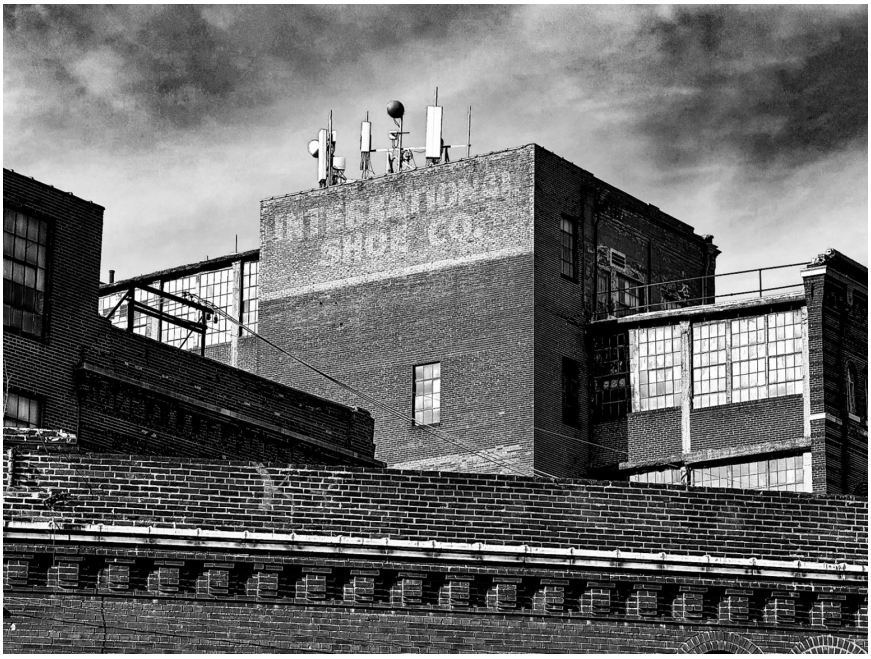

Civil Procedure

Thomas B. Bennett

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Preface

About This Book

This book is designed as an introductory text for a first-year law school course in federal civil procedure. These materials are free to use and may be adapted with permission.

> **Note**
>
> This casebook was first prepared for the first-year class in civil procedure at the University of Missouri School of Law in 2024.

Acknowledgements

Thank you to all my students over the years, especially those of you who emailed to identify typos in these materials. I dedicate this book to Bennett and Evie, who play quietly in the early morning hours.

-TBB

> **In case of errors**
>
> If you have any questions or spot any errors, please email them to me.

Part I.

From Claim to Judgment

1. Introduction

Civil procedure is at once both fine art and low culture: Matisse and Marvel, Van Gogh and Van Damme, Bach and *The Bachelor*. It is low culture because civil procedure is often concerned with the mundane, everyday details of litigating civil disputes. It will teach you when you must file your brief, where you can file your lawsuit, and how to make a motion for summary judgment. From this angle, civil procedure is practical and rule driven. Though this side of civil procedure is indispensable in practice, it is also responsible for the subject's undeserved reputation as dry, technical, and dull. Perhaps that reputation would be deserved if civil procedure's domain were limited to technical minutiae.

Yet civil procedure also sounds in a higher key, one that forces us to confront fundamental questions about fairness, economic justice, efficiency, sovereignty, and democracy. Skillful use of civil procedure has led to landmark developments in the law. *Brown v. Board of Education*, for example, started as a class action civil suit filed in federal court. Conversely, the monstrous decision in *Dred Scott v. Sandford* sought to embed white supremacy in the law under the guise of civil procedure.

Whether you want to practice personal injury law, advise insurance companies, pursue impact litigation to reform prisons or the police, or check government tyranny through the courts, civil procedure will give you both the practical tools and the theoretical frame to pursue those goals. And even if you end up never litigating a single case, civil procedure is essential because it sets fundamental rules for our society. Nearly all our social, political, and economic life happens in the shadow of those rules.

To encompass procedure's high and low aspects, our course of study will at various times look up or down. You will be expected to learn the Federal Rules of Civil Procedure and the cases that elaborate on their meaning. This study of numbered rules may at times seem mundane. But to truly understand the Rules, you must also embrace the competing theories that give rise to disagreements about how to apply them to individual cases.

We will also study constitutional rules that have been elaborated over decades to constrain state and federal courts. These rules have changed alongside the economy and technology—and they remain in flux today. To understand them, then, we will need to situate procedure and jurisdiction in social context. Mere recitation of numbered rules won't cut it here.

Finally, procedure is an opportunity to learn skills that you can apply in your other courses. For example, you will encounter procedural issues in torts and contracts. Learning well what a motion for summary judgment is will help you

in those classes as well. Similarly, much of the reading for this course will be opinions issued by federal courts in general and the Supreme Court in particular. We will therefore learn the essential skills of reading a case, understanding how judges apply rules and statutes to specific facts, and how they grapple with prior cases.

2. The Need for Tradeoffs

2.1. Case Study No. 1

Federal Rule of Civil Procedure 1

Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

[…]

The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System

Alan B. Morrison 90 Or. L. Rev. 993, 993–96 (2012)

Click here to open the article. Read pages 993–96 before reading the materials that follow.

Avista Management, Inc. v. Wausau Underwriters Ins. Co.

The following materials discuss a dispute between lawyers about where to hold a deposition. As you follow their dispute, pay attention to the conduct of not only the lawyers but also the judge. Who was in the right here? Who was in the wrong? And which matters more: getting the right answer, or resolving the dispute?

> **i** Note
>
> A "deposition" is a transcribed, under-oath examination of a witness by an attorney. The specific type of deposition at issue in *Avista*—a Rule 30(b)(6) deposition—is a special kind used to take the sworn testimony of a corporation or other non-corporeal person. You will learn more about depositions in Chapter 5, on the discovery process. *See* Section 5.2.

ORDER

This matter comes before the Court on Plaintiff's Motion to designate location of a Rule 30(b)(6) deposition (Doc. 105). Upon consideration of the Motion—the latest in a series of Gordian knots that the parties have been unable to untangle without enlisting the assistance of the federal courts—it is

ORDERED that said Motion is DENIED. Instead, the Court will fashion a new form of alternative dispute resolution, to wit: at 4:00 P.M. on Friday, June 30, 2006, counsel shall convene at a neutral site agreeable to both parties. If counsel cannot agree on a neutral site, they shall meet on the front steps of the Sam M. Gibbons U.S. Courthouse, 801 North Florida Ave., Tampa, Florida 33602. Each lawyer shall be entitled to be accompanied by one paralegal who shall act as an attendant and witness. At that time and location, counsel shall engage in one (1) game of "rock, paper, scissors." The winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition to be held somewhere in Hillsborough County during the period July 11–12, 2006. If either party disputes the outcome of this engagement, an appeal may be filed and a hearing will be held at 8:30 A.M. on Friday, July 7, 2006 before the undersigned in Courtroom 3, George C. Young United States Courthouse and Federal Building, 80 North Hughey Avenue, Orlando, Florida 32801.

DONE and **ORDERED** in Chambers, Orlando, Florida on June 6, 2006.

_____
Gregory A. Presnell
United States District Judge

Judge Rules Dispute To Be Settled By "Rock, Paper, Scissors" Match

Click here to open the article.

Correspondence

Two days after Judge Presnell entered the order above (Section 2.1), counsel for defendant Wausau Underwriters Insurance Co. wrote to counsel for plaintiff Avista Management, Inc.

Several days later, Mr. Craig again wrote to Mr. Pettinato.

ORDER

Defendant, Wausau Underwriters Insurance Company ("Wausau") has filed an Amended Motion (Doc. 108) to vacate this Court's Order of June 6, 2006 (Doc. 106). Apparently, the parties have now reached agreement on the location of the subject deposition. Plaintiff concurs with this Motion.

Figure 2.1.: June 6, 2006 Order

(a) Page 1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

AVISTA MANAGEMENT, INC., d/b/a Avista Plex, Inc.,

Plaintiff,

-vs-

Case No. 6:05-cv-1430-Orl-31JGG (Consolidated)

WAUSAU UNDERWRITERS INSURANCE COMPANY,

Defendant.

ORDER

This matter comes before the Court on Plaintiff's Motion to designate location of a Rule 30(b)(6) deposition (Doc. 105). Upon consideration of the Motion – the latest in a series of Gordian knots that the parties have been unable to untangle without enlisting the assistance of the federal courts – it is

ORDERED that said Motion is DENIED. Instead, the Court will fashion a new form of alternative dispute resolution, to wit: at 4:00 P.M. on Friday, June 30, 2006, counsel shall convene at a neutral site agreeable to both parties. If counsel cannot agree on a neutral site, they shall meet on the front steps of the Sam M. Gibbons U.S. Courthouse, 801 North Florida Ave., Tampa, Florida 33602. Each lawyer shall be entitled to be accompanied by one paralegal who shall act as an attendant and witness. At that time and location, counsel shall engage in one (1) game of "rock, paper, scissors." The winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition to be held somewhere in Hillsborough County during the

(b) Page 2

period July 11-12, 2006. If either party disputes the outcome of this engagement, an appeal may be filed and a hearing will be held at 8:30 A.M. on Friday, July 7, 2006 before the undersigned in Courtroom 3, George C. Young United States Courthouse and Federal Building, 80 North Hughey Avenue, Orlando, Florida 32801.

DONE and **ORDERED** in Chambers, Orlando, Florida on June 6, 2006.

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

Figure 2.2.: Correspondence of June 8, 2006

(a) Page 1

LEE CRAIG
Partner
Tampa
lcraig@butlerpappas.com

BUTLER PAPPAS
ATTORNEYS AT LAW

June 8, 2006

VIA FACSIMILE
AND U.S. MAIL

David J. Pettinato, Esquire
Merlin Law Group, P.A.
777 S. Harbour Island Boulevard
Suite 950
Tampa, FL 33602

Re: Avista Management, Inc., d/b/a Avista Plex, Inc. v.
Wausau Underwriters Insurance Company
Consolidated Case No.: 6:05-cv-1430-GAP-JGG
Our File No.: 0430-0512082

Dear Mr. Pettinato:

I guess we had better confirm in writing our agreement made yesterday about the location of the Rule 30(b)(6) witnesses in this case. On July 10, 2006, I will take the deposition of your clients' 30(b)(6) witness (probably Mr. Fortson) in your office. On July 11 and 12 you will take the deposition of my client's 30(b)(6) witness in my office. On July 13, I will take the deposition of your clients' other 30(b)(6) witness (probably Mr. Nana) in Orlando. That deposition will take place in Mr. Nana's office, or in the office of a court reporter, whichever you prefer. Also, you agreed to advise me, in advance, which areas of testimony will be handled specifically by Mr. Fortson and which by Mr. Nana.

On June 30, at 4:00 p.m. I will come upstairs to your office so we can comply with Judge Presnell's "rock, paper, scissors" order. Honestly, I do not think it is necessary since we have resolved our disagreement on the location of my client's (b)(6) witness. However, you are concerned about possible contempt if we do not do exactly as the order says. Regardless, we have agreed that, whoever wins will elect to proceed

(b) Page 2

as outlined above. I think we said also there will be no media present at, or notified about, our meeting on June 30. I am sure you will have no objection to that restriction in any event.

I am glad we were able to work this out. Please let me know if the above does not precisely state our agreement. Thank you for your consideration.

