

**RUTTER GROUP PRACTICE GUIDE
FEDERAL CIVIL PROCEDURE
BEFORE TRIAL
NATIONAL EDITION
2025 UPDATE**

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These Highlights summarize the most significant developments over the past year. The paragraph numbers are keyed to the 2025 edition of the Practice Guide where the topics are discussed in greater detail. Our cut-off for this Update was December 15, 2024. Some of the new cases cited could be affected by further proceedings, so be sure to check the subsequent histories before citing or relying on them.

Thank You! Your comments and suggestions are an important contribution to this Practice Guide. *Please keep them coming!*

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2025 UPDATE HIGHLIGHTS

CHAPTER 1

PRELIMINARY CONSIDERATIONS

Federal Versus State Law

[1:270] **Procedural Issues in Diversity Case Governed by Federal Law:** See *Voltage Pictures, LLC v. Gussi, S.A. de C.V.* (9th Cir. 2024) 92 F4th 815, 824.

CHAPTER 2C

DIVERSITY JURISDICTION

Type of Claim Affecting Diversity Jurisdiction—Probate Exception

[2:1727] **Not applicable where action purely contractual:** The probate exception did not bar federal jurisdiction over Financial Advisor’s lawsuit seeking fees from deceased Client’s estate. Financial Advisor provided tax and estate planning services under Contract with Client that specified Financial Advisor would be paid upon Client’s death. The action was “purely contractual” and did not require the federal court to probate/annul a will, administer the Client’s estate, or assume in rem jurisdiction of property in the probate court’s custody. (The fact that Contract required appraisal of estate’s assets did not constitute administration of the estate or assumption of in rem jurisdiction over estate property.) [*Silk v. Bond* (9th Cir. 2023) 65 F4th 445, 450-453]

CHAPTER 2D

REMOVAL JURISDICTION

Effects of Postremoval Changes in Case

[2:3615.1] **Amending the complaint:** An amended complaint supersedes the old one, and the original pleading no longer performs any function in the case. “The amended complaint becomes the operative one; and in taking the place of what has come before, it can either create or destroy jurisdiction.” [*Royal Canin USA, Inc. v. Wullschleger* (2025) 604 US 22, 34-35, 145 S.Ct. 41, 51-52]

- [2:3616] **Jurisdiction lost where amendment eliminates federal claims:** A post-removal complaint amendment excising all federal claims destroys the court’s subject matter jurisdiction as well as its supplemental jurisdiction, and the court must remand the case. [*Royal Canin USA, Inc. v. Wullschleger* (2025) 604 US 22, 39, 145 S.Ct. 41, 54-55]
- [2:3625] **Jurisdiction created where complaint amended to include federal claim:** Amending a complaint to add federal claims can *create federal jurisdiction* where it was wanting: “So even if removing the case was improper because the initial complaint did not contain a federal claim, the plaintiff’s later assertion of such a claim establishes jurisdiction going forward.” [*Royal Canin USA, Inc. v. Wullschleger* (2025) 604 US 22, 37-38,

145 S.Ct. 41, 53-54 (collecting cases); see also *Moffitt v. Residential Funding Co., LLC* (4th Cir. 2010) 604 F3d 156, 159—postremoval amendment gave rise to federal jurisdiction under CAFA; *Retail Property Trust v. United Brotherhood of Carpenters & Joiners of America* (9th Cir. 2014) 768 F3d 938, 962—postremoval amended complaint alleging federal labor law claim mooted absence of jurisdiction on removal]

Motion for Remand

Based on defects in removal procedure; may be waived

- [2:3692] **Exception—premature removal:** A notice of removal filed by defendant before a complaint was officially filed (known as a “super snap removal,” see ¶2:2322.1) was premature and had no legal effect because no civil action was yet on file; thus the 30-day time limit for filing a remand motion was not triggered and plaintiff did not waive its right to seek remand based on the defective removal. [*Casola v. Dexcom, Inc.* (9th Cir. 2024) 98 F4th 947, 964]

