in an amount to be proven at trial. [*AirDoctor, LLC v. Xiamen Qichuang Trade Co., Ltd.* (9th Cir. 2025) 134 F4th 552, 555 (reversing denial of damages award and remanding to district court for further prove-up proceeding)]

Setting Aside a Default or Default Judgment

Vacating default judgments—timeliness requirement

- [6:210.5; 6:216.1] **Void judgments distinguished:** A motion to void a judgment under FRCP 60(b)(4) must be brought within a "reasonable time," which can exceed the one-year time limit for FRCP 60(b)(1)-(3) motions. [*Coney Island Auto Parts Unlimited, Inc. v. Burton* (2026) 607 US ___, ___, 146 S.Ct. 579, 584-585—6-year gap between default judgment in bankruptcy court and motion to void default judgment was not reasonable]

CHAPTER 7

PARTIES

"Real Party in Interest" Requirements

"Real party in interest" in diversity jurisdiction cases

- [7:3.1e] **Limited liability companies (LLCs):** Similar to corporations (¶*7:3.1c*), where plaintiff's claimed injuries are not distinct from the LLC's own injuries, such injuries do not confer Article III standing or make the plaintiff the real party in interest under FRCP 17(a). [*Kenney v. Wells Fargo Bank, N.A.* (CD CA 2025) 791 F.Supp.3d 1163, 1168-1169]

Permissive Intervention (FRCP 24(b))

Grounds for permissive intervention—media access to judicial records

- [7:248.3] **Compliance with discovery orders:** By intervening for the limited purpose of obtaining access to sealed records, a media entity obtains the same rights *and obligations* as any other party to the litigation, including the requirement to comply with court orders managing discovery. [*Cahill v. Insider Inc.* (9th Cir. 2025) 131 F4th 933, 938-939—court possessed inherent powers to order media organization to return or destroy confidential documents where media organization voluntarily intervened, submitting to court's jurisdiction]

CHAPTER 8

PLEADINGS

Pleading Standards

Short and plain statement of claim or defense

- [8:96.6] **Facts disproving statutory exemption/affirmative defense need not be pled:** Where a statute has exemptions from prohibited conduct, constituting affirmative defenses, the party raising the exemptions will have the burden to plead and prove them. But the plaintiff is not required to plead facts disproving applicability of statutory exemptions/affirmative defenses at the pleading stage. [*Cunningham v. Cornell Univ.* (2025) 604 US 693, 701-702, 145 S.Ct. 1020, 1027-1028—plaintiffs who accused ERISA fiduciaries of misconduct not required to plead allegations to disprove statutory exemptions to proscribed conduct, since fiduciary would bear burden of pleading and proving exemption applied]
- [8:122; 8:175] **Complaints with multiple claims/ defendants:** Collectively pled complaints (i.e., containing multiple claims and defendants) are not per se prohibited so long as the complaint gives each defendant fair notice of each claim against them. [*Briskin v. Shopify, Inc.* (9th Cir. 2025) 135 F4th 739, 762 (en banc)—district court erred in dismissing complaint that collectively pled claims against three defendants for violation of Calif. consumer privacy laws, where complaint provided sufficient information to give each defendant fair notice of claims against them]
- [8:123; 8:124.1; 8:128] **Limitation—"plausible claim" required:** Plausible does not mean "probably." Plausibility asks for more than a "sheer possibility." [*Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos* (2025) 605 US 280, 291, 145 S.Ct. 1556, 1565 (internal quotes omitted)—where government of Mexico claimed gun makers aided and abetted illegal trafficking of guns into Mexico, Mexico failed to plausibly allege "conscious and culpable participation in another's wrongdoing" needed for aiding and abetting claim]

Securities fraud actions

- [8:321] **Claims under 1933 Securities Act:** Sections 11 and 12(a)(2) of the 1933 Securities Act ("Act") impose liability on certain participants in a registered securities offering when the registration statement or prospectus associated with the offering contains material misstatements or omissions. Section 11 imposes strict liability on issuers and signatories, and negligence liability on underwriters, and a Section 11 claim belongs to anyone acquiring such a security. Section 12(a)(2) imposes liability under similar circumstances against certain statutory sellers for misstatements or omissions in a prospectus. Section 15 of the Act imposes liability on individuals or entities that control any person liable under §11 or §12. [15 USC §§77k, 77(a)(2), 77o]

