What To Expect On Key Civil Procedure Issues From Barrett

By **James Wagstaffe**

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When the U.S. Senate questions Judge Amy Coney Barrett during the U.S. Supreme Court confirmation process, it will not be surprising, of course, if the lawmakers ask her about such hot-button issues as reproductive rights, health care, freedom of religion and judicial philosophy. However, I am dreaming of the questions no one will ask Judge Barrett on the large number and vitally important procedural issues that frequently come before our high court.

Just imagine the fun: A nerdy senator addresses Judge Barrett and asks:

- "Should a federal court under Erie utilize state anti-strategic lawsuits against public participation, or anti-SLAPP, statutes?"
- Or maybe, "Should there be personal jurisdiction in one state over a national manufacturer sued for defective products sold in another state but driven there where the injury occurred?"
- Or, how about, "What are your feelings on Spokeo standing in the case of informational injuries?"
- And, I'd be downright over the moon if a legislator asked: "Do you think that a defendant from the forum state should be able to snap-remove the case before it is even served in the state court action?"

Now, before the guffawing at such fanciful senatorial inquiries subsides, let's get real: Each of these questions involves issues that are either currently pending before or recently addressed by the Supreme Court, or involve deep circuit splits that are quite likely to get there in the next few terms.[1] And in each case, as any civil procedure professor or senior partner will tell you, such procedural rulings often provide the fulcrum on which case victory or loss depends.

So, upon learning of Judge Barrett's nomination, I did my own deep dive into her judicial record — not on the hot topics searingly raised in confirmation hearings — but on what may well prove to be her very important record of procedural rulings.

And from this crystal ball examination and due in large part to Judge Barrett's prolific opinion writing on the U.S. Court of Appeals for the Seventh Circuit since her appointment in 2017, there emerges a fairly clear picture revealing what we can expect from this jurist who likely will be writing, inter alia, civil procedure opinions for years to come.

1. Personal Jurisdiction — The Continued Untying of International Shoe

For some 65 years following the tectonic ruling in International Shoe Co. v. State of Washington,[2] the Supreme Court had authorized personal jurisdiction over out-of-state defendants as long as they had minimum contacts with the forum state. However, in the past decade, the high court has in all six of its decisions on the question found that there is no personal jurisdiction over defendants who thereby have gained litigation advantage by

thwarting the plaintiff's chosen forum.[3]

Like her mentor Justice Antonin Scalia, Judge Barrett has followed suit in taking a restrictive view of the sovereign power of state and federal courts to issue coercive judgments against out-of-state defendants. In the six opinions on which Judge Barrett has been on panels addressing personal jurisdiction, in five the court has ruled that the defendant's motion to dismiss was or should have been properly granted.

In fact, a fuller examination of Judge Barrett's personal jurisdiction cases, including in the two major cases where she authored the ruling, the court has taken the more business-friendly approach that defendants can be haled into out-of-state courts — and federal districts — only if they "expressly targeted" activities directly at that state and in a substantial way.

Specifically, Judge Barrett regularly cites Walden v. Fiore, where the Supreme Court, in an opinion authored by Justice Clarence Thomas, held that it is the contacts of the defendant — not the plaintiff — that determine the existence of personal jurisdiction.

For example, in Lexington Insurance Co. v. Hotai Insurance Co. Ltd.,[4] Judge Barrett, writing for the court, held there was no personal jurisdiction in Wisconsin over two Taiwanese insurers despite the fact that they provided additional insurance under their worldwide policies to a Wisconsin bicycle manufacturer.