Order Remanding Removed Action

[2:3958] **Appealability:** Limited review of defendant’s appeal of remand order permitted where remand was based on alleged violation of forum defendant rule and plaintiffs missed 30-day deadline for remand. But appeal was dismissed for lack of jurisdiction, because circuit court correctly found defendant’s initial notices of removal were premature and did not trigger remand motion deadline. [*Casola v. Dexcom, Inc.* (9th Cir. 2024) 98 F4th 947, 963-965]

CHAPTER 2E

SPECIAL JURISDICTIONAL LIMITATIONS

Plaintiff’s Standing to Sue

[2:4115] **Standing of any single plaintiff sufficient:** If any plaintiff has standing, the standing requirement is satisfied for all coplaintiffs who are proper parties on the same complaint seeking the same relief: The “presence of one party with standing assures that [the] controversy before [the] Court is justiciable.” [*Department of Commerce v. United States House of Representatives* (1999) 525 US 316, 328, 119 S.Ct. 765, 773; *Village of Arlington Heights v. Metropolitan Housing Develop. Corp.* (1977) 429 US 252, 264, 97 S.Ct. 555, 563, fn. 9; see also *Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky v. Labrador* (9th Cir. 2024) 122 F4th 825, 836—where legal issues are raised by one plaintiff with standing to bring suit “the court need not consider the standing of the other plaintiffs”]

[2:4140.1] **First Amendment cases—censorship of social media platforms:** Standing did not exist in a case brought by two states and several social media users alleging federal agencies and officials pressured social media platforms into censoring certain social media content in violation of the First Amendment. The social media platforms were not parties to the suit, and enjoining government defendants was unlikely to affect the platforms’ content moderation decisions. Moreover, the social media users had no right to sue over someone

else's censorship and could not point to a specific instance of content moderation that caused them identifiable harm. [*Murthy v. Missouri* (2024) 603 US 43, 73-76, 144 S.Ct. 1972, 1995-1997]

[2:4141.1] **Securities cases (28 USC §10(b)):** Standing to bring a claim for securities fraud under §10(b) of the Securities Exchange Act of 1934 is limited to purchasers and sellers of the particular security as to which the alleged misrepresentations were made. [*In re CCIV/Lucid Motors Secur. Litig.* (9th Cir. 2024) 110 F4th 1181, 1185-1186, citing *Blue Chip Stamps v. Manor Drug Stores* (1975) 421 US 723, 742, 95 S.Ct. 1917, 1928 (setting forth “Birnbaum Rule” limiting standing in securities cases to “purchasers or sellers of the stock in question”)]

“Injury in Fact” Requirement

[2:4151.1] Indirect injury to governmental instrumentality. Injury in fact was demonstrated where state nonprofit government corporation created to service federal student loans would lose \$44 million in service fees as a result of Secretary of Education's loan forgiveness program. [*Biden v. Nebraska* (2023) 600 US 477, 489-491, 216 S.Ct. 2355, 2365-2366]

[2:4165.2] Plaintiffs had standing to challenge regulations under the federal Migratory Bird Treaty Act and California regulations imposing unconstitutional conditions—unannounced, warrantless inspections in violation of the Fourth Amendment—on their right to obtain a falconry license. Reason: Under the “unconstitutional conditions” doctrine, a plaintiff suffers a constitutionally cognizable injury when the government pressures plaintiff into forfeiting a constitutional right in exchange for a benefit (or withholds the benefit for plaintiff's refusal to surrender a constitutional right). Plaintiffs' injury in fact was their forced choice to retain Fourth Amendment rights or receive a falconry license; and they would continue to suffer this injury every time they renewed their licenses. [*Stavriandoudakis v. United States Fish & Wildlife Service* (9th Cir. 2024) 108 F4th 1128, 1136-1139]

[2:4230] Medical Associations' assertion that FDA's accelerated approval of abortion-inducing drug impaired their ability to provide services and achieve their organizational missions did not establish standing. Nor did the fact that the Associations incurred costs to oppose the FDA's actions: “[A]n organization that has not suffered concrete injury . . . cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action.” [*Food & Drug Admin. v. Alliance for Hippocratic Medicine* (2024) 602 US 367, 393-395, 144 S.Ct. 1540, 1563-1564]