- [8:321] The stricter PSLRA pleading requirements do not apply to claims under Section 11 or Section 12(a)(2) because scienter, reliance, and loss causation are not elements of §11 or §12(a)(2) claims that need to satisfy heightened particularity of FRCP 9(b) unless they are based on fraud. [*Omnicare, Inc. v. Laborers Dist. Council Const. Industry Pension Fund* (2015) 575 US 175, 179, 135 S.Ct. 1318, 1323—plaintiff bringing §11 claim need not prove defendant acted with intent to deceive or defraud]
- [8:321] However, a plaintiff must plead a §11 claim with particularly where plaintiff relies entirely on defendant's alleged fraudulent conduct as the basis of the claim. [*Pino v. Cardone Capital, LLC* (9th Cir. 2025) 139 F4th 1102, 1110—§11 claim must be pled with particularity where factual allegations sound in fraud]

Complaint

Subject Matter Jurisdiction Allegation

- [8:507] **Judicial notice of citizenship?** In the Ninth Circuit, plaintiff cannot establish jurisdiction by asking the court to take judicial notice of a party's citizenship. [*Rosenwald v. Kimberly-Clark Corp.* (9th Cir. 2025) 152 F4th 1167, 1174-1175—citizenship of corporate defendant could not be established via judicial notice of exhibit attached to complaint (but noting circuit split on issue)]

Answer

Affirmative Defenses

- [8:1009.2] **Claim preclusion—state law claim dismissed *without prejudice* precluded same claim in later suit:** Plaintiff sued Employer in federal court, asserting federal claim for discrimination and state law claim for wrongful termination. District Court resolved the federal claim after exercising federal question jurisdiction, but declined to exercise supplemental jurisdiction over the state law claim, dismissing it without prejudice. Plaintiff filed his state law claim in a new case in state court, then Defendant removed the case to federal court and sought dismissal based on claim preclusion. Because Plaintiff could have asserted diversity jurisdiction in the earlier case to allow the court to resolve the state law claim, he was precluded from bringing the claim in a new case. Although dismissal without prejudice is generally not a final judgment on the merits, the issue for claim preclusion is whether there was a dismissal without prejudice as to the cause of action rather than the individual claim. As the district court had issued a judgment on the merits for the federal claim, which arose from the same operative facts as the state law claim, the final judgment on the federal claim foreclosed the state law claim in the new case. [*Markley v. U.S. Bank Nat'l Ass'n* (10th Cir. 2025) 142 F4th 732, 735, 739-740]

Amended and Supplemental Pleadings

Relation to other federal rules

- [8:1393; 8:1400] **Amendment after entry of judgment first requires FRCP 60(b) relief:** A party seeking to amend the complaint after the court has entered judgment must first satisfy the FRCP 60(b) standard for the court to grant relief from the judgment, before the FRCP 15(a) liberal amendment policy applies. Otherwise, FRCP 15(a) does not permit amendment after a final judgment. [*BLOM Bank SAL v. Honickman* (2025) 605 US 204, 210, 145 S.Ct. 1612, 1619]

CHAPTER 9

ATTACKING THE PLEADINGS

Motion to Dismiss

[9:188a] **FRCP 12(b)(6) motion to dismiss based on preemption:** See *King v. Navy Fed. Credit Union* (9th Cir. 2025) 148 F4th 628, 631-631 (affirming dismissal of state law claims challenging federal credit union's account fees based on express preemption by National Credit Union Administration regulation)]

Where Motion to Dismiss Not Appropriate

[9:239.8] **Exhaustion of administrative remedies under PLRA:** Under the Prison Litigation Reform Act (PLRA), prisoners complaining of prison conditions must first exhaust available administrative remedies before filing a federal lawsuit. [42 USC §1997e(a)] When the issue of whether a prisoner has exhausted administrative procedures is intertwined with the merits of the lawsuit, the prisoner is entitled to a jury trial on the exhaustion issue. [*Perttu v. Richards* (2025) 605 US 460, 468, 145 S.Ct. 1793, 1800—prisoners entitled to jury trial on exhaustion issue where they were allegedly threatened and retaliated against for attempting to exhaust grievance procedures]