Sincerely yours,

BUTLER PAPPAS WEIHMULLER KATZ CRAIG LLP

Figure 2.3.: Correspondence of June 20, 2006

(a) Page 1

LEE CRAIG
Partner
Tampa
lcraig@butlerpappas.com

BUTLER PAPPAS
ATTORNEYS AT LAW

June 20, 2006

VIA FACSIMILE
AND U.S. MAIL

David J. Pettinato, Esquire
Merlin Law Group, P.A.
777 S. Harbour Island Boulevard
Suite 950
Tampa, FL 33602

Re: Avista Management, Inc., d/b/a Avista Plex, Inc. v.
Wausau Underwriters Insurance Company
Consolidated Case No.: 6:05-cv-1430-GAP-JGG
Our File No.: 0430-0512082

Dear Mr. Pettinato:

I called earlier because I want to ask Judge Presnell to abate the "rock/paper/scissors" Order. As you know, the day after the Court issued the Order, you and I settled our dispute over deposition locations that had led to the Order in the first place. Thus there is no need to play a game. You told me you are worried that we might be in contempt if we do not do exactly as the Order says, even though it may be unnecessary. I do not agree, but I respect your concerns.

Here are my thoughts. There has been a lot of media coverage of these cases because the Order was unusual therefore interesting. I have not welcomed this attention. I do not think it shows the case, or the attorneys, in a good light. I do not think it benefits my client either. Accordingly I have declined comment to all reporters.

I would like to avoid any further publicity about the Order. Will you stipulate with me that the Order can be abated? If the Judge abates the Order, you will have no

(b) Page 2

worry about being in contempt. And I should think you are satisfied that the Merlin Law Group has gotten plenty enough publicity out of this already.

Will you stipulate? Please let me know.

Sincerely yours,

BUTLER PAPPAS WEIHMULLER KATZ CRAIG LLP

Lee Craig

2. The Need for Tradeoffs

Since the dispute underlying this Court's Order has been resolved, there is no need to engage in the ADR contest ordered by the Court. With civility restored (at least for now), it is

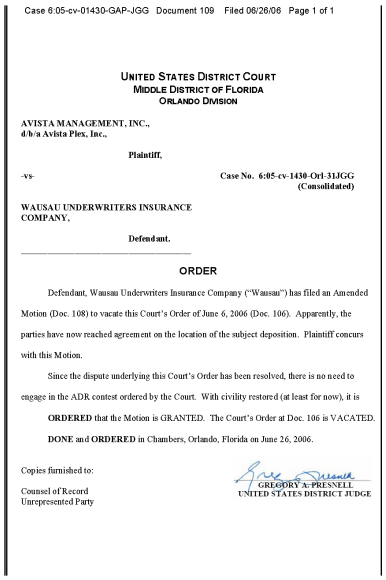
ORDERED that the Motion is GRANTED. The Court's Order at Doc. 106 is VACATED.

DONE and **ORDERED** in Chambers, Orlando, Florida on June 26, 2006.

_____
Gregory A. Presnell
United States District Judge

Figure 2.4.: June 26, 2006 Order

(a) Page 1



Case 6:05-cv-01430-GAP-JGG Document 109 Filed 06/26/06 Page 1 of 1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

AVISTA MANAGEMENT, INC., d/b/a Avlsta Plex, Inc.,

Plaintiff,

-vs- Case No. 6:05-cv-1430-Orl-31JGG (Consolidated)

WAUSAU UNDERWRITERS INSURANCE COMPANY,

Defendant.

ORDER

Defendant, Wausau Underwriters Insurance Company ("Wausau") has filed an Amended Motion (Doc. 108) to vacate this Court's Order of June 6, 2006 (Doc. 106). Apparently, the parties have now reached agreement on the location of the subject deposition. Plaintiff concurs with this Motion.

Since the dispute underlying this Court's Order has been resolved, there is no need to engage in the ADR contest ordered by the Court. With civility restored (at least for now), it is

ORDERED that the Motion is GRANTED. The Court's Order at Doc. 106 is VACATED.

DONE and **ORDERED** in Chambers, Orlando, Florida on June 26, 2006.

Copies furnished to:

Counsel of Record
Unrepresented Party

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

2.2. Case Study No. 2

Walker v. City of Birmingham

388 U.S. 307 (1967)

Mr. Justice Stewart delivered the opinion of the Court.

On Wednesday, April 10, 1963, officials of Birmingham, Alabama, filed a bill of complaint in a state circuit court asking for injunctive relief against 139 individuals and two organizations. The bill and accompanying affidavits stated that during the preceding seven days:

> "[Respondents [had] sponsored and/or participated in and/or conspired to commit and/or to encourage and/or to participate in certain movements, plans or projects commonly called 'sit-in' demonstrations, 'kneel-in' demonstrations, mass street parades, trespasses on private property after being warned to leave the premises by the owners of said property, congregating in mobs upon the public streets and other public places, unlawfully picketing private places of business in the City of Birmingham, Alabama; violation of numerous ordinances and statutes of the City of Birmingham and State of Alabama … ."

It was alleged that this conduct was "calculated to provoke breaches of the peace," "threaten[ed] the safety, peace and tranquility of the City," and placed "an undue burden and strain upon the manpower of the Police Department."

The bill stated that these infractions of the law were expected to continue and would "lead to further imminent danger to the lives, safety, peace, tranquility and general welfare of the people of the City of Birmingham," and that the "remedy by law [was] inadequate." The circuit judge granted a temporary injunction as prayed in the bill, enjoining the petitioners from, among other things, participating in or encouraging mass street parades or mass- processions without a permit as required by a Birmingham ordinance.

Five of the eight petitioners were served with copies of the writ early the next morning. Several hours later four of them held a press conference. There a statement was distributed, declaring their intention to disobey the injunction because it was "raw tyranny under the guise of maintaining law and order."[2] At this press conference one of the petitioners stated: "That they had respect for the Federal Courts, or Federal Injunctions, but in the past the State Courts had favored local law enforcement, and if the police couldn't handle it, the mob would."

[2] The full statement is reproduced as Appendix B to this opinion.

That night a meeting took place at which one of the petitioners announced that "[i]njunction or no injunction we are going to march tomorrow." The next afternoon, Good Friday, a large crowd gathered in the vicinity of Sixteenth Street and Sixth Avenue North in Birmingham. A group of about 50 or 60 proceeded to parade along the sidewalk while a crowd of 1,000 to 1,500 onlookers stood by, "clapping, and hollering, and [w]hooping." Some of the crowd followed the marchers and spilled out into the street. At least three of the petitioners participated in this march.

Meetings sponsored by some of the petitioners were held that night and the following night, where calls for volunteers to "walk" and go to jail were made. On Easter Sunday, April 14, a crowd of between 1,500 and 2,000 people congregated in the midafternoon in the vicinity of Seventh Avenue and Eleventh Street North in Birmingham. One of the petitioners was seen organizing members of the crowd in formation. A group of about 50, headed by three other petitioners, started down the sidewalk two abreast. At least one other petitioner was among the marchers. Some 300 or 400 people from among the onlookers followed in a crowd that occupied the entire width of the street and overflowed

onto the sidewalks. Violence occurred. Members of the crowd threw rocks that injured a newspaperman and damaged a police motorcycle.

The next day the city officials who had requested the injunction applied to the state circuit court for an order to show cause why the petitioners should not be held in contempt for violating it. At the ensuing hearing the petitioners sought to attack the constitutionality of the injunction on the ground that it was vague and over-broad, and restrained free speech. They also sought to attack the Birmingham parade ordinance upon similar grounds, and upon the further ground that the ordinance had previously been administered in an arbitrary and discriminatory manner.

The circuit judge refused to consider any of these contentions, pointing out that there had been neither a motion to dissolve the injunction, nor an effort to comply with it by applying for a permit from the city commission before engaging in the Good Friday and Easter Sunday parades. Consequently, the court held that the only issues before it were whether it had jurisdiction to issue the temporary injunction, and whether thereafter the petitioners had knowingly violated it. Upon these issues the court found against the petitioners, and imposed upon each of them a sentence of five days in jail and a $50 fine, in accord with an Alabama statute.

The Supreme Court of Alabama affirmed. That court, too, declined to consider the petitioners' constitutional attacks upon the injunction and the underlying Birmingham parade ordinance. […]

Without question the state court that issued the injunction had, as a court of equity, jurisdiction over the petitioners and over the subject matter of the controversy. And this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity. We have consistently recognized the strong interest of state and local governments in regulating the use of their streets and other public places. When protest takes the form of mass demonstrations, parades, or picketing on public streets and sidewalks, the free passage of traffic and the prevention of public disorder and violence become important objects of legitimate state concern. As the Court stated, in *Cox v. Louisiana*, "We emphatically reject the notion … that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." 379 U.S. 536, 555. […]

The generality of the language contained in the Birmingham parade ordinance upon which the injunction was based would unquestionably raise substantial constitutional issues concerning some of its provisions. The petitioners, however, did not even attempt to apply to the Alabama courts for an authoritative construction of the ordinance. Had they done so, those courts might have given the licensing authority granted in the ordinance a narrow and precise scope, as did the New Hampshire courts in *Cox v. New Hampshire* and *Poulos v. New Hampshire*. Here, just as in *Cox* and *Poulos*, it could not be assumed that this ordinance was void on its face.

The breadth and vagueness of the injunction itself would also unquestionably be subject to substantial constitutional question. But the way to raise that question was to apply to the Alabama courts to have the injunction modified or dissolved. The injunction in all events clearly prohibited mass parading without a permit, and the evidence shows that the petitioners fully understood that prohibition when they violated it.

The petitioners also claim that they were free to disobey the injunction because the parade ordinance on which it was based had been administered in the past in an arbitrary and discriminatory fashion. In support of this claim they sought to introduce evidence that, a few days before the injunction issued, requests for permits to picket had been made to a member of the city commission. One request had been rudely rebuffed, and this same official had later made clear that he was without power to grant the permit alone, since the issuance of such permits was the responsibility of the entire city commission. Assuming the truth of this proffered evidence, it does not follow that the parade ordinance was void on its face. The petitioners, moreover, did not apply for a permit either to the commission itself or to any commissioner after the injunction issued. Had they done so, and had the permit been refused, it is clear that their claim of arbitrary or discriminatory administration of the ordinance would have been considered by the state circuit court upon a motion to dissolve the injunction.

This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims. […] It cannot be presumed that the Alabama courts would have ignored the petitioners' constitutional claims. Indeed, these contentions were accepted in another case by an Alabama appellate court that struck down on direct review the conviction under this very ordinance of one of these same petitioners.[13]

The rule of law that Alabama followed in this case reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.

Affirmed.

Mr. Chief Justice Warren, whom Mr. Justice Brennan and Mr. Justice Fortas join, dissenting.

Petitioners in this case contend that they were convicted under an ordinance that is unconstitutional on its face because it submits their First and Fourteenth Amendment rights to free speech and peaceful assembly to the unfettered discretion of local officials. They further contend that the ordinance was unconstitutionally applied to them because the local officials used their discretion to

[13] [*Ed.*: The Court cited to the pending appeal by Rev. Shuttlesworth of his criminal conviction in Alabama state courts. An excerpt of the Supreme Court's eventual opinion reversing the Alabama Supreme Court's decision upholding Rev. Shuttlesworth's conviction appears *infra* at Section 2.2.]

prohibit peaceful demonstrations by a group whose political viewpoint the officials opposed. The Court does not dispute these contentions, but holds that petitioners may nonetheless be convicted and sent to jail because the patently unconstitutional ordinance was copied into an injunction—issued *ex parte* without prior notice or hearing on the request of the Commissioner of Public Safety—forbidding all persons having notice of the injunction to violate the ordinance without any limitation of time. I dissent because I do not believe that the fundamental protections of the Constitution were meant to be so easily evaded, or that "the civilizing hand of law" would be hampered in the slightest by enforcing the First Amendment in this case. […]

Mr. Justice Douglas, with whom The Chief Justice, Mr. Justice Brennan, and Mr. Justice Fortas concur, dissenting.