Mootness Limitation

[2:4303.2] A statutory change to challenged legislation raises a presumption that the action is moot, unless a reasonable expectation exists that the legislature is likely to enact the same or substantially similar legislation in the future. [*McDonald v. Lawson* (9th Cir. 2024) 94 F4th 864, 868-869 (appeals mooted where California repealed challenged COVID-19 statute and presented evidence it would not enforce violations during time statute was effective)]

[2:4287] A court must consider factual developments occurring after

the suit is filed to ensure an actual controversy continues to exist at all stages of the litigation. [*Bacon v. Woodward* (9th Cir. 2024) 104 F4th 744, 750—court must consider all arguments for why a case “remains live”; see also *City of Erie v. Pap’s A.M.* (2000) 529 US 277, 287, 120 S.Ct. 1382, 1390—“A case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome”]

Pullman Abstention—Avoiding Constitutional Issues

[2:4514] *Pullman* abstention encourages federal courts to avoid constitutional determinations by allowing state courts to construe state law. [*Peridot Tree, Inc. v. City of Sacramento* (9th Cir. 2024) 94 F4th 916, 926]

Even so, federal courts cannot avoid resolving a matter merely because it “approaches the confines” of the Constitution. [*Peridot Tree, Inc. v. City of Sacramento* (9th Cir. 2024) 94 F4th 916, 935-936 (*Pullman* abstention not applicable where state court determination of city ordinance would not moot plaintiff’s dormant Commerce Clause claim that had to be addressed); see also *United States v. Morros* (9th Cir. 2001) 268 F3d 695, 704 (federal court could not abstain from deciding whether Nuclear Waste Policy Act preempted state statute since Act preempted field of nuclear waste disposal)]

Limitations Affecting Matters Subject to Administrative Regulation

[2:4600-4605] **Federal court review under APA:** The Administrative Procedure Act (APA) (5 USC §551 et seq.) governs how federal agencies develop and issue regulations. It provides federal court standing for parties injured by agency actions (§2:4138), and determines the scope (§2:4601) and standard of review (§2:4605).

- [2:4610] **Caution—former “Chevron deference” overturned:** The Supreme Court has overturned a longstanding judicial precedent requiring federal courts to defer to agency interpretations of statutes they administer, concluding that the high court’s prior decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 US 837, 104 S.Ct. 2778, can no longer be “squared” with the dictates of the APA. [*Loper Bright Enterprises v. Raimondo* (2024) 603 US 369, 396, 144 S.Ct. 2244, 2263]

Under *Chevron* deference, federal courts gave effect to Congress’ unambiguously expressed intent regarding agency statutes where such intent was evident. However, where agency statutes appeared *ambiguous*, federal courts deferred to agencies’ “permissible” statutory interpretations even where the courts would *not have reached the same interpretation* had the question originally arisen in a judicial proceeding. [*Loper Bright Enterprises v. Raimondo* (2024) 603 US 369, 396-398, 144 S.Ct. 2244, 2264-2265]

Going forward, federal courts must exercise independent judgment to determine whether an agency has acted within its statutory authority; but they may not defer to the agency’s *interpretation of the law* simply because a statute is ambiguous. [*Loper Bright Enterprises v. Raimondo* (2024) 603 US 369, 412-413, 144 S.Ct. 2244, 2273]

- [2:4611] **Compare—preexisting exceptions to *Chevron* remain:** Even prior to *Loper* (§2:4610), *Chevron* deference did not apply to cases involving “major questions” of economic and political significance. *See discussion at* §2:4381 *ff.*
- [2:4612] **Effect of *Loper* on prior holdings:** The *Loper* decision (§2:4610) makes it clear that prior cases relying on the *Chevron* framework remain good law despite the court’s change in interpretive methodology. [*Loper Bright Enterprises v. Raimondo* (2024) 603 US 369, 412, 144 S.Ct. 2244, 2273]

CHAPTER 3

PERSONAL JURISDICTION

Tradition Bases for Personal Jurisdiction

[3:45.1] **Statutes permitting nationwide service of process:** Establishing venue is not a prerequisite to determining personal jurisdiction. [*Cox v. CoinMarketCap OPCO, LLC* (9th Cir. 2024) 112 F4th 822, 829-834—personal jurisdiction proper under Commodity Exchange Act’s nationwide service of process provision based on defendants’ minimum contacts in U.S. irrespective of venue requirement (defendants filed motion to dismiss for lack of personal jurisdiction but did not assert improper venue)]