CHAPTER 10

ACTIONS WITH SPECIAL PROCEDURAL REQUIREMENTS

Declaratory Relief

"Case or controversy" limitation

- [10:27.7] **Copyright actions:** A party may seek a declaratory judgment as to whether a particular work will infringe another's copyright if the dispute has ripened into an actual controversy (e.g., copyright owner has threatened to sue if the other work is published). [*Yuga Labs, Inc. v. Ripps* (9th Cir. 2025) 144 F4th 1137, 1177 (affirming dismissal of Defendants' declaratory relief counterclaims where Plaintiff had not registered copyright related to NFT images, but noting that Defendants could reassert claims later if Plaintiff registered copyright and then threatened litigation)]

Class actions

FRCP 23(a) class action prerequisites

- [10:273.13] **Commonality:** Commonality was satisfied where putative class of immigration detainees subject to mandatory detention were denied individualized bond determination by immigration judges. Class members do not need to "share every fact in common or completely identical legal issues," given that Rule 23(a)(1) does not require uniformity, but rather courts only look for "some shared legal issue or a common core of facts." [*Rodriguez v. Bostock* (WD WA 2025) 349 FRD 333, 354 (internal quotes omitted)]

FRCP 23(b) grounds for class action

- [10:413.15] **Whether common questions predominate:** In an action by insureds against automobile insurer, individual issues predominated, where insureds challenged insurer's adjustments to cash value calculations of totaled vehicles. Class action was inappropriate given that each individual putative class member would need to compare insurer's allegedly flawed calculation to the correct one to determine whether that individual was harmed. [*Ambrosio v. Progressive Preferred Ins. Co.* (9th Cir. 2025) 154 F4th 1107, 1108, 1112-1113]

Federal question jurisdiction

- [10:491.1; 10:491.5] **Securities fraud class actions:** The Securities Litigation Uniform Standards Act of 1998 (SLUSA) establishes that federal courts have exclusive jurisdiction in class actions under the Securities Exchange Act of 1934 (15 USC §78a et seq.) for fraud in connection with the purchase or sale of nationally traded securities. [15 USC §78bb(f)] However, the SLUSA neither strips state courts of jurisdiction to adjudicate class actions for violations of the Securities Act of 1933 (15 USC §77a et seq.) nor authorizes removing such suits from state to federal court. [15 USC §77p(b), (c); *Cyan, Inc. v. Beaver County Employees Retirement Fund* (2018) 583 US 416, 426-427, 138 S.Ct. 1061, 1069-1070]

Minimal Diversity class actions (Class Action Fairness Act)

- [10:497.5] **Effect of postremoval amendment to remove class allegations:** If plaintiff's postremoval amendment to the complaint removes the class action allegations that were necessary to meet CAFA's minimal diversity requirements, the court no longer has jurisdiction and should remand (unless another basis for federal jurisdiction is established). [*Faulk v. JELD-WEN, Inc.* (9th Cir. 2025) 159 F4th 618, 620-621, 625]

CHAPTER 11

DISCLOSURE AND DISCOVERY

Duty to Preserve Information Before Discovery Request

[11:140] **Sanctions for destruction ("spoliation") of**

evidence: Sanctions for spoliation of evidence may be imposed under the court's inherent power to manage its own affairs. [*MS Amlin Marine NV v. Delta Marine Indus.* (WD WA 2025) 348 FRD 658, 679-680 (listing elements to consider before imposing spoliation sanctions)]

[11:156] **Terminating sanctions—default or dismissal:** Terminating sanctions are the court's most severe punishment for knowing and egregious discovery abuses. [*American Career College Inc. v. Medina* (CD CA 2023) 673 F.Supp.3d 1139, 1149-1152—district court ordered terminating sanctions after finding plaintiffs were prejudiced by defendants destroying evidence, disobeying court orders, and providing false deposition testimony]