We sit as a court of law functioning primarily as a referee in the federal system. Our function in cases coming to us from state courts is to make sure that state tribunals and agencies work within the limits of the Constitution. Since the Alabama courts have flouted the First Amendment, I would reverse the judgment.

Picketing and parading are methods of expression protected by the First Amendment against both state and federal abridgment. […] Since they involve more than speech itself and implicate street traffic, the accommodation of the public and the like, they may be regulated as to the times and places of the demonstrations. […] But a State cannot deny the right to use streets or parks or other public grounds for the purpose of petitioning for the redress of grievances. […]

The right to defy an unconstitutional statute is basic in our scheme. Even when an ordinance requires a permit to make a speech, to deliver a sermon, to picket, to parade, or to assemble, it need not be honored when it is invalid on its face. […]

A court does not have *jurisdiction* to do what a city or other agency of a State lacks *jurisdiction* to do. The command of the Fourteenth Amendment, through which the First Amendment is made applicable to the States, is that no "State" shall deprive any person of "liberty" without due process of law. […] An ordinance—unconstitutional on its face or patently unconstitutional as applied—is not made sacred by an unconstitutional injunction that enforces it. It can and should be flouted in the manner of the ordinance itself. Courts as well as citizens are not free "to ignore all the procedures of the law," to use the Court's language. The "constitutional freedom" of which the Court speaks can be won only if judges honor the Constitution. […]

APPENDIX B TO OPINION OF THE COURT

"In our struggle for freedom we have anchored our faith and hope in the rightness of the Constitution and the moral laws of the universe.

"Again and again the Federal judiciary has made it clear that the privileges guaranteed under the First and the Fourteenth Amendments are too sacred to be trampled upon by the machinery of state government and police power. In the past we have abided by Federal injunctions out of respect for the forthright and consistent leadership that the Federal judiciary has given in establishing the principle of integration as the law of the land.

"However we are now confronted with recalcitrant forces in the Deep South that will use the courts to perpetuate the unjust and illegal system of racial separation.

"Alabama has made clear its determination to defy the law of the land. Most of its public officials, its legislative body and many of its law enforcement agents have openly defied the desegregation decision of the Supreme Court. We would feel morally and legally responsible to obey the injunction if the courts of Alabama applied equal justice to all of its citizens. This would be sameness made legal. However the issuance of this injunction is a blatant of *difference* made *legal*.

"Southern law enforcement agencies have demonstrated now and again that they will utilize the force of law to misuse the judicial process. "This is raw tyranny under the guise of maintaining law and order. We cannot in all good conscience obey such an injunction which is an unjust, undemocratic and unconstitutional misuse of the legal process.

"We do this not out of any disrespect for the law but out of the highest respect for *the* law. This is not an attempt to evade or defy the law or engage in chaotic anarchy. Just as in all good conscience we cannot obey unjust laws, neither can we respect the unjust use of the courts.

"We believe in a system of law based on justice and morality. Out of our great love for the Constitution of the U.S. and our desire to purify the judicial system of the state of Alabama, we risk this critical move with an awareness of the possible consequences involved."

Notes & Questions

(1) Separate out the various segregationist policies at issue here.

i) The policies of stores in downtown Birmingham that refused service to Black customers.
ii) The actions of police officers to enforce those businesses' decision to impose Jim Crow policies.
iii) The city ordinance requiring marchers to obtain permits.
iv) The city's denial of a permit specifically to the SCLC.
v) The injunction against the Good Friday march.
vi) The punishment imposed on the marchers for defying the injunction.

vii) The ordinance granting broad discretion to the City Commission over whether to issue permits.

viii) The Alabama court's rule allowing the issuance of the injunction even without notice or an opportunity to be heard.

ix) The collateral bar rule imposed by the *Walker* Court requiring the marchers to challenge the injunction before disobeying it. Which of these do you think is unjust? Which did the SCLC disobey?

(2) Under current law, only rules c and i (above) are permissible; the rest are now recognized as unconstitutional. The collateral bar rule remains good law, and many localities require permits for demonstrations or parades. Importantly, however, the reasons why these policies are now considered unconstitutional have changed since *Walker*. Many of these policies and laws are unconstitutional because they violate the Fourteenth Amendment guarantee of equal protection. Other rules listed above are now deemed unconstitutional on the grounds of due process, which is also guaranteed by the Fourteenth Amendment. Our next module will explore due process in greater depth.

(3) The *Walker* Court rejected the constitutional challenge to the punishment in part because it could not "presume that the Alabama courts would have ignored the petitioners' constitutional claims." The Court even cited an Alabama appellate court decision vacating Rev. Shuttlesworth's conviction. In November 1967, the Alabama Supreme Court reversed and reinstated Rev. Shuttlesworth's conviction. Five months later, Dr. King was shot on the balcony of the Lorraine Motel in Memphis. Seventh months after Dr. King's death, the Supreme Court heard argument on Rev. Shuttlesworth's appeal from the Alabama Supreme Court. See if you can detect a change in the way the Court talks about the events of Good Friday 1963.

Shuttlesworth v. City of Birmingham

394 U.S. 147 (1969)

Mr. JUSTICE STEWART delivered the opinion of the Court.

The petitioner stands convicted for violating an ordinance of Birmingham, Alabama, making it an offense to participate in any "parade or procession or other public demonstration" without first obtaining a permit from the City Commission. The question before us is whether that conviction can be squared with the Constitution of the United States.

On the afternoon of April 12, Good Friday, 1963, 52 people, all Negroes, were led out of a Birmingham church by three Negro ministers, one of whom was the petitioner, Fred L. Shuttlesworth. They walked in orderly fashion, two abreast for the most part, for four blocks. The purpose of their march was to protest the alleged denial of civil rights to Negroes in the city of Birmingham. The marchers stayed on the sidewalks except at street intersections, and they did not interfere with other pedestrians. No automobiles were obstructed, nor

were traffic signals disobeyed. The petitioner was with the group for at least part of this time, walking alongside the others, and once moving from the front to the rear. As the marchers moved along, a crowd of spectators fell in behind them at a distance. The spectators at some points spilled out into the street, but the street was not blocked and vehicles were not obstructed.

At the end of four blocks the marchers were stopped by the Birmingham police, and were arrested for violating § 1159 of the General Code of Birmingham. […] The petitioner was convicted for violation of § 1159 and was sentenced to 90 days' imprisonment at hard labor and an additional 48 days at hard labor in default of payment of a $75 fine and $24 costs. The Alabama Court of Appeals reversed the judgment of conviction […]. The Supreme Court of Alabama, however, giving the language of § 1159 an extraordinarily narrow construction, reversed the judgment of the Court of Appeals and reinstated the conviction. […]

There can be no doubt that the Birmingham ordinance, as it was written, conferred upon the City Commission virtually unbridled and absolute power to prohibit any "parade," "procession," or "demonstration" on the city's streets or public ways. For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of "public welfare, peace, safety, health, decency, good order, morals or convenience." This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." And our decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license. "The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands."

The judgment is

Reversed.

Notes & Questions

1. Among those involved in the Good Friday march—the organizers, the city officials, the police officers—who was most faithful to the law? In this regard, consider that the airport in Birmingham, Alabama is now

named the Birmingham-Shuttlesworth International Airport in honor of Rev. Shuttlesworth. Does the fact that history celebrates the marchers and condemns Bull Connor change the calculus? Does it matter that Dr. King was arrested 29 times during his campaigns of nonviolent resistance?

2. What explains the Court's change from *Walker* to *Shuttlesworth*? Can doctrines like the collateral bar rule, on their own, account for the different outcomes in the two cases?

3. What Is Procedure?

3.1. How Much Procedure Is Due?

U.S. Constitution amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution amend XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[…]

Notes & Questions

1. The due process clauses of the Fifth and Fourteenth Amendments supply the constitutional tests to determine whether a government procedure is fair. As you will see, most procedures in civil cases in federal courts are governed by the Federal Rules of Civil Procedure, which are generally understood to comply with constitutional due process in nearly all cases. But constitutional due process is an important backdrop, as the following materials illustrate.

2. The two hallmarks of due process are notice and an opportunity to be heard. In practice, that means the government must inform (or try to inform) individuals affected by a proceeding that might affect their life, liberty, or property and allow them to present arguments and/or evidence in connection with that proceeding.

3. At the same time, the requirements of due process are flexible and contextual. In some situations, due process requires more; in other situations, less. In Mathews v. Eldridge—a case about how much process the government must provide before terminating a Social Security recipient's benefits—the Supreme Court formulated a three-factor balancing test to determine the requirements of due process. As you read the case that follows, see if you can write down the three factors and how courts are supposed to balance them.

Lassiter v. Department of Social Services

452 U.S. 18 (1981)

Justice Stewart delivered the opinion of the Court.

I

In the late spring of 1975, after hearing evidence that the petitioner, Abby Gail Lassiter, had not provided her infant son William with proper medical care, the District Court of Durham County, N. C., adjudicated him a neglected child and transferred him to the custody of the Durham County Department of Social Services, the respondent here. A year later, Ms. Lassiter was charged with first-degree murder, was convicted of second-degree murder, and began a sentence of 25 to 40 years of imprisonment. […] In 1978 the Department petitioned the court to terminate Ms. Lassiter's parental rights because, the Department alleged, she "has not had any contact with the child since December of 1975" and "has willfully left the child in foster care for more than two consecutive years without showing that substantial progress has been made in correcting the conditions which led to the removal of the child, or without showing a positive response to the diligent efforts of the Department of Social Services to strengthen her relationship to the child, or to make and follow through with constructive planning for the future of the child."

Ms. Lassiter was served with the petition and with notice that a hearing on it would be held. Although her mother had retained counsel for her in connection with an effort to invalidate the murder conviction, Ms. Lassiter never mentioned the forthcoming hearing to him (or, for that matter, to any other person except, she said, to "someone" in the prison). At the behest of the Department of Social Services' attorney, she was brought from prison to the hearing, which was held August 31, 1978. The hearing opened, apparently at the judge's instance, with a discussion of whether Ms. Lassiter should have more time in which to find legal assistance. Since the court concluded that she "has had ample opportunity to seek and obtain counsel prior to the hearing of this matter, and [that] her failure to do so is without just cause," the court did not postpone

the proceedings. Ms. Lassiter did not aver that she was indigent, and the court did not appoint counsel for her.

A social worker from the respondent Department was the first witness. She testified that in 1975 the Department "received a complaint from Duke Pediatrics that William had not been followed in the pediatric clinic for medical problems and that they were having difficulty in locating Ms. Lassiter … ." She said that in May 1975 a social worker had taken William to the hospital, where doctors asked that he stay "because of breathing difficulties [and] malnutrition and [because] there was a great deal of scarring that indicated that he had a severe infection that had gone untreated." The witness further testified that, except for one "prearranged" visit and a chance meeting on the street, Ms. Lassiter had not seen William after he had come into the State's custody, and that neither Ms. Lassiter nor her mother had "made any contact with the Department of Social Services regarding that child." When asked whether William should be placed in his grandmother's custody, the social worker said he should not, since the grandmother "has indicated to me on a number of occasions that she was not able to take responsibility for the child" and since "I have checked with people in the community and from Ms. Lassiter's church who also feel that this additional responsibility would be more than she can handle." The social worker added that William "has not seen his grandmother since the chance meeting in July of '76 and that was the only time."