When the American insurer sought indemnity for a products liability payout in Texas-based litigation on behalf of the Wisconsin insured, Judge Barrett found no jurisdiction over the Taiwanese companies since they did not target Wisconsin in particular. Citing Walden, Judge Barrett reasoned that "it is a defendant's contacts with the forum state, not with the plaintiff, that count."[5]

In rejecting jurisdiction — fully consistent with the Supreme Court's recent jurisprudence — Judge Barrett emphasized that collateral benefits from the forum state are not enough. Her prose, as typical across the full range of her opinions, was Scalia-like persuasive:

> If a parent bets her fifth grader fifty dollars that it will rain in every single state during the month of June, she hasn't "done business" in all fifty states even though her profit will increase or decrease based on what happens in each — and even though her risk and potential profit would have been less if she had limited the territory to twenty-five states.[6]

Similarly, in J.S.T. Corp. v. Foxconn Interconnect,[7] Judge Barrett, on behalf of the court, provided out-of-state defendants protection from jurisdiction despite causing an eventual economic effect in the forum. There, the plaintiff, from Illinois, confidentially provided electrical adapter design specifications to an engineering company that then sold them to General Motors for use in some of its cars.

The engineering company then gave designs to some of the plaintiff's competitors who proceeded to manufacture knockoffs for eventual sales in Texas and to G.M. to be incorporated into cars sold nationwide, including in Illinois. The Barrett opinion found no jurisdiction in Illinois rejecting a "stream of commerce" analysis in a trade secrets case and finding the defendants' connection to Illinois too attenuated.[8]

So, Judge Barrett's rulings in this procedural area, consistent with the clear trend in the Supreme Court, have generally protected out-of-state defendants from having to answer for

lawsuits simply because the injured plaintiff happens to live in the forum.[9] However, when there has been a showing of a direct targeting of the state, including online exploitation of the local market, Judge Barrett has not hesitated to join in opinions upholding jurisdiction.[10]

2. Standing — The Spokeo Revolution

When it comes to federal courts placing jurisdictional limits on the cases that can come before them, it would be hard to find a more revolutionary decision than the Supreme Court's 2016 decision in Spokeo Inc. v. Robins.[11]

For in that case, the high court ruled that if a party alleges bare procedural statutory credit reporting violations but has suffered no concrete and particular injury, there is no standing. So, what might previously have seemed like a simple absence of proof of damages is now treated as a lack of Article III standing stripping the court of subject matter jurisdiction.[12]

In the deep dive into Judge Barrett's body of Seventh Circuit work, we again find a good number of decisions that give us insight into her approach to such issues when serving on the high court. In fact and indicative of her commitment to principles of judicial restraint, she has written that the "doctrine of standing imposes a non-negotiable limit on the power of a federal court."[13]

There is no shortage of crystal ball material from Judge Barrett for predicting her approach to the Spokeo principle. In Casillas v. Madison Avenue Associates Inc., in holding there was no standing in a Fair Debt Collection Practices Act class action simply because the defendant creditor sent a dunning letter that neglected to include a statutory notice, Judge Barrett wrote for the court: "The bottom line of our opinion can be succinctly stated: no harm, no foul."[14]

Citing Spokeo, the opinion reasoned that "a bare procedural violation, divorced from any concrete harm," cannot satisfy the injury-in-fact requirement of Article III."[15]

The Barrett source material on standing also discloses a general inclination to embrace the Spokeo juggernaut in the spirit of judges who take a controlled view of the role of courts in our country. In this regard, Judge Barrett has authored recent standing opinions holding:

- A blind plaintiff in an Americans with Disabilities Act case, Carello v. Aurora Policemen Credit Union, suing a credit union for not having a text-aloud reader lacked standing since he was ineligible for membership.[16]

- The plaintiffs in Protect Our Parks Inc. v. Chicago Park District, seeking to halt construction of the Obama Presidential Center in Chicago's Jackson Park on grounds that site selection violated Illinois' public trust doctrine and caused generalized injury to the environment, lack standing to sue in federal court (even if they could in state court) as their injury was no different than all residents of Chicago for Article III purposes.[17]

- A political party lacked standing in Democratic Party of Wisconsin v. Vos to challenge state legislation that stripped the incoming governor and attorney general of various powers since there was no deprivation of any voting rights.[18]

The body of Judge Barrett's judicial writings tells us, therefore, that most likely she will take

the restrained approach and rule that mere procedural injuries under consumer protection statutes, vague environmental claims and taxpayer-type suits present insufficiently concrete injuries to confer Article III standing.