Initial Disclosures

[11:281.1] ***PRACTICE POINTER RE DAMAGES DISCLOSURES:*** Notwithstanding the lack of clarity in defining "category of damages," it is essential that counsel make key damages disclosures consistent with any scheduling order the court may issue. Do not assume the court will permit a late supplemental disclosure. Failure to make timely disclosures may risk exclusion of damages evidence entirely. [*Bespoke Studio, Inc. v. Gabbe Private Ltd.* (ND FL 2024) 348 FRD 262, 265-266—court denied party's effort to submit supplemental disclosure of damages, where party's failure to timely make any FRCP 26(a)(1)(iii) initial disclosure of damages was neither justified nor harmless]

Expert Witness Disclosure and Discovery

[11:401] ***PRACTICE POINTER RE EXPERT REPORT:*** The expert's report must be sufficiently comprehensive to cover all aspects of the anticipated testimony at deposition and/or trial. Courts generally exclude expert opinion testimony that is not disclosed in the report. [*Science Applications Int'l Corp. v. United States* (2025) 175 Fed.Cl. 389, 405]

Limitations on Right to Discovery

[11:527.3b] **Court order for expedited discovery:** Good cause was found for expedited discovery in trademark infringement action concerning counterfeit supplements where plaintiffs sought to identify Doe defendants in effort to obtain preliminary injunction to prevent harm to their business. [*Solv Wellness, Inc. v. Does 1-10* (ND GA 2025) 788 F.Supp.3d 1252, 1260]

International Discovery

[11:1304] **Discovery in U.S. by Foreign Litigants (28 USC §1782(a))**: District court has discretion to permit discovery under 28 USC §1782(a). [*In re Banco Mercantil del Norte, S.A.* (4th Cir. 2025) 126 F4th 926, 932-933—factors cited in *Intel Corp. v. Advanced Micro Devices, Inc.* (2004) 542 US 241, weighed in favor of granting discovery under 28 USC §1782]

Sanctions for Failure to Comply with Court Order Compelling Discovery

[11:2416] **Striking pleadings, dismissal or default limited to**

extreme circumstances: See *Freeman v. Guiliani* (D DC 2023) 691 F.Supp.3d 32, 63-65—default judgment entered due to defendant's pattern of willful discovery violations.

CHAPTER 12

MOTION PRACTICE

Rules Governing Motions

Rule 11 Considerations

- [12:12.2] **Caution—use of AI:** By signing a legal filing, an attorney represents that they have reviewed the document, believe it is supported by the facts and the law, and are not acting for an improper purpose. Violations can lead to FRCP 11 sanctions. [*Wadsworth v. Walmart Inc.* (D WY 2025) 348 FRD 489, 495-497—court imposed FRCP 11 sanctions against attorneys who prepared and/or signed motions containing fake case citations and quotations generated by AI]

CHAPTER 13

INJUNCTIONS

Procedural Considerations

Standing

- [13:21.7] **Plaintiff must demonstrate each element of standing:** Plaintiffs sought injunctive relief against Arizona Secretary of State challenging Secretary's statutory duty to canvass election results and prevent voter intimidation, alleging violations of plaintiffs' free speech and due process rights. The Ninth Circuit affirmed the district court's grant of an injunction as to the voter intimidation claim, but vacated the injunction as to the canvass claim finding that plaintiffs had failed to point to any specific election where county officials were likely to violate their mandatory duty to certify election results, thereby failing to establish the requisite injury in fact. [*American Encore v. Fontes* (9th Cir. 2025) 152 F4th 1097, 1111-1113]

Requirements for Injunctive Relief

Likelihood of irreparable injury

- [13:65.1] **Likelihood of irreparable injury easily established in First Amendment cases:** See *Hubbard v. City of San Diego* (9th Cir. 2025) 139 F4th 843, 853—"irreparable harm is relatively easy to establish in a First Amendment case because the party seeking the injunction need only demonstrate the existence of a colorable First Amendment claim" (internal quotes omitted).