[…]

Ms. Lassiter conducted a cross-examination of the social worker, who firmly reiterated her earlier testimony. The judge explained several times, with varying degrees of clarity, that Ms. Lassiter should only ask questions at this stage; many of her questions were disallowed because they were not really questions, but arguments.

Ms. Lassiter herself then testified, under the judge's questioning, that she had properly cared for William. Under cross-examination, she said that she had seen William more than five or six times after he had been taken from her custody and that, if William could not be with her, she wanted him to be with her mother since, "He knows us. Children know they family … . They know they people, they know they family and that child knows us anywhere … . I got four more other children. Three girls and a boy and they know they little brother when they see him."

Ms. Lassiter's mother was then called as a witness. She denied, under the questioning of the judge, that she had filed the complaint against Ms. Lassiter, and on cross-examination she denied both having failed to visit William when he was in the State's custody and having said that she could not care for him.

The court found that Ms. Lassiter "has not contacted the Department of Social Services about her child since December, 1975, has not expressed any concern for his care and welfare, and has made no efforts to plan for his future." Because Ms. Lassiter thus had "wilfully failed to maintain concern or responsibility for the welfare of the minor," and because it was "in the best interests of the minor," the court terminated Ms. Lassiter's status as William's parent.[2]

[2] The petition had also asked that the parental rights of the putative father, William Boykin, be terminated. Boykin was not married to Ms. Lassiter, he had never contributed to William's financial support, and indeed he denied that he was William's father. The court granted the petition to terminate his alleged parental status.

On appeal, Ms. Lassiter argued only that, because she was indigent, the Due Process Clause of the Fourteenth Amendment entitled her to the assistance of counsel, and that the trial court had therefore erred in not requiring the State to provide counsel for her. The North Carolina Court of Appeals decided that "[w]hile this State action does invade a protected area of individual privacy, the invasion is not so serious or unreasonable as to compel us to hold that appointment of counsel for indigent parents is constitutionally mandated." […] The Supreme Court of North Carolina summarily denied Ms. Lassiter's application for discretionary review, […] and we granted certiorari to consider the petitioner's claim under the Due Process Clause of the Fourteenth Amendment […].

II

For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." […] Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

A

[…]

The Court's precedents speak with one voice about what "fundamental fairness" has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.

B

The case of *Mathews v. Eldridge*, 424 U.S. 319, 335, propounds three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. We must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.

This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to "the companionship, care, custody, and management of his or her children" is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection." […] Here the State has sought not simply to infringe upon that interest, but to end it. If the State prevails, it will have worked a unique kind of

deprivation. […] A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one.[3]

Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision. For this reason, the State may share the indigent parent's interest in the availability of appointed counsel. If, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal. […]

The State's interests, however, clearly diverge from the parent's insofar as the State wishes the termination decision to be made as economically as possible and thus wants to avoid both the expense of appointed counsel and the cost of the lengthened proceedings his presence may cause. But though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here, particularly in light of the concession in the respondent's brief that the "potential costs of appointed counsel in termination proceedings … is [sic] admittedly de minimis compared to the costs in all criminal actions."

Finally, consideration must be given to the risk that a parent will be erroneously deprived of his or her child because the parent is not represented by counsel. North Carolina law now seeks to assure accurate decisions by establishing the following procedures: […] A petition must describe facts sufficient to warrant a finding that one of the grounds for termination exists, […] and the parent must be notified of the petition and given 30 days in which to file a written answer to it […].

The respondent argues that the subject of a termination hearing — the parent's relationship with her child — far from being abstruse, technical, or unfamiliar, is one as to which the parent must be uniquely well informed and to which the parent must have given prolonged thought. The respondent also contends that a termination hearing is not likely to produce difficult points of law.[5]

Yet the ultimate issues with which a termination hearing deals are not always simple, however commonplace they may be. Expert medical and psychiatric testimony, which few parents are equipped to understand and fewer still to confute, is sometimes presented. The parents are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation. These factors may combine to overwhelm an uncounseled parent […].

C

The dispositive question […] is whether the three *Eldridge* factors, when weighed against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty, suffice to rebut that presumption and thus to lead to the conclusion that the Due

[3] Some parents will have an additional interest to protect. Petitions to terminate parental rights are not uncommonly based on alleged criminal activity. Parents so accused may need legal counsel to guide them in understanding the problems such petitions may create.

[5] Both the respondent and the Columbia Journal of Law and Social Problems, 4 Colum. J. L. & Soc. Prob. 230 (1968), have conducted surveys purporting to reveal whether the presence of counsel reduces the number of erroneous determinations in parental termination proceedings. Unfortunately, neither survey goes beyond presenting statistics which, standing alone, are unilluminating. The Journal note does, however, report that it questioned the New York Family Court judges who preside over parental termination hearings and found that 72.2% of them agreed that when a parent is unrepresented, it becomes more difficult to conduct a fair hearing (11.1% of the judges disagreed); 66.7% thought it became difficult to develop the facts (22.2% disagreed).

Process Clause requires the appointment of counsel when a State seeks to terminate an indigent's parental status. To summarize the above discussion of the *Eldridge* factors: the parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest, and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high.

If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel. But since the *Eldridge* factors will not always be so distributed, and since "due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed," […]neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore […] leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review. […]

III

[…] Nevertheless, because child-custody litigation must be concluded as rapidly as is consistent with fairness,[7] we decide today whether the trial judge denied Ms. Lassiter due process of law when he did not appoint counsel for her.

[7] According to the respondent's brief, William Lassiter is now living "in a pre-adoptive home with foster parents committed to formal adoption to become his legal parents." He cannot be legally adopted, nor can his status otherwise be finally clarified, until this litigation ends.

[…] In […] these circumstances, we hold that the trial court did not err in failing to appoint counsel for Ms. Lassiter.

IV

In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution. Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but in dependency and neglect proceedings as well. […] Most significantly, 33 States and the District of Columbia provide statutorily for the appointment of counsel in termination cases. The Court's opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.

For the reasons stated in this opinion, the judgment is affirmed.

It is so ordered.

Justice Blackmun, with whom Justice Brennan and Justice Marshall join, dissenting.

The Court today denies an indigent mother the representation of counsel in a judicial proceeding initiated by the State of North Carolina to terminate her parental rights with respect to her youngest child. The Court most appropriately recognizes that the mother's interest is a "commanding one," and it finds no countervailing state interest of even remotely comparable significance. Nonetheless, the Court avoids what seems to me the obvious conclusion that due process requires the presence of counsel for a parent threatened with judicial termination of parental rights […]. Because I believe that the unique importance of a parent's interest in the care and custody of his or her child cannot constitutionally be extinguished through formal judicial proceedings without the benefit of counsel, I dissent.

I

[…] This Court has recognized that what process is due varies in relation to the interests at stake and the nature of the governmental proceedings. Where the individual's liberty interest is of diminished or less than fundamental stature, or where the prescribed procedure involves informal decisionmaking without the trappings of an adversarial trial-type proceeding, counsel has not been a requisite of due process. Implicit in this analysis is the fact that the contrary conclusion sometimes may be warranted. Where an individual's liberty interest assumes sufficiently weighty constitutional significance, and the State by a formal and adversarial proceeding seeks to curtail that interest, the right to counsel may be necessary to ensure fundamental fairness. […] To say this is simply to acknowledge that due process allows for the adoption of different rules to address different situations or contexts.

It is not disputed that state intervention to terminate the relationship between petitioner and her child must be accomplished by procedures meeting the requisites of the Due Process Clause. Nor is there any doubt here about the kind of procedure North Carolina has prescribed. North Carolina law requires notice and a trial-type hearing before the State on its own initiative may sever the bonds of parenthood. The decisionmaker is a judge, the rules of evidence are in force, and the State is represented by counsel. The question, then, is whether proceedings in this mold, that relate to a subject so vital, can comport with fundamental fairness when the defendant parent remains unrepresented by counsel. As the Court today properly acknowledges, our consideration of the process due in this context, as in others, must rely on' a balancing of the competing private and public interests, an approach succinctly described in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). […] As does the majority, I evaluate the "three distinct factors" specified in *Eldridge*: the private interest affected; the risk of error under the procedure employed by the State; and the countervailing governmental interest in support of the challenged procedure.

A

[…] Rather than opting for the insensitive presumption that incarceration is the only loss of liberty sufficiently onerous to justify a right to appointed counsel,

I would abide by the Court's enduring commitment to examine the relationships among the interests on both sides, and the appropriateness of counsel in the specific type of proceeding. The fundamental significance of the liberty interests at stake in a parental termination proceeding is undeniable, and I would find this first portion of the due process balance weighing heavily in favor of refined procedural protections. […]

Given the weight of the interests at stake, this risk of error assumes extraordinary proportions. By intimidation, inarticulateness, or confusion, a parent can lose forever all contact and involvement with his or her offspring.

C

The final factor to be considered, the interests claimed for the State, do not tip the scale against providing appointed counsel in this context. […]

The State may, and does, properly assert a legitimate interest in promoting the physical and emotional well-being of its minor children. But this interest is not served by terminating the rights of any concerned, responsible parent. […]

The State also has an interest in avoiding the cost and administrative inconvenience that might accompany a right to appointed counsel. But, as the Court acknowledges, the State's fiscal interest "is hardly significant enough to overcome private interests as important as those here." Where, as here, the threatened loss of liberty is severe and absolute, the State's role is so clearly adversarial and punitive, and the cost involved is relatively slight, there is no sound basis for refusing to recognize the right to counsel as a requisite of due process in a proceeding initiated by the State to terminate parental rights.

II

A

The Court's analysis is markedly similar to mine; it, too, analyzes the three factors listed in *Mathews v. Eldridge*, and it, too, finds the private interest weighty, the procedure devised by the State fraught with risks of error, and the countervailing governmental interest insubstantial. Yet, rather than follow this balancing process to its logical conclusion, the Court abruptly pulls back and announces that a defendant parent must await a case-by-case determination of his or her need for counsel. […]

B

The problem of inadequate representation is painfully apparent in the present case. Petitioner, Abby Gail Lassiter, is the mother of five children. The State moved to remove the fifth child, William, from petitioner's care on the grounds of parental neglect. Although petitioner received notice of the removal proceeding, she did not appear at the hearing and was not represented. In May 1975, the State's District Court adjudicated William to be neglected under North Carolina law and placed him in the custody of the Durham County Department of Social Services. At some point, petitioner evidently arranged for the other four children to reside with and be cared for by her mother, Mrs.

Lucille Lassiter. They remain under their grandmother's care at the present time.