Limited Personal Jurisdiction Based on Acts Committed Outside Forum Causing Effect Within Forum

[3:209.5a] **Patent infringement—extra judicial enforcement by patent owner:** Where patent owner (Delaware company) purposefully directed enforcement activities in Utah by submitting patent dispute to Amazon’s patent infringement evaluation process, the patent owner was subject to personal jurisdiction in competitor’s action for declaratory judgment of noninfringement in Utah. The court distinguished enforcement conduct from a passive cease-and-desist letter because the aim of the enforcement conduct was to remove competitor’s listings from Amazon.com, which would affect sales and marketing in Utah. [*SnapPower v. Lighting Defense Group* (Fed.Cir. 2024) 100 F4th 1371, 1375]

CHAPTER 4

VENUE

Specific Venue Statutes

[4:510] **Clean Air Act:** Challenges to nationally applicable regulations must be brought before the D.C. Circuit Court of Appeals, while challenges to actions that are locally or regionally applicable may be filed only in the appropriate regional circuit court of appeals. [See *Hunt Refining Co. v. U.S. Environmental Protection Agency* (11th Cir. 2024) 90 F4th 1107, 1109-1110]

CHAPTER 8

PLEADINGS

Pleading Fraud With Particularity

[8:171] **Pleading time, place, and content of fraud:** The pleading

must identify the time, place, parties involved, content of the representations, and explain how the representations are false. [*In re Cloudera* (9th Cir. 2024) 121 F4th 1180, 1187]

Securities Fraud Actions

[8:190-8:191] **Subject to heightened pleadings requirements:** See *In re Genius Brands Int'l, Inc. Secur. Litig.* (9th Cir. 2024) 97 F4th 1171, 1180-1181.

[8:215.5] **Pure omissions not actionable:** Rule 10b-5 does not proscribe pure omissions (where the speaker says nothing); there is no affirmative duty to disclose any and all material information. Rather, failure to disclose information is actionable only if the omission of a material fact causes statements already made to be misleading. [*Macquarie Infrastructure Corp. v. Moab Partners, L.P.* (2024) 601 US 257, 263-264, 144 S.Ct. 885, 891 (resolving circuit split on whether pure omission, in absence of otherwise-misleading statement, is actionable)]

[8:227] **Words alleging falsity must be clear and sufficiently defined:** The heightened standard is not met where plaintiff alleges false statements based on industry-specific or technical terms that lack plain or ordinary meaning, without including facts supporting the definition of those terms at the time the statements were made. [*In re Cloudera, Inc.* (9th Cir. 2024) 121 F4th 1180, 1187-1189 (affirming dismissal where plaintiff failed to plead facts supporting definitions of “cloud-native,” “native public cloud services,” and “hybrid cloud”)]

CHAPTER 9

ATTACKING THE PLEADINGS

FRCP 12(b)(7) Motion to Dismiss for Failure to Join Party Under FRCP 19

[9:158] **Motion by Nonparty:** A nonparty may move to intervene to file a 12(b)(7) motion to dismiss on the grounds it is a required party to the action under FRCP 19. [See *Maverick Gaming v. United States* (9th Cir. 2024) 123 F4th 960, 972-978 (affirming dismissal where tribe intervened to file motion to dismiss under FRCP 12(b)(7) on the grounds lawsuit could not proceed without tribe’s inclusion and tribe was indispensable party that could not be joined due to its sovereign immunity)]

Standards Governing FRCP 12(b)(6) Motions

[9:212.1c] **Incorporation by reference doctrine—Eleventh Circuit exception for document central to plaintiff’s claim with unquestioned authenticity:** The Eleventh Circuit has concluded that the court may properly consider a document not referred to or attached to a complaint when ruling on a 12(b)(6) motion if the document is central to the plaintiff’s claims and its authenticity is not challenged. [*Johnson v. City of Atlanta* (11th Cir. 2024) 107 F4th 1292, 1300]

Appeal of Order Granting Motion to Dismiss

[9:314.1] The Court of Appeal can affirm dismissal on any ground supported by the record. [*In re Genius Brands Int'l, Inc. Secur. Litig.* (9th Cir. 2024) 97 F4th 1171, 1180]