Effect of Order Granting Preliminary Injunction

Attorney fees

- [13:179.3] **"Prevailing party" status for fee**

award: Preliminary injunctions do not conclusively resolve the rights of parties on the merits and therefore do not confer "prevailing party" status. [*Lackey v. Stinnie* (2025) 604 US 192, 201, 207, 145 S.Ct. 659, 667, 671—party prevails when court grants enduring relief on the merits that alters legal relationship between parties; drivers whose licenses were suspended under Virginia statute obtained preliminary injunction, but were not entitled to attorney fees where statute was repealed before final judgment thereby rendering action moot]

Geographic Scope of Preliminary Injunction

Limitation on universal injunctions

- [13:190.2a] **Universal injunctions likely exceed court's authority:** When district courts assert the power to prohibit enforcement of a law or policy against anyone, such a nationwide or universal injunction likely exceeds the equitable authority granted by Congress to the courts. [*Trump v. CASA, Inc.* (2025) 606 US 831, 841-847, 145 S.Ct. 2540, 2550-2554 (granting partial stay of universal preliminary injunctions of executive order on birthright citizenship to extent injunctions were broader than necessary to provide complete relief to plaintiffs who had standing)]
- [13:190.2b] **Compare—nationwide relief in class actions:** A significant problem with universal injunctions is that they circumvent the FRCP 23 requirements by allowing "courts to create de facto class actions at will" to provide relief to parties and nonparties alike. [*Trump v. CASA, Inc.* (2025) 606 US 831, 849, 145 S.Ct. 2540, 2556 (internal quotes omitted)] Plaintiffs who challenge a federal law may still seek injunctive relief through a class action brought under FRCP 23. [*Trump v. CASA, Inc.,* supra, 606 US at 869, 145 S.Ct. at 2567 (J. Kavanaugh concur.opn.); *A.A.R.P. v. Trump* (2025) 605 US 91, 97, 145 S.Ct. 1364, 1369—Supreme Court could properly issue temporary injunctive relief to putative class of immigration detainees to preserve its jurisdiction pending appeal; *CASA, Inc. v. Trump* (D MD 2025) 793 F.Supp.3d 687, 699-700 (enjoining enforcement of executive order on birthright citizenship with respect to nationwide certified class)]
- [13:190.2c] **Compare—nationwide injunction to grant complete relief:** A nationwide preliminary injunction may be appropriate, and within the jurisdiction of the district court to issue, when necessary to provide "complete relief" to plaintiffs. [*Washington v. Trump* (9th Cir. 2025) 145 F4th 1013, 1037-1039 (dismissing individual plaintiffs' claims but holding universal injunction was necessary to give state plaintiffs complete relief in challenge to executive order on birthright citizenship); see also *National TPS Alliance v. Noem* (9th Cir. 2025) 150 F4th 1000, 1028-1029—nationwide postponement of agency action necessary to provide complete relief to plaintiffs]

Appeal of preliminary injunction order

Standard of review

- [13:225] **Order based on clearly erroneous finding of fact:** A finding of fact will be considered clearly erroneous "if it is implausible in light of the record, viewed in its entirety, or if the record contains no evidence to support it." [*San Luis Obispo Coastkeeper v. County of San Luis Obispo* (9th Cir. 2025) 161 F4th 590, 597 (internal quotes omitted) (vacating preliminary injunction to protect trout under Endangered Species Act, where district court failed to balance equities and public interest with respect to other endangered species)]

Enforcement of Injunction

Contempt proceedings

- [13:254] **Scope of review:** A district court's *decision whether* to hold a party in contempt is reviewed under an abuse of discretion standard. However, a district court's *factual findings* in connection with a contempt order are reviewed for clear error. [*Coleman v. Newson* (9th Cir. 2025) 131 F4th 948, 956]

CHAPTER 14

SUMMARY JUDGMENT

Matters Constituting Proof

[14:166] **"Sham affidavit" (contradicting earlier harmful testimony) does not create issue of fact:** See *Podkulski v. Tucco* (ND IL 2025) 784 F.Supp.3d 1079, 1090-1091—plaintiff's response to summary judgment motion that contradicted earlier deposition testimony violated sham affidavit rule and was thus insufficient to create issue of fact.