As the Court notes, petitioner did not visit William after July 1976. She was unable to do so, for she was imprisoned as a result of her conviction for second-degree murder. In December 1977, she was visited in prison by a Durham County social worker who advised her that the Department planned to terminate her parental rights with respect to William. Petitioner immediately expressed strong opposition to that plan and indicated a desire to place the child with his grandmother. […] After receiving a summons, a copy of the State's termination petition, and notice that a termination hearing would be held in August 1978, petitioner informed her prison guards about the legal proceeding. They took no steps to assist her in obtaining legal representation, […] nor was she informed that she had a right to counsel. Under these circumstances, it scarcely would be appropriate, or fair, to find that petitioner had knowingly and intelligently waived a right to counsel. […]

It is perhaps understandable that the District Court Judge experienced difficulty and exasperation in conducting this hearing. But both the difficulty and the exasperation are attributable in large measure, if not entirely, to the lack of counsel. An experienced attorney might have translated petitioner's reaction and emotion into several substantive legal arguments. The State charged petitioner with failing to arrange a "constructive plan" for her child's future or to demonstrate a "positive response" to the Department's intervention. A defense would have been that petitioner had arranged for the child to be cared for properly by his grandmother, and evidence might have been adduced to demonstrate the adequacy of the grandmother's care of the other children. […] The Department's own "diligence" in promoting the family's integrity was never put in issue during the hearing, yet it is surely significant in light of petitioner's incarceration and lack of access to her child. […] Finally, the asserted willfulness of petitioner's lack of concern could obviously have been attacked since she was physically unable to regain custody or perhaps even to receive meaningful visits during 21 of the 24 months preceding the action. […]

III

Petitioner plainly has not led the life of the exemplary citizen or model parent. It may well be that if she were accorded competent legal representation, the ultimate result in this particular case would be the same. But the issue before the Court is not petitioner's character; it is whether she was given a meaningful opportunity to be heard when the State moved to terminate absolutely her parental rights. In light of the unpursued avenues of defense, and of the experience petitioner underwent at the hearing, I find virtually incredible the Court's conclusion today that her termination proceeding was fundamentally fair. To reach that conclusion, the Court simply ignores the defendant's obvious inability to speak effectively for herself […]. I am unable to ignore that factor; instead, I believe that the record, and the norms of fairness acknowledged by the majority, compel a holding according counsel to petitioner and persons similarly situated. […]

Ours, supposedly, is "a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), and our notion of due process is, "perhaps, the least frozen concept of our law." *Griffin v. Illinois*, 351 U.S. 12, 20 (1956) (opinion concurring in judgment). If the Court in *Boddie v. Connecticut*, 401 U.S. 371 (1971), was able to perceive as constitutionally necessary the access to judicial resources required to dissolve a marriage at the behest of private parties, surely it should perceive as similarly necessary the requested access to legal resources when the State itself seeks to dissolve the intimate and personal family bonds between parent and child. It will not open the "floodgates" that, I suspect, the Court fears. On the contrary, we cannot constitutionally afford the closure that the result in this sad case imposes upon us all.

I respectfully dissent.

Justice Stevens, dissenting.

A woman's misconduct may cause the State to take formal steps to deprive her of her liberty. The State may incarcerate her for a fixed term and also may permanently deprive her of her freedom to associate with her child. The former is a pure deprivation of liberty; the latter is a deprivation of both liberty and property, because statutory rights of inheritance as well as the natural relationship may be destroyed. Although both deprivations are serious, often the deprivation of parental rights will be the more grievous of the two. The plain language of the Fourteenth Amendment commands that both deprivations must be accompanied by due process of law. […]

Without so stating explicitly, the Court appears to treat this case as though it merely involved the deprivation of an interest in property that is less worthy of protection than a person's liberty. The analysis employed in *Mathews v. Eldridge*, in which the Court balanced the costs and benefits of different procedural mechanisms for allocating a finite quantity of material resources among competing claimants, is an appropriate method of determining what process is due in property cases. Meeting the Court on its own terms, Justice Blackmun demonstrates that the *Mathews v. Eldridge* analysis requires the appointment of counsel in this type of case. I agree with his conclusion, but I would take one further step.

In my opinion the reasons supporting the conclusion that the Due Process Clause of the Fourteenth Amendment entitles the defendant in a criminal case to representation by counsel apply with equal force to a case of this kind. The issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits. Accordingly, even if the costs to the State were not relatively insignificant but rather were just as great as the costs of providing prosecutors, judges, and defense counsel to ensure the fairness of criminal proceedings, I would reach the same result in this category of cases. For the value of protecting our liberty from deprivation by the State without due process of law is priceless. […]

Brooke D. Coleman, Lassiter v. Department of Social Services: Why Is It Such a Lousy Case?

Click here to view the article. 12 Nev. L.J. 591 (2012)

Hamdi v. Rumsfeld

JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER join. 542 U.S. 507 (2004)

At this difficult time in our Nation's history, we are called upon to consider the legality of the Government's detention of a United States citizen on United States soil as an "enemy combatant" and to address the process that is constitutionally owed to one who seeks to challenge his classification as such. The United States Court of Appeals for the Fourth Circuit held that petitioner Yaser Hamdi's detention was legally authorized and that he was entitled to no further opportunity to challenge his enemy-combatant label. We now vacate and remand. We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.

I

On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks. One week later, in response to these "acts of treacherous violence," Congress passed a resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (AUMF). Soon thereafter, the President ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.

This case arises out of the detention of a man whom the Government alleges took up arms with the Taliban during this conflict. His name is Yaser Esam Hamdi. Born in Louisiana in 1980, Hamdi moved with his family to Saudi Arabia as a child. By 2001, the parties agree, he resided in Afghanistan. At some point that year, he was seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, and eventually was turned over to the United States military. The Government asserts that it initially detained and interrogated Hamdi in Afghanistan before transferring him to the United States Naval Base in Guantanamo Bay in January 2002. In

April 2002, upon learning that Hamdi is an American citizen, authorities transferred him to a naval brig in Norfolk, Virginia, where he remained until a recent transfer to a brig in Charleston, South Carolina. The Government contends that Hamdi is an "enemy combatant," and that this status justifies holding him in the United States indefinitely—without formal charges or proceedings—unless and until it makes the determination that access to counsel or further process is warranted.

In June 2002, Hamdi's father, Esam Fouad Hamdi, filed the present petition for a writ of habeas corpus under 28 U.S.C. § 2241 in the Eastern District of Virginia, naming as petitioners his son and himself as next friend. The elder Hamdi alleges in the petition that he has had no contact with his son since the Government took custody of him in 2001, and that the Government has held his son "without access to legal counsel or notice of any charges pending against him." The petition contends that Hamdi's detention was not legally authorized. It argues that, "[a]s an American citizen, … Hamdi enjoys the full protections of the Constitution," and that Hamdi's detention in the United States without charges, access to an impartial tribunal, or assistance of counsel "violated and continue[s] to violate the Fifth and Fourteenth Amendments to the United States Constitution." […] Although his habeas petition provides no details with regard to the factual circumstances surrounding his son's capture and detention, Hamdi's father has asserted in documents found elsewhere in the record that his son went to Afghanistan to do "relief work," and that he had been in that country less than two months before September 11, 2001, and could not have received military training. The 20-year-old was traveling on his own for the first time, his father says, and "[b]ecause of his lack of experience, he was trapped in Afghanistan once the military campaign began." […]

[T]he Government filed a response and a motion to dismiss the petition. It attached to its response a declaration from one Michael Mobbs (hereinafter Mobbs Declaration), who identified himself as Special Advisor to the Under Secretary of Defense for Policy. […] Mobbs […] set forth what remains the sole evidentiary support that the Government has provided to the courts for Hamdi's detention. The declaration states that Hamdi "traveled to Afghanistan" in July or August 2001, and that he thereafter "affiliated with a Taliban military unit and received weapons training." It asserts that Hamdi "remained with his Taliban unit following the attacks of September 11" and that, during the time when Northern Alliance forces were "engaged in battle with the Taliban," "Hamdi's Taliban unit surrendered" to those forces, after which he "surrender[ed] his Kalishnikov assault rifle" to them. The Mobbs Declaration also states that, because al Qaeda and the Taliban "were and are hostile forces engaged in armed conflict with the armed forces of the United States," "individuals associated with" those groups "were and continue to be enemy combatants." Mobbs states that Hamdi was labeled an enemy combatant "[b]ased upon his interviews and in light of his association with the Taliban." According to the declaration, a series of "U.S. military screening team[s]" determined that Hamdi met "the criteria for enemy combatants," and "[a] subsequent interview of Hamdi has confirmed the fact that he

surrendered and gave his firearm to Northern Alliance forces, which supports his classification as an enemy combatant." […]

[The district court ruled in Hamdi's favor. The Fourth Circuit reversed and ruled in favor of the government.] We now vacate the judgment below and remand.

II

The threshold question before us is whether the Executive has the authority to detain citizens who qualify as "enemy combatants." […] [The plurality concluded that, in enacting the AUMF, Congress authorized the president to detain enemy combatants for the duration of the war on terror.]

III

Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status. Hamdi argues that he is owed a meaningful and timely hearing and that "extra-judicial detention [that] begins and ends with the submission of an affidavit based on third-hand hearsay" does not comport with the Fifth and Fourteenth Amendments. The Government counters that any more process than was provided below would be both unworkable and "constitutionally intolerable." Our resolution of this dispute requires a careful examination both of the writ of habeas corpus, which Hamdi now seeks to employ as a mechanism of judicial review, and of the Due Process Clause, which informs the procedural contours of that mechanism in this instance.

A

Though they reach radically different conclusions on the process that ought to attend the present proceeding, the parties begin on common ground. All agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States. U.S. Const., Art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"). Only in the rarest of circumstances has Congress seen fit to suspend the writ. *See, e.g.*, Act of Mar. 3, 1863; Act of Apr. 20, 1871. At all other times, it has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law. All agree suspension of the writ has not occurred here. Thus, it is undisputed that Hamdi was properly before an Article III court to challenge his detention under 28 U.S.C. § 2241. Further, all agree that § 2241 and its companion provisions provide at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review. Most notably, § 2243 provides that "the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts," and § 2246 allows the taking of evidence in habeas proceedings by deposition, affidavit, or interrogatories.

The simple outline of § 2241 makes clear both that Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts

and that courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process. The Government recognizes the basic procedural protections required by the habeas statute, but asks us to hold that, given both the flexibility of the habeas mechanism and the circumstances presented in this case, the presentation of the Mobbs Declaration to the habeas court completed the required factual development. It suggests two separate reasons for its position that no further process is due.

[…]

C

The Government's [argues] that further factual exploration is unwarranted and inappropriate in light of the extraordinary constitutional interests at stake. Under the Government's most extreme rendition of this argument, "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict" ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme. At most, the Government argues, courts should review its determination that a citizen is an enemy combatant under a very deferential "some evidence" standard. Under this review, a court would assume the accuracy of the Government's articulated basis for Hamdi's detention, as set forth in the Mobbs Declaration, and assess only whether that articulated basis was a legitimate one.

In response, Hamdi emphasizes that this Court consistently has recognized that an individual challenging his detention may not be held at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive's asserted justifications for that detention have basis in fact and warrant in law. He argues that the Fourth Circuit inappropriately "ceded power to the Executive during wartime to define the conduct for which a citizen may be detained, judge whether that citizen has engaged in the proscribed conduct, and imprison that citizen indefinitely," and that due process demands that he receive a hearing in which he may challenge the Mobbs Declaration and adduce his own counter evidence. The District Court, agreeing with Hamdi, apparently believed that the appropriate process would approach the process that accompanies a criminal trial. It therefore disapproved of the hearsay nature of the Mobbs Declaration and anticipated quite extensive discovery of various military affairs. Anything less, it concluded, would not be "meaningful judicial review."

Both of these positions highlight legitimate concerns. And both emphasize the tension that often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right. The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty, or property, without due process of law," U.S. Const., Amdt. 5, is the test that we articulated in *Mathews v. Eldridge*. *Mathews*

dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burdens the Government would face in providing greater process. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards." We take each of these steps in turn.