CHAPTER 10

ACTIONS WITH SPECIAL PROCEDURAL REQUIREMENTS

Removal of Class Actions

[10:497.5] **Minimal diversity class actions (CAFA actions):** Postremoval denial of class certification does not affect the district court’s jurisdiction. [*Kress Stores of P.R., Inc. v. Wal-Mart P.R., Inc.* (1st Cir. 2024) 121 F4th 228, 234-236]

CHAPTER 11

DISCLOSURE AND DISCOVERY

No Supplementation of Expert Report Where Party is Noncompliant

[11:440.5] Although parties have a duty to supplement or correct their experts’ report or deposition testimony if they learn the report or testimony is incomplete or incorrect, when a party fails to comply with initial disclosure requirements, courts will not be fooled by a later report that is characterized as a “corrected” disclosure. [See *Singh v. Sachem Central School Dist.* (ED NY 2022) 342 FRD 367, 370-371—submission of expert report, where none was previously provided, 1 year after disclosure deadline was not a corrected disclosure that fixed an “inadvertent mistake”]

Fee Payment for Expert’s Deposition Required Even if Testimony is Inadmissible

[11:458] Absent a finding of “manifest injustice,” payment of an expert’s reasonable fees for participation in discovery is mandatory. It is immaterial that the expert’s testimony is inadmissible. [*Miller v. Sawant* (9th Cir. 2024) 114 F4th 1071, 1075—objection to expert’s qualification does not obviate deposing party’s obligation to pay reasonable fees under Rule 26]

Discovery Stay to Resolve Immunity Disputes Disfavored

[11:1104] Some courts generally disfavor a stay of all discovery in cases involving disqualified immunity where a qualified immunity defense is not dispositive of all claims in the case. [See *McGinn v. El Paso County* (D CO 2022) 640 F.Supp.3d 1070, 1074-1076 (stay denied)]

Intent to Deprive Needed for Severe Sanctions Under FRCP 37

[11:2347] Before imposing a “severe sanction” under FRCP 37(e)(2) (i.e., unfavorable presumptions, unfavorable inferences or dismissal/default judgment), a court must find a party “acted with the *intent to deprive* another party of the information’s use in the litigation” (FRCP 37(e)(2) (emphasis added)). This specific intent standard is most naturally understood to involve “the willful destruction of evidence with the purpose of avoiding its discovery by an adverse party.” [*Gregory v. Montana* (9th Cir. 2024) 118 F4th 1069, 1080, citing *Jones v. Riot Hosp. Group LLC* (9th Cir. 2024) 95 F4th 730, 735 (internal quotes omitted)—government’s reckless actions resulting in loss of surveillance footage insufficient to warrant Rule 37(e)(2) sanctions; see *Skanska USA Civil Southeast Inc. v. Bagelheads, Inc.* (11th Cir. 2023) 75 F4th 1290, 1314—intent to deprive standard is equivalent of bad faith in spoliation contexts]

CHAPTER 13
INJUNCTIONS

Action by Government—Deference to Political Branches

[13:76.11a] **Caution—former “Chevron” deference overturned:** See discussion at ¶2:4610 ff. of the Highlights Summaries.

Appeal from Order Granting or Denying Injunction

[13:215.7] **Order having practical effect of granting or denying injunction:** District court’s failure to timely rule on preliminary injunction was effectively a denial and thus appealable under 28 USC §1292(a)(1). [*In re Fort Worth Chamber of Commerce* (5th Cir. 2024) 100 F4th 528, 532-536]

Under 28 USC §1253, a three-judge district court order having the practical effect of granting or denying an injunction is treated as such for purposes of determining the Supreme Court’s appellate jurisdiction. [*Abbott v. Perez* (2018) 585 US 579, 594-595, 138 S.Ct. 2305, 2319]

[13:215.8] **Limited review of successive motion:** Interlocutory appellate review of a district court’s order on a successive motion to modify a preliminary injunction is permitted only where changed circumstances in evidence or law have occurred since the prior motion. A successive motion is one that raises the same issues as a prior motion or raises issues that could have been raised in a prior motion. The appellant must show a close nexus between the change in circumstances and the issues on appeal. [*United States Securities & Exchange Commission v. Young* (10th Cir. 2024) 121 F4th 70, 76-78 (collecting cases)]