Standards Governing Summary Judgment

[14:240] **Whether factual dispute is material:** "Material" facts are those that, under applicable substantive law, *may affect the outcome* of the case. [*National Foam, Inc. v. Zurich American Ins. Co.* (ND CA 2025) 768 F.Supp.3d 1009, 1014]

CHAPTER 15

PRETRIAL CONFERENCE AND SETTLEMENT PROCEDURES

Scheduling Conference ("Initial Status Conference" or "Initial Case Management Conference")

[15:21.2] **Initial management conference in multidistrict litigation cases:** In multidistrict litigation (MDL) cases (¶*15:5.2*), after the Judicial Panel on Multidistrict Litigation transfers actions, the transferee court should schedule an initial management conference to address pretrial activity and order the parties to meet and submit a report to the court before the conference. [FRCP 16.1(a), (b)(1) (added eff. 12/1/25)]

- [15:21.3] **Initial management conference not**

mandatory: Because not all MDL proceedings present the management challenges addressed in FRCP 16.1, courts maintain flexibility in managing MDL proceedings. Thus, an initial management conference, while oftentimes helpful to the transferee judge and parties, is not mandatory. [FRCP 16.1, Adv. Comm. Notes (added eff. 12/1/25)]

- [15:21.4] **Preconference report:** The transferee court ordinarily should order the parties to meet to submit a report to the court about the matters designated in FRCP 16.1(b), and any other matters the court wants the parties to address, prior to the initial management conference. FRCP 16 and 16.1(b) merely provide a series of prompts, not a mandatory checklist, for the transferee court. [FRCP 16.1, Adv. Comm. Notes (added eff. 12/1/25)]
- [15:21.5] **Single report:** Although a single report should be submitted to the court, it may reflect the parties' divergent views on the matters addressed. [FRCP 16.1, Adv. Comm. Notes (added eff. 12/1/25)]
- [15:21.6] **Parties' views on leadership counsel and other matters:** Unless the court orders otherwise, the parties must include in the preconference report their views on: whether leadership counsel should be appointed; any previously entered scheduling or other orders that should be vacated or modified; a schedule for additional management conferences with the court; how to manage the direct filing of new actions in the MDL proceedings; and whether related actions have been, or are expected to be, filed in other courts, and whether to adopt coordination methods. [FRCP 16.1(b)(2)(A)-(E) (added eff. 12/1/25)]
- [15:21.7] **Parties' initial views on various matters:** Certain issues in MDL proceedings may be premature before leadership counsel, if any, is appointed. Thus, FRCP 16.1(b)(3) requires only the parties' *initial views* on the following matters: whether consolidated pleadings should be prepared; how and when the parties will exchange information about the factual bases for their claims and defenses; discovery, including any difficult issues that may arise; any likely pretrial motions; whether the court should consider any measures to facilitate resolving some or all actions before the court; whether any matters should be referred to a magistrate judge or a master; and the principal factual and legal issues likely to be presented. [FRCP 16.1(b)(3)(A)-(G) & Adv. Comm. Notes (added eff. 12/1/25)]

CHAPTER 16

OTHER MOTIONS AND PROCEDURES

Right to Jury Trial

Statutory claims enforceable in federal court & triable by jury

- [16:39.9] Hotel visitor's statutory damages claim against hotel

owner for violations of the Americans with Disabilities Act (42 USC §12181 et seq.) and California's Unruh Civil Rights Act (Calif. Civ.C. §51 et seq.) was a legal claim giving right to a jury trial. [*In re Tsay JBR LLC* (9th Cir. 2025) 136 F4th 1176, 1179-1181]

Statutory claims not triable by jury

- [16:46.15] **Compare—advisory jury:** Even where there is otherwise no right to a jury trial, the court may (discretionary), on its own or on a party's motion, order any issue tried by an advisory jury. [See FRCP 39(c)(1)] But where parties consent to a jury trial (*see* ¶*16:46.10*) and the district court does not specify in advance whether findings made by the jury are nonbinding under FRCP 39(c)(1) or binding under FRCP 39(c)(2), the jury findings are binding by default. [*Thomas v. Broward County Sheriff's Office* (11th Cir. 2023) 71 F4th 1305, 1314-1315 (collecting cases)]