1

It is beyond question that substantial interests lie on both sides of the scale in this case. Hamdi's "private interest … affected by the official action," is the most elemental of liberty interests—the interest in being free from physical detention by one's own government. "In our society liberty is the norm," and detention without trial "is the carefully limited exception." "We have always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty," and we will not do so today.

Nor is the weight on this side of the *Mathews* scale offset by the circumstances of war or the accusation of treasonous behavior, for "[i]t is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection," and at this stage in the *Mathews* calculus, we consider the interest of the erroneously detained individual. Indeed, as amicus briefs from media and relief organizations emphasize, the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process here is very real. *See* Brief for AmeriCares et al. as Amici Curiae 13–22 (noting ways in which "[t]he nature of humanitarian relief work and journalism present a significant risk of mistaken military detentions"). Moreover, as critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat. Because we live in a society in which "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty," our starting point for the *Mathews v. Eldridge* analysis is unaltered by the allegations surrounding the particular detainee or the organizations with which he is alleged to have associated. We reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.

2

On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States. As discussed above, the law of war and the realities of combat may render such detentions both necessary and appropriate, and our due process analysis need not blink at those

realities. Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them.

The Government also argues at some length that its interests in reducing the process available to alleged enemy combatants are heightened by the practical difficulties that would accompany a system of trial-like process. In its view, military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war. To the extent that these burdens are triggered by heightened procedures, they are properly taken into account in our due process analysis.

3

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

With due recognition of these competing concerns, we believe that neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant. That is, "the risk of an erroneous deprivation" of a detainee's liberty interest is unacceptably high under the Government's proposed rule, while some of the "additional or substitute procedural safeguards" suggested by the District Court are unwarranted in light of their limited "probable value" and the burdens they may impose on the military in such cases. *Mathews*.

We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker. "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' " These essential constitutional promises may not be eroded.

At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and

fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant. In the words of *Mathews*, process of this sort would sufficiently address the "risk of an erroneous deprivation" of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government.

We think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts. The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to continue to hold those who have been seized. The Government has made clear in its briefing that documentation regarding battlefield detainees already is kept in the ordinary course of military affairs. Any factfinding imposition created by requiring a knowledgeable affiant to summarize these records to an independent tribunal is a minimal one. Likewise, arguments that military officers ought not have to wage war under the threat of litigation lose much of their steam when factual disputes at enemy-combatant hearings are limited to the alleged combatant's acts. This focus meddles little, if at all, in the strategy or conduct of war, inquiring only into the appropriateness of continuing to detain an individual claimed to have taken up arms against the United States. While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.

In sum, while the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator.

D

[…] Because we conclude that due process demands some system for a citizen detainee to refute his classification, the proposed "some evidence" standard is inadequate. Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short. As the Government itself has recognized, we have utilized the "some evidence" standard in the past as a standard of review, not as a standard of proof. That

is, it primarily has been employed by courts in examining an administrative record developed after an adversarial proceeding—one with process at least of the sort that we today hold is constitutionally mandated in the citizen enemy-combatant setting. This standard therefore is ill suited to the situation in which a habeas petitioner has received no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive's factual assertions before a neutral decisionmaker. […]

There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention. In the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved. […]

IV

Hamdi asks us to hold that the Fourth Circuit also erred by denying him immediate access to counsel upon his detention and by disposing of the case without permitting him to meet with an attorney. Since our grant of certiorari in this case, Hamdi has been appointed counsel, with whom he has met for consultation purposes on several occasions, and with whom he is now being granted unmonitored meetings. He unquestionably has the right to access to counsel in connection with the proceedings on remand. No further consideration of this issue is necessary at this stage of the case.

* * *

The judgment of the United States Court of Appeals for the Fourth Circuit is vacated, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, concurring in part, dissenting in part, and concurring in the judgment.

According to Yaser Hamdi's petition for writ of habeas corpus, brought on his behalf by his father, the Government of the United States is detaining him, an American citizen on American soil, with the explanation that he was seized on the field of battle in Afghanistan, having been on the enemy side. It is undisputed that the Government has not charged him with espionage, treason, or any other crime under domestic law. It is likewise undisputed that for one year and nine months, on the basis of an Executive designation of Hamdi as an "enemy combatant," the Government denied him the right to send or receive any communication beyond the prison where he was held and, in particular, denied him access to counsel to represent him. The Government asserts a right to hold Hamdi under these conditions indefinitely, that is, until the Government determines that the United States is no longer threatened by the terrorism exemplified in the attacks of September 11, 2001.

In these proceedings on Hamdi's petition, he seeks to challenge the facts claimed by the Government as the basis for holding him as an enemy combatant. […]

The Government responds that Hamdi's incommunicado imprisonment as an enemy combatant seized on the field of battle falls within the President's power as Commander in Chief under the laws and usages of war, and is in any event authorized by two statutes. Accordingly, the Government contends that Hamdi has no basis for any challenge by petition for habeas except to his own status as an enemy combatant; and even that challenge may go no further than to enquire whether "some evidence" supports Hamdi's designation; if there is "some evidence," Hamdi should remain locked up at the discretion of the Executive. At the argument of this case, in fact, the Government went further and suggested that as long as a prisoner could challenge his enemy combatant designation when responding to interrogation during incommunicado detention he was accorded sufficient process to support his designation as an enemy combatant. Since on either view judicial enquiry so limited would be virtually worthless as a way to contest detention, the Government's concession of jurisdiction to hear Hamdi's habeas claim is more theoretical than practical, leaving the assertion of Executive authority close to unconditional.

The plurality rejects any such limit on the exercise of habeas jurisdiction and so far I agree with its opinion. The plurality does, however, accept the Government's position that if Hamdi's designation as an enemy combatant is correct, his detention (at least as to some period) is authorized by an Act of Congress as required by § 4001(a), that is, by the Authorization for Use of Military Force, 115 Stat. 224 (hereinafter Force Resolution). Ante, at 517–521. Here, I disagree and respectfully dissent. The Government has failed to demonstrate that the Force Resolution authorizes the detention complained of here even on the facts the Government claims. If the Government raises nothing further than the record now shows, the Non-Detention Act entitles Hamdi to be released. […]

IV

Because I find Hamdi's detention forbidden by § 4001(a) and unauthorized by the Force Resolution, I would not reach any questions of what process he may be due in litigating disputed issues in a proceeding under the habeas statute or prior to the habeas enquiry itself. For me, it suffices that the Government has failed to justify holding him in the absence of a further Act of Congress, criminal charges, a showing that the detention conforms to the laws of war, or a demonstration that § 4001(a) is unconstitutional. I would therefore vacate the judgment of the Court of Appeals and remand for proceedings consistent with this view.

Since this disposition does not command a majority of the Court, however, the need to give practical effect to the conclusions of eight Members of the Court rejecting the Government's position calls for me to join with the plurality in ordering remand on terms closest to those I would impose. Although I think litigation of Hamdi's status as an enemy combatant is unnecessary, the terms of the plurality's remand will allow Hamdi to offer evidence that he is not an

enemy combatant, and he should at the least have the benefit of that opportunity.

It should go without saying that in joining with the plurality to produce a judgment, I do not adopt the plurality's resolution of constitutional issues that I would not reach. It is not that I could disagree with the plurality's determinations (given the plurality's view of the Force Resolution) that someone in Hamdi's position is entitled at a minimum to notice of the Government's claimed factual basis for holding him, and to a fair chance to rebut it before a neutral decisionmaker; nor, of course, could I disagree with the plurality's affirmation of Hamdi's right to counsel. On the other hand, I do not mean to imply agreement that the Government could claim an evidentiary presumption casting the burden of rebuttal on Hamdi, or that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas.

Subject to these qualifications, I join with the plurality in a judgment of the Court vacating the Fourth Circuit's judgment and remanding the case.

JUSTICE SCALIA, with whom JUSTICE STEVENS joins, dissenting.

Petitioner Yaser Hamdi, a presumed American citizen, has been imprisoned without charge or hearing in the Norfolk and Charleston Naval Brigs for more than two years, on the allegation that he is an enemy combatant who bore arms against his country for the Taliban. His father claims to the contrary, that he is an inexperienced aid worker caught in the wrong place at the wrong time. This case brings into conflict the competing demands of national security and our citizens' constitutional right to personal liberty. Although I share the plurality's evident unease as it seeks to reconcile the two, I do not agree with its resolution.

Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, § 9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause. Accordingly, I would reverse the judgment below.

I

The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive. […]

The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property. When a citizen was deprived of liberty because of alleged criminal conduct, those procedures typically required committal by a magistrate followed

by indictment and trial. The Due Process Clause "in effect affirms the right of trial according to the process and proceedings of the common law." […]

These due process rights have historically been vindicated by the writ of habeas corpus. [Justice Scalia then discussed the history of habeas practice in England.] […] The writ of habeas corpus was preserved in the Constitution—the only common-law writ to be explicitly mentioned. *See* Art. I, § 9, cl. 2. […]

II

The allegations here, of course, are no ordinary accusations of criminal activity. Yaser Esam Hamdi has been imprisoned because the Government believes he participated in the waging of war against the United States. The relevant question, then, is whether there is a different, special procedure for imprisonment of a citizen accused of wrongdoing by aiding the enemy in wartime.

A

JUSTICE O'CONNOR, writing for a plurality of this Court, asserts that captured enemy combatants (other than those suspected of war crimes) have traditionally been detained until the cessation of hostilities and then released. That is probably an accurate description of wartime practice with respect to enemy aliens. The tradition with respect to American citizens, however, has been quite different. Citizens aiding the enemy have been treated as traitors subject to the criminal process. […]

V

It follows from what I have said that Hamdi is entitled to a habeas decree requiring his release unless (1) criminal proceedings are promptly brought, or (2) Congress has suspended the writ of habeas corpus. A suspension of the writ could, of course, lay down conditions for continued detention, similar to those that today's opinion prescribes under the Due Process Clause. But there is a world of difference between the people's representatives' determining the need for that suspension (and prescribing the conditions for it), and this Court's doing so.

The plurality finds justification for Hamdi's imprisonment in the Authorization for Use of Military Force, which […] is not remotely a congressional suspension of the writ, and no one claims that it is. […]

It should not be thought, however, that the plurality's evisceration of the Suspension Clause augments, principally, the power of Congress. As usual, the major effect of its constitutional improvisation is to increase the power of the Court. Having found a congressional authorization for detention of citizens where none clearly exists; and having discarded the categorical procedural protection of the Suspension Clause; the plurality then proceeds, under the guise of the Due Process Clause, to prescribe what procedural protections it thinks appropriate. It "weigh[s] the private interest … against the Government's asserted interest," and—just as though writing a new Constitution—comes up with an unheard-of system in which the citizen rather than the Government bears the burden of proof, testimony is by hearsay rather than live witnesses,

and the presiding officer may well be a "neutral" military officer rather than judge and jury. It claims authority to engage in this sort of "judicious balancing" from *Mathews v. Eldridge*, a case involving … the withdrawal of disability benefits! Whatever the merits of this technique when newly recognized property rights are at issue (and even there they are questionable), it has no place where the Constitution and the common law already supply an answer.