[13:225] **Standard of review:** The *merits* of a district court’s decision granting, denying, modifying or dissolving a preliminary injunction are reviewed for *abuse of discretion*, but any *issues of law* underlying the preliminary injunction are reviewed *de novo*. [*Matsumoto v. Labrador* (9th Cir. 2024) 122 F4th 787, 804]

CHAPTER 14
SUMMARY JUDGMENT

Opposing Party’s Points and Authorities

[14:106] **Unsupported argument is not a substitute for admissible evidence:** See *Bustamante v. KIND, LLC* (2nd Cir. 2024) 100 F4th 419, 432-432—nonmovant cannot meet burden to show triable issue of fact through reliance on unsupported allegations in complaint.

Declaration Showing Need for Further Discovery

[14:114.2] **Specific reasons required:** See *Estrada v. Mayorkas* (ND CA 2024) 347 FRD 36, 37-38—plaintiff’s “hope to unveil relevant evidence” was “speculative” and failed to meet burden under FRCP 56(d).

CHAPTER 16

OTHER MOTIONS AND PROCEDURES

Effect of Mass Arbitration Clauses

[16:55.7] **Mass arbitration clauses:** Pursuant to *AT&T Mobility LLC v. Concepcion* (see ¶16:55.1), states cannot require companies to use class arbitration procedures to address multiple individual small-stakes consumer claims. In response, some companies began including “mass arbitration” clauses in their “Terms of Use” to require arbitration of large numbers of parallel individual small-stakes consumer claims. [See *Heckman v. Live-Nation Entertainment, Inc.* (9th Cir. 2024) 120 F4th 670, 676-680]

- [16:55.7a] **Application:** Defendant company’s Terms of Use provided for an ADR provider (not the appointed arbitrator) to decide which cases would be put into “batches” for a single arbitrator to decide all cases in that batch, with the ADR provider retaining discretion to replace the arbitrator. The Terms of Use also applied binding precedent from “bellwether decisions” (i.e., decisions made in a limited sampling of claims) to claimants who had no opportunity to participate in those arbitrations, prohibited discovery and limited other procedural rights (i.e., appellate rights). The arbitration clause, which disproportionately favored defendant, was “procedurally and substantively” unconscionable under California law. Application of California law denying arbitration was not preempted under the FAA because such application neither disfavored arbitration nor interfered with the FAA’s objectives. [*Heckman v. Live Nation Entertainment, Inc.* (9th Cir. 2024) 120 F4th 670, 680-689]
- [16:55.7b] **Compare—provisions consolidating individual arbitrations:** Unlike the “representative arbitration” procedures used in *Heckman* (see ¶16:55.7a), an arbitration clause permitting consolidation of individual arbitrations utilizing an appointment process for a single arbitrator is enforceable. [See *Jones v. Starz Entertainment, LLC* (9th Cir. 2025) 129 F4th 1176, 1180-1183—JAMS’ appointment of different arbitrators to preside over consolidated arbitrations enforceable (individual plaintiffs could not compel single arbitration process because they were not “aggrieved” by process and had not pursued other available relief under JAMS arbitration process)]
- [16:55.7c] **Comment:** The mass arbitration rules of the new ADR provider at issue in *Heckman* (see ¶16:55.7a), as opposed to more traditional arbitration fora (e.g., American Arbitration Association (AAA) or Judicial Arbitration and Mediation Services (JAMS)), were biased against plaintiffs and therefore unenforceable. To have a court compel arbitration under mass arbitration provisions, the Terms of Use and rules for arbitration must be *fundamentally fair* to both sides to be enforced (see ¶16:121.11 ff.).