However, Judge Barrett in no way comes across as dogmatic in this regard; if, for example, the denial of information to a plaintiff results in a specific injury she has joined her colleagues in finding standing.[19] Similarly, if the facts show that the alleged injury is real rather than abstract, she has been willing to let the case go forward in federal court.[20]

3. Limited Federal Jurisdiction and the Erie Brave New Railroad

It was no one less than Justice Louis Brandeis who said that "the most important thing federal judges do is not doing." Clearly based on her judicial writings, Judge Barrett could not agree more with this sentiment extolling the virtues of federal courts as ones of limited jurisdiction.

In Webb v. Financial Industry Regulatory Authority, Judge Barrett authored the court's opinion that sua sponte identified jurisdictional defects on appeal though neither side had raised such a challenge and both sides were willing to concede that jurisdiction was proper.[21] There, U.S. District Court for the Northern District of Illinois was reviewing a FINRA arbitration result as well as an added claim that FINRA itself had acted inappropriately.

The Seventh Circuit opinion held (1) the supposed damages of a $1,600 arbitration filing fee and legally unrecoverable attorney fees were insufficient to support diversity, and (2) there could be no federal question jurisdiction because the alleged violation of the FINRA procedural rule did not arise under federal law.[22]

And when it comes to civil procedure and judicial power there is nothing quite so heady and arcane as the tectonic rule enunciated in 1938 by the Supreme Court decision in Erie Railroad Co. v. Tompkins.[23] And as to this rule of federalism that mandates application of state substantive law in diversity actions, Judge Barrett joined a panel opinion affectionately stating that appeals with such issues raise "arguments that ... spark excitement — or fear — in the heart of a civil procedure student."[24]

In Cooke v. Jackson National Life Insurance Co.,[25] Judge Barrett joined U.S. Circuit Judge Frank Easterbrook of the Seventh Circuit in holding that even in a diversity suit, a court is to evaluate an award of sanctions for unreasonable litigation activities under federal law, not an Illinois statute that would allow the shifting of fees in such a situation.

The panel opinion added that

> federal, not state, rules apply to procedural matters — such as what ought to be attached to pleadings — in all federal suits, whether they arise under federal or state law. ... Federal rules and doctrines provide ample means to penalize unreasonable or vexatious conduct in federal litigation. The district court's decision to rely on state rather than federal law was a mistake.

Thus, while Judge Barrett, much akin to federal judges across the country, jealously guards the jurisdiction of federal courts, she appears to be amenable to utilizing the federal procedural rules per Erie when it comes to the processing of actions and sanctions. This could be vitally important when, as is likely, the Supreme Court tackles the current circuit splits on whether state tort reform statutes will be applied to diversity actions in federal

court.[26]

4. Other Procedural Images From the Judge Barrett Crystal Ball

There is no small number of thoughtful Judge Barrett decisions on jurisdictional and procedural issues that provide an insight into her judicial philosophy and future role on the Supreme Court. These include the following decisions of note from Judge Barrett or her panel:

- Removal Jurisdiction: A removing defendant is not required to submit evidence to support its notice of removal, but rather must submit only a "short and plain" statement of the grounds of removal.[27]

- Complete Preemption/Grable: Removal under the "embedded federal question" theory of Grable & Sons Metal Products Inc. v. Darue Engineering and Manufacturing was proper as to an artfully pled state law claim for the alleged backdating of a new collective bargaining agreement.[28]

- Supplemental Jurisdiction: A circuit court has supplemental jurisdiction over disputes between attorneys and clients concerning costs and fees for representation in matters pending before a district court.[29]

- Exhaustion of Remedies: In a Federal Tort Claims Act case, a plaintiff must first exhaust her administrative remedies by presenting her claim to the appropriate federal agency, which means, among other things, that she must demand a sum certain from the agency.[30]

- Procedural Time Limits: The 10-day time limit to petition an appellate court for an interlocutory appeal under Title 28 of the U.S. Code, Section 1292(b), is jurisdictional and federal courts have no authority to read equitable exceptions into fixed filing deadlines.[31]

- Arbitrability: Whether class or collective arbitration is available is a threshold, gateway question as to arbitrability and therefore is to be determined by the court, not the arbitrator, unless, of course, the parties clearly and unmistakably delegated the question to the arbitrator for determination.[32]

All in all, the breadth of Judge Barrett's civil procedure and litigation portfolio is quite impressive, particularly given her relatively short tenure with the Seventh Circuit. And in assessing the judicial philosophy of this nominee, one best return to where we and she started, i.e., understanding the circumscribed yet scholarly role of judge as her mentor Justice Scalia would have it played.