Having distorted the Suspension Clause, the plurality finishes up by transmogrifying the Great Writ—disposing of the present habeas petition by remanding for the District Court to "engag[e] in a factfinding process that is both prudent and incremental." "In the absence of [the Executive's prior provision of procedures that satisfy due process], … a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved." This judicial remediation of executive default is unheard of. The role of habeas corpus is to determine the legality of executive detention, not to supply the omitted process necessary to make it legal. It is not the habeas court's function to make illegal detention legal by supplying a process that the Government could have provided, but chose not to. If Hamdi is being imprisoned in violation of the Constitution (because without due process of law), then his habeas petition should be granted; the Executive may then hand him over to the criminal authorities, whose detention for the purpose of prosecution will be lawful, or else must release him.

There is a certain harmony of approach in the plurality's making up for Congress's failure to invoke the Suspension Clause and its making up for the Executive's failure to apply what it says are needed procedures—an approach that reflects what might be called a Mr. Fix-it Mentality. The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches' actions and omissions. Has the Legislature failed to suspend the writ in the current dire emergency? Well, we will remedy that failure by prescribing the reasonable conditions that a suspension should have included. And has the Executive failed to live up to those reasonable conditions? Well, we will ourselves make that failure good, so that this dangerous fellow (if he is dangerous) need not be set free. The problem with this approach is not only that it steps out of the courts' modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of government by the people.

VI

Several limitations give my views in this matter a relatively narrow compass. They apply only to citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court. This is not likely to be a numerous group; currently we know of only two, Hamdi and Jose Padilla. Where the citizen is captured outside and held outside the United States, the constitutional requirements may be different. Moreover, even within the United States, the accused citizen-enemy combatant may lawfully be detained

once prosecution is in progress or in contemplation. The Government has been notably successful in securing conviction, and hence long-term custody or execution, of those who have waged war against the state.

I frankly do not know whether these tools are sufficient to meet the Government's security needs, including the need to obtain intelligence through interrogation. It is far beyond my competence, or the Court's competence, to determine that. But it is not beyond Congress's. If the situation demands it, the Executive can ask Congress to authorize suspension of the writ—which can be made subject to whatever conditions Congress deems appropriate, including even the procedural novelties invented by the plurality today. To be sure, suspension is limited by the Constitution to cases of rebellion or invasion. But whether the attacks of September 11, 2001, constitute an "invasion," and whether those attacks still justify suspension several years later, are questions for Congress rather than this Court. If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court.

* * *

[…] Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis—that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it. Because the Court has proceeded to meet the current emergency in a manner the Constitution does not envision, I respectfully dissent.

JUSTICE THOMAS, dissenting.

The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision. As such, petitioners' habeas challenge should fail, and there is no reason to remand the case. The plurality reaches a contrary conclusion by failing adequately to consider basic principles of the constitutional structure as it relates to national security and foreign affairs and by using the balancing scheme of *Mathews v. Eldridge*. I do not think that the Federal Government's war powers can be balanced away by this Court. Arguably, Congress could provide for additional procedural protections, but until it does, we have no right to insist upon them. But even if I were to agree with the general approach the plurality takes, I could not accept the particulars. The plurality utterly fails to account for the Government's compelling interests and for our own institutional inability to weigh competing concerns correctly. I respectfully dissent. […]

Notes & Questions

1. The portions of *Hamdi* reproduced above address a weighty question about the conduct of a global war on terror: what legal process must be afforded to a U.S.-citizen enemy combatant detained in the United States. Does it surprise you, then, to see the Court apply the same balancing test to that question as it did to whether a parent has a right to legal representation in a hearing about whether to terminate their parental rights?
2. Due process is a vague concept, and one that verges on the circular (the process that is due is the process that courts say is due). But through case by case elaboration and broad balancing tests (such as the one from *Mathews v. Eldridge*), due process has been given more definite content.
3. Balancing tests are frequently criticized because they are prone to generate different answers when applied by different judges. But more definite rules could not be applied to as many different factual contexts as broad balancing tests can be. What do you think is the right approach?
4. Notice in this regard that the plurality's answer to the question of how much process is due is neither "none" nor "the same process as is due in a federal criminal trial." Perhaps another consequence of balancing tests is compromise of this sort.
5. Note the dissenting opinion by Justice Scalia, joined by Justice Stevens. Those two justices decided 2453 cases together. They only agreed at all in about two-thirds of those cases. In closely divided, 5–4 cases, the two voted together in the majority only eight percent of the time. They voted in dissent together, just the two of them, no more than eight times (including *Hamdi*). What do you think drew them together in this case?
6. The reasoning of Justice Scalia's dissent turns on the suspension clause of the Constitution, which guarantees the right to petition for a writ of habeas corpus unless the right has been formally suspended by Congress. As you may learn in other classes, the right of habeas corpus guarantees certain procedures above and beyond due process. It is therefore important to remember that due process is but one element of procedural rights enshrined in the constitution.

4. Pleadings

4.1. Service

As we have seen, due process binds the government across many different areas of law, from family law to the law of war. And we have seen that the requirements of due process are flexible and require balancing competing interests. Finally, we have seen that the twin hallmarks of due process are notice and an opportunity to be heard. In other words, before the government can deprive a person of life, liberty, or property (including money), it typically must notify that person of the proceeding in which such deprivation may occur and afford them an opportunity to defend themselves.

The same rules of due process apply to civil lawsuits in court. After all, a civil suit is a proceeding by which a plaintiff asks the government (a court) to afford her relief, typically by depriving the defendant of property (ordering him to pay money damages). For that reason, due process requires that the plaintiff and/or the court notify the defendant of the proceeding. This notice is traditionally achieved through service of process, which typically consists of delivering a copy of the complaint and summons to each defendant. The next two cases examine how due process interacts with service of process, which is the beginning of most civil suits. Much of the remainder of the first half of this course will examine what opportunities to be heard courts afford to parties appearing before them.

Mullane v. Central Hanover Bank & Tr. Co.

MR. JUSTICE JACKSON delivered the opinion of the Court. 339 U.S. 306 (1950)

This controversy questions the constitutional sufficiency of notice to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund established under the New York Banking Law. […]

[Common trust funds allow a bank to pool together trusts that would otherwise be too small to warrant the bank's supervision.] The income, capital gains, losses and expenses of the collective trust are shared by the constituent trusts in proportion to their contribution. By this plan, diversification of risk and economy of management can be extended to those whose capital standing alone would not obtain such advantage.

[The law allows banks to make periodic "accountings" of trusts under their control. Such accountings allow beneficiaries to challenge the bank's actions during a specified period, but once the accounting is complete, no further challenges may be brought alleging mismanagement of the trust during the relevant period.] The decree in each such judicial settlement of accounts is made binding and conclusive as to any matter set forth in the account upon everyone having any interest in the common fund or in any participating estate, trust or fund.

In January, 1946, Central Hanover Bank and Trust Company established a common trust fund in accordance with these provisions, and in March, 1947, it petitioned the Surrogate's Court for settlement of its first account as common trustee. During the accounting period a total of 113 trusts […] participated in the common trust fund, the gross capital of which was nearly three million dollars. The record does not show the number or residence of the beneficiaries, but they were many and it is clear that some of them were not residents of the State of New York.

[…] [T]he only notice required [by New York law], and the only one given, was by newspaper publication setting forth merely the name and address of the trust company, the name and the date of establishment of the common trust fund, and a list of all participating estates, trusts or funds. [However, as required by law, when the trust was first established, the bank sent a letter to each beneficiary describing the procedures, including notice, governing future accountings.]

Upon the filing of the petition for the settlement of accounts, appellant [Mullane] was, by order of the court […], appointed special guardian and attorney for all persons known or unknown not otherwise appearing who had or might thereafter have any interest in the income of the common trust fund; and appellee Vaughan was appointed to represent those similarly interested in the principal. There were no other appearances on behalf of any one interested in either interest or principal.

Appellant [Mullane] appeared specially, objecting that notice and the statutory provisions for notice to beneficiaries were inadequate to afford due process under the Fourteenth Amendment, and therefore that the court was without jurisdiction to render a final and binding decree. Appellant's objections were entertained and overruled, the Surrogate [(a special kind of judge with jurisdiction over trusts in New York)] holding that the notice required and given was sufficient. A final decree accepting the accounts has been entered. […]

The effect of this decree, as held below, is to settle "all questions respecting the management of the common fund." We understand that every right which beneficiaries would otherwise have against the trust company, either as trustee of the common fund or as trustee of any individual trust, for improper management of the common trust fund during the period covered by the accounting is sealed and wholly terminated by the decree. […]

[What] opportunity […] must [the state] give beneficiaries to contest [the outcome of a proceeding affecting their property?] Many controversies have raged

about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

In two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. Certainly the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up to the standards of due process.

Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. But the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified.

Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that "The fundamental requisite of due process of law is the opportunity to be heard." This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents. We disturb none of the established rules on these subjects. No decision constitutes a controlling or even a very illuminating precedent for the case before us. But a few general principles stand out in the books.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. […]

But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended

on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint.

Nor is publication here reinforced by steps likely to attract the parties' attention to the proceeding. It is true that publication traditionally has been acceptable as notification supplemental to other action [such as attachment or seizure] which in itself may reasonably be expected to convey a warning. [But no such action is present here.]

This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.

Those beneficiaries represented by appellant whose interests or whereabouts could not with due diligence be ascertained come clearly within this category. As to them the statutory notice is sufficient. However great the odds that publication will never reach the eyes of such unknown parties, it is not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the best notice practicable.

Nor do we consider it unreasonable for the State to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee. […] We recognize the practical difficulties and costs that would be attendant on frequent investigations into the status of great numbers of beneficiaries, many of whose interests in the common fund are so remote as to be ephemeral; and we have no doubt that such impracticable and extended searches are not required in the name of due process. […] These are practical matters in which we should be reluctant to disturb the judgment of the state authorities.

Accordingly we overrule appellant's constitutional objections to published notice insofar as they are urged on behalf of any beneficiaries whose interests or addresses are unknown to the trustee.

As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

The trustee has on its books the names and addresses of the income beneficiaries represented by appellant, and we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses. Certainly sending them a copy of the statute months and perhaps years in advance does not answer this purpose. The trustee periodically remits their income to them, and we think that they might reasonably expect that with or apart from their remittances word might come to them personally that steps were being taken affecting their interests.

We need not weigh contentions that a requirement of personal service of citation on even the large number of known resident or nonresident beneficiaries would, by reasons of delay if not of expense, seriously interfere with the proper administration of the fund. […]

The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication. Moreover, the fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund was established is persuasive that postal notification at the time of accounting would not seriously burden the plan.

In some situations the law requires greater precautions in its proceedings than the business world accepts for its own purposes. In few, if any, will it be satisfied with less. Certainly it is instructive, in determining the reasonableness of the impersonal broadcast notification here used, to ask whether it would satisfy a prudent man of business, counting his pennies but finding it in his interest to convey information to many persons whose names and addresses are in his files. We are not satisfied that it would. Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests. […]

We hold that the notice of judicial settlement of accounts required by the New York Banking Law § 100-c(12) is incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights. Accordingly

the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Jones v. Flowers

547 U.S. 220 (2006)

Chief Justice Roberts delivered the opinion of the Court.

Before a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner "notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co*. We granted certiorari to determine whether, when notice of a tax sale is mailed to the owner and returned undelivered, the government must take additional reasonable steps to provide notice before taking the owner's property.

I

In 1967, petitioner Gary Jones purchased a house at 717 North Bryan Street in Little Rock, Arkansas. He lived in the house with his wife until they separated in 1993. Jones then moved into an apartment in Little Rock, and his wife continued to live in the North Bryan Street house. Jones paid his mortgage each month for 30 years, and the mortgage company paid Jones' property taxes. After Jones paid off his mortgage in 1997, the property taxes went unpaid, and the property was certified as delinquent.