Consent to Arbitrate in Internet Contracts

[16:73.3] **Mutual assent required:** To form a contract (including an agreement to arbitrate), parties must manifest mutual assent to

the contract terms, which is evidenced by written or spoken word or through conduct. Assent by conduct is not effective unless a party intends to engage in the conduct and knows, or has reason to know, the other party may infer assent from that conduct. [See Rest.2d Contracts §19] This rule applies with equal force to contracts formed online. [See *Berman v. Freedom Fin'l Network, LLC* (9th Cir. 2022) 30 F4th 849, 855-856—enforceable online contract formed if website offers terms and user engages in conduct that manifests acceptance of those terms (discussing different methods of online consent); *Specht v. Netscape Communications Corp.* (2nd Cir. 2002) 306 F3d 17, 28-29—clear and conspicuous arbitration terms important in securing informed assent]

For online agreements, unless a website operator can show the consumer had actual knowledge of the terms (including arbitration), “inquiry notice” is required by showing that:

- the website provided *reasonably conspicuous notice* of the binding terms; and
- the consumer took some *action*, such as clicking a button or checking a box, that *unambiguously manifested assent* to those terms. [*Patrick v. Running Warehouse, LLC* (9th Cir. 2024) 93 F4th 468, 476; *Berman v. Freedom Fin'l Network, LLC*, *supra*, 30 F4th at 856]

[16:73.3a] **Unenforceable under “browsewrap” agreement:** Under a “browsewrap” agreement, a user “agrees” to contractual terms simply by using the website or its services without requiring the user to visit the homepage containing such terms or even knowing that such a webpage exists. Because no affirmative action is required, a browsewrap agreement is only valid if the user has actual or inquiry notice of the website’s terms and conditions. [*Nguyen v. Barnes & Noble Inc.* (9th Cir. 2014) 763 F3d 1171, 1175-1178—absent notice or prompts to users to take affirmative action to demonstrate assent, mere proximity or conspicuousness of hyperlink alone is insufficient; see also *Berman v. Freedom Fin'l Network, LLC* (9th Cir. 2022) 30 F4th 849, 856—browsewrap agreements frequently unenforceable because consumers are unaware of terms and acceptance]

- *Compare—conspicuous hyperlink at checkout:* Distinguishing *Berman v. Freedom Fin'l Network, LLC*, inquiry notice of arbitration provision was sufficient where notice of the terms of use were accessible at checkout via a “hyperlink” that was on an uncluttered page, not hidden or obscured, clear and legible, and colored bright green. “Place Order” button, which clearly stated agreement to terms of use by clicking, constituted assent to the terms of use accessible through conspicuous hyperlink. [*Patrick v. Running Warehouse, LLC* (9th Cir. 2024) 93 F4th 468, 476-477]

[16:73.3b] **Enforceable under “clickwrap” agreement:** A “clickwrap” agreement demonstrates assent because a user clicks on an “I agree” box after being presented with a list of terms of use. [*Keebaugh v. Warner Bros. Entertainment Inc.* (9th Cir. 2024) 100 F4th 1005, 1014; *Meyer v. Uber Technologies, Inc.* (2nd Cir. 2017) 868 F3d 66, 75]

[16:73.3c] **Enforceable under “sign-in wrap” agreement:** Under a “sign-in wrap” agreement, a user is required to advance (i.e., play a game, register an account, etc.) through a sign-in screen that provides notice of a user’s assent as part of the sign-in process (i.e., “by tapping

‘Play’ I agree to the Terms of Use”). Sign-in wrap agreements may be enforceable based on inquiry notice if the website provides reasonably conspicuous notice of the terms of use and the consumer takes some action (e.g., clicking a button or checking a box) that manifests consent to the terms of the agreement. [*Keebaugh v. Warner Bros. Entertainment Inc.* (9th Cir. 2024) 100 F4th 1005, 1014 (arbitration provision in sign-in wrap agreement for game application enforceable); *Meyer v. Uber Technologies, Inc.* (2nd Cir. 2017) 868 F3d 66, 75-80 (same re smartphone application for ride sharing service)]

[16:73.3d] **Enforceable under “scrollwrap” agreement:** Under a “scrollwrap” agreement, a user must scroll through all the terms of use before the user can click the mandatory “I agree” box. This type of agreement is considered the strongest form of notice and is enforced. [*Keebaugh v. Warner Bros. Entertainment Inc.* (9th Cir. 2024) 100 F4th 1005, 1014]

Who Decides Arbitrability Issues—Court or Arbitrator?