Or, in the words of the poet T.S. Eliot: "We shall not cease from exploration, and the end of all our exploring will be to arrive where we started and know the place for the first time."

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[1] See, e.g., Ford Motor Co. v. Montana Eighth Judicial District Ct., cert. granted, No. 19-368 (Supreme Court oral argument October 7, 2020) — question whether there is personal jurisdiction over Michigan-based national automobile manufacturer for car sold in Washington and driven to forum state of Montana; Thole v. U.S. Bank NA, 140 S.Ct. 1615 (2020) — no Spokeo standing under ERISA for mismanagement of defined-benefit plan since plaintiffs' payments unaffected by alleged wrongdoing; see also The Wagstaffe Group Prac. Guide: Fed. Civ. Pro. Before Trial (LexisNexis 2020) § 3-V[B][3][b] — Erie anti-SLAPP circuit split; § 8-VI[E][4] — snap removal circuit split.

[2] International Shoe Co. v. State of Washington, 326 U.S. 310 (1945).

[3] See J. Wagstaffe, Supreme Court's Stealth Revolution in Civil Procedure (Law360 July 2, 2019).

[4] 938 F.3d 874 (7th Cir. 2019).

[5] Id. at 880.

[6] Id. at 881; see also id. at 884 n. 7 — only counting the contacts that "directly arise out of the specific contacts between the defendant and the forum state" (not found there as the plaintiff sought indemnity for defense and settlement costs in a Texas lawsuit involving a Texas accident — albeit as caused by the insured which was located in the forum state, Wisconsin).

[7] 956 F.3d 571 (7th Cir. 2020).

[8] Id. at 576; see also Ariel Investments LLC v. Ariel Capital Advisors LLC, 881 F.3d 520 (7th Cir. 2018) (joining Judge Easterbrook's 3-0 opinion) — holding no jurisdiction over a Florida-based defendant when it allegedly infringed the trademark of the Illinois-based plaintiff by using its business name outside the forum.

[9] See, e.g., Peters v. Sloan, 762 Fed. Appx. 344 (7th Cir. 2019)—no personal jurisdiction over California-based bank executive for alleged misconduct affecting out-of-state plaintiff; Jenkins v. Burkey,744 Fed. Appx. 955 (7th Cir. 2018) — no jurisdiction over out-of-state attorney for settlement activities in forum-based case since "specific jurisdiction is confined to the adjudication of issues deriving from the very controversy that establishes jurisdiction."

[10] See, e.g., Curry v. Revolution Laboratories, 949 F.3d 385 (7th Cir. 2020) — court upholds jurisdiction when out-of-state defendant sold $1.6 million of forum-based plaintiff's trademark infringing product over the internet to customers in that state and as part of a

nationwide marketing effort; see also Mussat v. IQVIA Inc., 953 F.3d 441 (7th Cir. 2020) — Bristol-Myers jurisdictional principle does not apply to unnamed members of a class action in federal court.

[11] 136 S.Ct. 1540 (2016); see also J. Wagstaffe, Five Essential Tip for Surviving the Supreme Court's Tectonic Changes to the Meaning of "Jurisdiction" and the Spokeo Standing Earthquake (LexisNexis Apriil 2019).

[12] Id. at 1547-1548.

[13] Carello v. Aurora Policemen Credit Union, 930 F.3d 830, 833 (7th Cir. 2019).

[14] 926 F.3d 329, 331 (7th Cir. 2019).