Waiver of right to jury trial

- [16:48.36] **Effect of legal error:** A party's legal error in characterizing the relief sought in a lawsuit does not invalidate its waiver of the right to a jury trial. [*Consumer Fin'l Protection Bureau v. CashCall, Inc.* (9th Cir. 2025) 135 F4th 683, 691—where parties mistakenly characterized restitution claim as equitable rather than legal, shared legal error did not vitiate defendant's waiver of its 7th Amend. right to jury trial]
- [16:48.37] **Effect of posttrial objection on remand:** After a party voluntarily participates in a bench trial, an objection on remand cannot revive a right to a jury trial. [*Consumer Fin'l Protection Bureau v. CashCall, Inc.* (9th Cir. 2025) 135 F4th 683, 691-692—noting defendant never demanded jury trial on remand and "back-handed" argument re 7th Amend. violation due to excess award "was both too little and too late" to undo defendant's jury waiver]

Procedures Relating to Contractual Arbitration

Federal versus state court jurisdiction

- [16:62.5] **On petition to confirm award?** Federal courts have traditionally applied different approaches in determining the amount in controversy to confer jurisdiction on a petition to confirm an arbitration award (e.g., look to the award, the demand or the question of remand). However, after the Supreme Court's decision in *Badgerow v. Walters* (¶*16:60*), facts establishing a jurisdictional basis must be present *on the face of the petition* to confirm or vacate an award. [*Tesla Motors, Inc. v. Balan* (9th Cir. 2025) 134 F4th 558, 561—district court did not have jurisdiction to confirm zero-dollar arbitration award because petition on its face could not support amount in controversy for diversity jurisdiction]

Defenses to arbitration—consent to arbitrate in internet contracts

- [16:73.3e] **Unambiguous manifest assent**

required: Ultimately, the test to enforce an online arbitration agreement hinges on whether the customer actually agreed to—not merely saw—the "terms of use"; i.e., did the user take some action that unambiguously manifested assent to those terms. [*Chabolla v. ClassPass Inc.* (9th Cir. 2025) 129 F4th 1147, 1158—notice must explicitly notify user of legal significance of action to be taken to enter into contractual agreement; *Godun v. JustAnswer LLC* (9th Cir. 2025) 135 F4th 699, 710-711—unambiguous manifest assent occurs in inquiry notice context only where webpage explains certain actions by customer will signal assent to contractual terms and identifies what those actions are]

Voluntary Dismissals (FRCP 41)

Effect of voluntary dismissal without prejudice

- [16:390.1] **Considered final judgment:** A FRCP 41(a) voluntary dismissal without prejudice qualifies as a final judgment under FRCP 60(b). [*Waetzig v. Halliburton Energy Services, Inc.* (2025) 604 US 305, 311-312, 145 S.Ct. 690, 696]

  Comment—alternatives to dismissal pending arbitration: In *Waetzig v. Halliburton Energy Services, Inc.*, supra, the parties dismissed the action in order to proceed with arbitration. Alternatively, a court may dismiss an action based on separate, independent grounds unrelated to arbitration (i.e., lack of jurisdiction), *see* ¶*16:110*. Rather than ordering dismissal, however, courts typically stay the case pending the result of the arbitration. [See *Smith v. Spizzirri* (2024) 601 US 472, 478, 144 S.Ct. 1173, 1178] A plaintiff also can move to abate the case pending arbitration as an alternative to dismissal. [See *Waetzig v. Halliburton Energy Services, Inc.* (10th Cir. 2025) 145 F4th 1279, 1284]

CHAPTER 17

SANCTIONS

FRCP 11

Sanctions for violations—against whom sanctions awardable

- [17:176.1] **Joint and several liability of counsel:** When several lawyers contribute to a brief containing misrepresentations sanctionable under Rule 11, the court may award sanctions jointly and severally against all counsel. [*Lake v. Gates* (9th Cir. 2025) 130 F4th 1054, 1059-1060—declining to adopt heightened causation analysis (attorney-by-attorney analysis of who caused specific fees) because it would require litigants to maintain billing records with "unreasonable level of granularity"]