[16.81] **Effect of multiple contracts with conflicting arbitration/forum selection provisions:** Where parties execute two contracts—one sending arbitrability disputes to arbitration and the other either explicitly or implicitly sending arbitrability disputes to the courts—a *court* must decide which contract governs. [*Coinbase, Inc. v. Suski* (2024) 602 US 143, 152, 144 S.Ct. 1186, 1194-1195—consumer entered into online user agreement containing arbitration provision with delegation clause when cryptocurrency account created and executed subsequent promotional sweepstakes agreement containing forum selection clause]

Procedures for Enforcement of Arbitration Provisions

[16:101.1] **Burden of proof:** A party seeking to compel arbitration has the burden to prove the existence of an arbitration agreement by a preponderance of the evidence. [*Johnson v. Walmart, Inc.* (9th Cir. 2023) 57 F4th 677, 681]

Effect of Motion Compelling Arbitration on Underlying Litigation

[16:93.4] **Motion to compel arbitration may include request for order staying action:** The party seeking arbitration may also seek an order under 9 USC §3 staying any pending litigation (*see* ¶16:104). Although seeking a stay is not a prerequisite to an order compelling arbitration, if a party requests a stay and the court grants a motion to compel arbitration, the court must stay (rather than dismiss) the pending litigation, i.e., there is no discretion to dismiss the arbitrable claims pending conclusion of arbitration (*see discussion at* ¶16:110 *ff.*).

[16:110] **Ordering stay mandatory:** The FAA stay provision (9 USC §3) uses “shall” language (district court “*shall*” stay trial of the action on a party’s application unless the applicant is in default in proceeding with the arbitration). Thus, when a party requests a stay pending arbitration, the court is *compelled* to stay the proceeding. In addition, it has no discretion to dismiss the action as an alternative. [*Smith v. Spizzirri* (2024) 601 US 472, 478-479, 144 S.Ct. 1173, 1178; *Herrera v. Cathay Pac. Airways Ltd.* (9th Cir. 2024) 104 F4th 702, 711]

However, the court is not barred by 9 USC §3 from dismissing a case based on separate, independent grounds *unrelated* to the fact that an issue in the case is subject to arbitration (i.e., a court’s lack of jurisdiction). [*Smith v. Spizzirri*, supra, 601 US at 479, 144 S.Ct. at 1178, fn. 2]

Grounds for Disqualification; Financial or Other Interests

[16:188.15] **Effect of divestiture where impartiality reasonably questioned:** Recusal under 28 USC §455(a) may be required even if facts do not support recusal under 28 USC §455(b) (i.e., financial interest is divested and no evidence of judge’s knowledge of such interest) where judge’s impartiality was reasonably questioned based on same facts and posed a risk of general harm to parties, other proceedings, and public confidence in the judicial process. [*Litovich v. Bank of America Corp.* (2nd Cir. 2024) 106 F4th 218, 226 (see ¶16:171.5)]

Implied Consent to Magistrate Judge’s Jurisdiction

[16:303.5e-303.5f] **Opt-Out Consent Procedure:** Consent to a magistrate judge’s jurisdiction also may be implied where a party is notified in writing of the opportunity to “decline” consent and fails to exercise such right within the specified period. [*Washington v. Kijakazi* (9th Cir. 2023) 72 F4th 1029, 1036-1037—consent implied where party failed to return declination of consent form issued pursuant to district court’s general orders and local rules]

- **PRACTICE POINTER:** The opt-out consent procedure used in many districts provides written notification to litigants of their right to decline consent to a magistrate judge’s jurisdiction and is distinct from the “implied consent” analysis discussed at ¶16:303.5 ff., 16:305.4b.

CHAPTER 17

SANCTIONS

Court’s Inherent Power to Sanction

[17:16] Federal courts have inherent power to impose certain sanctions, including imposing deterrence sanctions for the repeated filing of meritless lawsuits. [See *PS Products Inc. v. Panther Trading Co. Inc.* (Fed Cir. 2024) 122 F4th 893, 900-901]

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[17:262] **Sanctions analysis requires review of specific statements in complaint:** Court categorized complaint’s allegations and performed individualized analysis of each category to determine sanctionable misconduct attributed to specific portions of complaint [*King v. Whitmer* (6th Cir. 2023) 71 F4th 511, 521-527]