[15] Id. at 332; see also Tsau v. United States of America, 805 Fed. Appx. 434 (2020) (Barrett, J.) — plaintiff challenging the government's funding of the teaching of religion as affecting his own theories lacks standing because he did not suffer an injury that affects him in a personal and individual way.

[16] Carello v. Aurora Policemen Credit Union, 930 F.3d 830 (7th Cir. 2019) — no "informational" standing as this is a case about access to accommodations not one to information under governing public record disclosure statutes.

[17] Protect Our Parks Inc. v. Chicago Park District, 971 F.3d 722 (7th Cir. 2020) — "For Article III purposes, the plaintiffs are nothing more than 'concerned bystanders," and concerned bystanders are not entitled to press their claims in federal court;" see also Shakman v. Clerk of the Circuit Ct. of Cook County, 969 F.3d 810 (7th Cir. 2020) — holding that bystanders (union affected by ruling but not intervening in court enforcement of consent decree) had no standing to appeal.

[18] Democratic Party of Wisconsin v. Vos, 966 F.3d 581 (7th Cir. 2020) (Wood, J.).

[19] Robertson v. Allied Solutions LLC, 902 F.3d 690, 697 (7th Cir. 2018) — informational injury provides standing when plaintiff claimed denial of information required under statute would have provided a specific advantage, i.e., rescission of job offer without furnishing plaintiff copy of required background check report deprived opportunity to review and present her side of the story.

[20] For example, in Gadelhak v. AT&T Services Inc., 950 F.3d 458 and after engagingly noting that the wording of the TCPA statute "is enough to make a grammarian thrown down her pen," Judge Barrett wrote that receiving unwanted text messages can constitute a concrete injury-in-fact for Article III purposes) under the statute. Id. at 460.

[21] 889 F.3d 853 (7th Cir. 2018).

[22] Id. at 856; see also Collier v. SP Plus Corp., 889 F.3d 894 (7th Cir. 2018) (Barrett, J. as part of per curiam panel decision) — if plaintiff lacks standing and defendant removes case to federal court, remand must occur for lack of jurisdiction.

[23] Erie R. Co. v. Tompkins, 304 U.S. 64 (1938); see also J. Wagstaffe, Erie Railroad Rule on Brave New Track (LexisNexis March 2019).

[24] Boogard v. Nat'l Hockey League, 891 F.3d 289, 290 (7th Cir. 2018).

[25] 919 F.3d 1024 (7th Cir. 2019).

[26] Compare Goodin v. Schencks, 629 F.3d 79 (1st Cir. 2010) with La Liberte v. Reid, 966 F.3d 79 (2d Cir. 2020); see also The Wagstaffe Group Prac. Guide: Fed. Civ. Pro. Before Trial (LexisNexis 2020) § 2-[J] — Erie anti-SLAPP circuit split.

[27] Betzner v. Boeing Co., 910 F.3d 1010 (7th Cir. 2018) — jurisdictional allegations control unless it is legally impossible for them to be true so stating that Boeing was "acting under" the U.S., its agencies or its officers" regarding its government contractor defense was sufficient.

[28] Sarauer v. Int'l Ass'n of Machinists and Aerospace Workers Dist. No. 10, 966 F.3d 661 (7th Cir. 2020); see also Boogard v Nat'l Hockey League, 891 F.3d 289, 293 — claim arising from death of professional hockey player completely preempted by the LMRA (and removable) since the NHL's substance abuse policy was incorporated into the collective bargaining agreement.

[29] Anderson v. Gibbs Law Group LLP, 798 Fed. Appx. 14 (7th Cir. 2020); see also Lavite v. Dunstan, 932 F.3d 1020 (7th Cir. 2019) — declining supplemental jurisdiction after summary judgment on federal claim "is not rigid, but this practice is common and usually sensible if all claims within the court's original jurisdiction have been resolved before trial." Id. at 1034-1035.

[30] Chronis v. United States, 932 F.3d 544 (7th Cir. 2019).

[31] Groves v. United States, 941 F.3d 315 (7th Cir. 2019).

[32] Herrington v. Waterstone Mortgage Corp., 907 F.3d 502 (7th Cir. 2018).