Grounds for sanctions—credible evidence standard

- [17:247.1] **"Of counsel" subject to Rule 11 sanctions:** The Ninth Circuit has held that "of counsel" attorneys may be held liable for Rule 11 sanctions if they sign a pleading without

a reasonable basis to believe the pleadings are not frivolous and are based on facts, even if the misstated facts are outside the scope of the attorney's role. [*Lake v. Gates* (9th Cir. 2025) 130 F4th 1054, 1060-1061—"of counsel" attorney responsible for 1 section of brief that did not contain misstated allegations could still be subject to Rule 11 sanctions (declining to retroactively apply rule in this case)]

- [17:256.1] **Application—reliance on inquiry by third person:** Plaintiff's counsel filed initial complaint without first interviewing confidential source to confirm the allegations. Although counsel subsequently amended the complaint, counsel did so knowing that the investigator's information from interviewing the key witness was unverified and potentially unreliable, and the key witness was refusing to cooperate further. Rule 11(b) sanctions were appropriate against counsel for failing to conduct its own reasonable investigation. [*City of Livonia Employees' Retirement System v. Boeing Co.* (ND IL 2014) 306 FRD 175, 181-182]

Grounds for sanctions—not "warranted by law"

- [17:67.1; 17:111.2; 17:284.1] ***CAUTION—failure to verify AI generated research:*** The use of artificial intelligence (AI) as a tool for legal drafting is an increasingly concerning issue for courts and litigators. AI is known to "hallucinate" cases (i.e., make up fake legal citations). The inclusion of false citations, whatever the source, in motion papers is a serious violation of an attorney's ethical duty under Rule 11 and may also violate a court's local rules and the district judge's procedures, resulting in sanctions against both attorneys and their law firms. [*Benjamin v. Costco Wholesale Corp.* (ED NY 2025) 779 F.Supp.3d 341, 351 ($1,000 monetary sanction imposed against counsel sua sponte); *Wadsworth v. Walmart Inc.* (D WY 2025) 348 FRD 489, 499 (revoking counsel's pro hac vice admission, removing attorney as counsel of record, and imposing $3,000 fine against drafting attorney and $1,000 fine against attorney who signed, but did not draft, brief); *Mata v. Avianca, Inc*. (SD NY 2023) 678 F.Supp.3d 443, 464-466 (sanctioning law firm and lawyers jointly and severally for citing nonexistent judicial opinions, including imposition of $5,000 fine and requiring notification of sanctions to client and judges whose names were wrongfully invoked)]

Alternatives to FRCP 11—28 USC §1927

Against whom §1927 sanctions awardable

- [17:685.1] **Award against attorney not of record:** Attorneys that are admitted to conduct cases in any U.S. court, even if not an attorney of record in the case, are subject to §1927 sanctions. [*Rowland v. Watchtower Bible & Tract Soc. of N.Y., Inc.* (9th Cir. 2025) 142 F4th 1169, 1173—general counsel who was not attorney of record but signed affidavit demonstrating reckless disregard of accurate facts regarding court's personal jurisdiction was subject to sanctions under §1927]

Alternatives to FRCP 11—Court's Inherent Power to Sanction

Bad faith conduct

- [17:712.2] **Improper influence over judicial process:** Courts may use their inherent powers to sanction prelitigation conduct that is intended to improperly influence the judicial process. [*Sofaly v. Portfolio Recovery Assocs., LLC* (3rd Cir. 2025) 155 F4th 289, 295—attorneys who engaged in deceptive scheme to manufacture violations of Fair Debt Collection Practices Act by sending fake dispute letters to debt collectors were subject to sanctions where letters were intended to deceive court and meddle with record]
- [17:720] **Pattern of vexatious litigation:** In assessing bad faith for imposing sanctions under its inherent powers, courts also may consider litigation conduct in other cases to determine if there is a "pattern of misusing the courts." [*Trump v. Clinton* (11th Cir. 2025) 161 F4th 671, 690-691 (internal quotes omitted)]
- [17:61.1; 17:721-722] **Misuse of AI:** Attorneys, as well as their law firm, may be disciplined under the court's inherent power for misuse of AI, provided such conduct constitutes recklessness tantamount to bad faith in failing to ensure the accuracy of cases generated by AI and used in discovery pleadings. [*Johnson v. Dunn* (ND AL 2025) 792 F.Supp.3d 1241, 1259]