In April 2000, respondent Mark Wilcox, the Commissioner of State Lands, attempted to notify Jones of his tax delinquency, and his right to redeem the property, by mailing a certified letter to Jones at the North Bryan Street address. The packet of information stated that unless Jones redeemed the property, it would be subject to public sale two years later on April 17, 2002. Nobody was home to sign for the letter, and nobody appeared at the post office to retrieve the letter within the next 15 days. The post office returned the unopened packet to the Commissioner marked "unclaimed."

Two years later, and just a few weeks before the public sale, the Commissioner published a notice of public sale in the Arkansas Democrat Gazette. No bids were submitted, which permitted the State to negotiate a private sale of the property. *See* § 26-37-202(b). Several months later, respondent Linda Flowers submitted a purchase offer. The Commissioner mailed another certified letter to Jones at the North Bryan Street address, attempting to notify him that his house would be sold to Flowers if he did not pay his taxes. Like the first letter, the second was also returned to the Commissioner marked "unclaimed." Flowers purchased the house, which the parties stipulated in the trial court had a fair market value of $80,000, for $21,042.15. Immediately after the 30-day period for postsale redemption passed, *see* § 26-37-202(e), Flowers had an unlawful detainer notice delivered to the property. The notice was served on Jones' daughter, who contacted Jones and notified him of the tax sale.

Jones filed a lawsuit in Arkansas state court against the Commissioner and Flowers, alleging that the Commissioner's failure to provide notice of the tax sale and of Jones' right to redeem resulted in the taking of his property without due process. The Commissioner and Flowers moved for summary judgment on the ground that the two unclaimed letters sent by the Commissioner were a constitutionally adequate attempt at notice, and Jones filed a cross-motion for summary judgment. The trial court granted summary judgment in favor of the Commissioner and Flowers. It concluded that the Arkansas tax sale statute, which set forth the notice procedure followed by the Commissioner, complied with constitutional due process requirements.

Jones appealed, and the Arkansas Supreme Court affirmed the trial court's judgment.

[…] We hold that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so. Under the circumstances presented here, additional reasonable steps were available to the State. We therefore reverse the judgment of the Arkansas Supreme Court.

II

A

Due process does not require that a property owner receive actual notice before the government may take his property. Rather, we have stated that due process requires the government to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*. The Commissioner argues that once the State provided notice reasonably calculated to apprise Jones of the impending tax sale by mailing him a certified letter, due process was satisfied. The Arkansas statutory scheme is reasonably calculated to provide notice, the Commissioner continues, because it provides for notice by certified mail to an address that the property owner is responsible for keeping up to date. The Commissioner notes this Court's ample precedent condoning notice by mail and adds that the Arkansas scheme exceeds constitutional requirements by requiring the Commissioner to use certified mail.

[…] [W]e have never addressed whether due process entails further responsibility when the government becomes aware prior to the taking that its attempt at notice has failed. That is a new wrinkle, and we have explained that the "notice required will vary with circumstances and conditions." The question presented is whether such knowledge on the government's part is a "circumstance and condition" that varies the "notice required."

The Courts of Appeals and State Supreme Courts have addressed this question on frequent occasions, and most have decided that when the government learns its attempt at notice has failed, due process requires the government to do something more before real property may be sold in a tax sale. […] Many

States already require in their statutes that the government do more than simply mail notice to delinquent owners, either at the outset or as a follow-up measure if initial mailed notice is ineffective.

In *Mullane,* we stated that "when notice is a person's due … [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," and that assessing the adequacy of a particular form of notice requires balancing the "interest of the State" against "the individual interest sought to be protected by the Fourteenth Amendment." […]

We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed. If the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again. No one "desirous of actually informing" the owners would simply shrug his shoulders as the letters disappeared and say "I tried." Failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman.

By the same token, when a letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so. This is especially true when, as here, the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house. Although the State may have made a reasonable calculation of how to reach Jones, it had good reason to suspect when the notice was returned that Jones was "no better off than if the notice had never been sent." Deciding to take no further action is not what someone "desirous of actually informing" Jones would do; such a person would take further reasonable steps if any were available.

In prior cases, we have required the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case. […]

The Commissioner points out that in these cases, the State was aware of such information *before* it calculated how best to provide notice. But it is difficult to explain why due process would have settled for something less if the government had learned after notice was sent, but before the taking occurred, that the property owner was in prison or was incompetent. […] [The government's] knowledge was one of the "practicalities and peculiarities of the case," *Mullane*, that the Court took into account in determining whether constitutional requirements were met. It should similarly be taken into account in assessing the adequacy of notice in this case. The dissent dismisses the State's knowledge that its notice was ineffective as "learned long after the fact," but the notice letter was promptly returned to the State two to three weeks after it was sent, and the Arkansas statutory regime precludes the State from taking the property for

two *years* while the property owner may exercise his right to redeem, *see* Ark. Code Ann. § 26-37-301.

It is certainly true […] that the failure of notice in a specific case does not establish the inadequacy of the attempted notice; in that sense, the constitutionality of a particular procedure for notice is assessed *ex ante*, rather than *post hoc.* But if a feature of the State's chosen procedure is that it promptly provides additional information to the government about the effectiveness of notice, it does not contravene the *ex ante* principle to consider what the government does with that information in assessing the adequacy of the chosen procedure. After all, the State knew *ex ante* that it would promptly learn whether its effort to effect notice through certified mail had succeeded. It would not be inconsistent with the approach the Court has taken in notice cases to ask, with respect to a procedure under which telephone calls were placed to owners, what the State did when no one answered. Asking what the State does when a notice letter is returned unclaimed is not substantively different. […]

Jones should have been more diligent with respect to his property, no question. People must pay their taxes, and the government may hold citizens accountable for tax delinquency by taking their property. But before forcing a citizen to satisfy his debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking. U.S. Const., Amdt. 14.

B

[…] For the reasons stated, we conclude the State should have taken additional reasonable steps to notify Jones, if practicable to do so. The question remains whether there were any such available steps. While "[i]t is not our responsibility to prescribe the form of service that the [government] should adopt," if there were no reasonable additional steps the government could have taken upon return of the unclaimed notice letter, it cannot be faulted for doing nothing.

We think there were several reasonable steps the State could have taken. What steps are reasonable in response to new information depends upon what the new information reveals. The return of the certified letter marked "unclaimed" meant either that Jones still lived at 717 North Bryan Street, but was not home when the postman called and did not retrieve the letter at the post office, or that Jones no longer resided at that address. One reasonable step primarily addressed to the former possibility would be for the State to resend the notice by regular mail, so that a signature was not required. The Commissioner says that use of certified mail makes actual notice more likely, because requiring the recipient's signature protects against misdelivery. But that is only true, of course, when someone is home to sign for the letter, or to inform the mail carrier that he has arrived at the wrong address. Otherwise, […] the use of certified mail might make actual notice less likely in some cases—the letter cannot be left like regular mail to be examined at the end of the day, and it can only be retrieved from the post office for a specified period of time. Following up with regular mail might also increase the chances of actual notice to Jones if—as it turned out—he had moved. Even occupants who ignored certified mail notice

slips addressed to the owner (if any had been left) might scrawl the owner's new address on the notice packet and leave it for the postman to retrieve, or notify Jones directly.

Other reasonable followup measures, directed at the possibility that Jones had moved as well as that he had simply not retrieved the certified letter, would have been to post notice on the front door, or to address otherwise undeliverable mail to "occupant." Most States that explicitly outline additional procedures in their tax sale statutes require just such steps. Either approach would increase the likelihood that the owner would be notified that he was about to lose his property, given the failure of a letter deliverable only to the owner in person. That is clear in the case of an owner who still resided at the premises. It is also true in the case of an owner who has moved: Occupants who might disregard a certified mail slip not addressed to them are less likely to ignore posted notice, and a letter addressed to them (even as "occupant") might be opened and read. In either case, there is a significant chance the occupants will alert the owner, if only because a change in ownership could well affect their own occupancy. In fact, Jones first learned of the State's effort to sell his house when he was alerted by one of the occupants—his daughter—after she was served with an unlawful detainer notice.

Jones believes that the Commissioner should have searched for his new address in the Little Rock phonebook and other government records such as income tax rolls. We do not believe the government was required to go this far. […] An open-ended search for a new address— especially when the State obligates the taxpayer to keep his address updated with the tax collector, *see* Ark. Code Ann. § 26-35-705 (1997)—imposes burdens on the State significantly greater than the several relatively easy options outlined above.

The Commissioner complains about the burden of even those additional steps, […] The Commissioner has offered no estimate of how many notice letters are returned, and no facts to support the dissent's assertion that the Commissioner must now physically locate "tens of thousands of properties every year." […] Successfully providing notice is often the most efficient way to collect unpaid taxes, […] but rather than taking relatively easy additional steps to effect notice, the State undertook the burden and expense of purchasing a newspaper advertisement, conducting an auction, and then negotiating a private sale of the property to Flowers.

The Solicitor General argues that requiring further effort when the government learns that notice was not delivered will cause the government to favor modes of providing notice that do not generate additional information—for example, starting (and stopping) with regular mail instead of certified mail. We find this unlikely, as we have no doubt that the government repeatedly finds itself being asked to prove that notice was sent and received. Using certified mail provides the State with documentation of personal delivery and protection against false claims that notice was never received. That added security, however, comes at a price—the State also learns when notice has *not* been received. We conclude that, under the circumstances presented, the State cannot simply ignore that information in proceeding to take and sell the owner's property […].

Though the Commissioner argues that followup measures are not constitutionally required, he reminds us that the State did make some attempt to follow up with Jones by publishing notice in the newspaper a few weeks before the public sale. Several decades ago, this Court observed that "[c]hance alone" brings a person's attention to "an advertisement in small type inserted in the back pages of a newspaper," *Mullane*, and that notice by publication is adequate only where "it is not reasonably possible or practicable to give more adequate warning." Following up by publication was not constitutionally adequate under the circumstances presented here because, as we have explained, it was possible and practicable to give Jones more adequate warning of the impending tax sale. […]

There is no reason to suppose that the State will ever be less than fully zealous in its efforts to secure the tax revenue it needs. The same cannot be said for the State's efforts to ensure that its citizens receive proper notice before the State takes action against them. In this case, the State is exerting extraordinary power against a property owner—taking and selling a house he owns. It is not too much to insist that the State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed.

The Commissioner's effort to provide notice to Jones of an impending tax sale of his house was insufficient to satisfy due process given the circumstances of this case. The judgment of the Arkansas Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of this case.

JUSTICE THOMAS, with whom JUSTICE SCALIA and JUSTICE KENNEDY join, dissenting.

[…] Because, under this Court's precedents, the State's notice methods clearly satisfy the requirements of the Due Process Clause, I respectfully dissent.

I

[…] Balancing a State's interest in efficiently managing its administrative system and an individual's interest in adequate notice, this Court has held that a State must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." […] "[H]eroic efforts," however, are not required. […]

The methods of notice employed by Arkansas were reasonably calculated to inform petitioner of proceedings affecting his property interest and thus satisfy the requirements of the Due Process Clause. The State mailed a notice by certified letter to the address provided by petitioner. The certified letter was returned to the State marked "unclaimed" after three attempts to deliver it. The State then published a notice of public sale containing redemption information in the *Arkansas Democrat Gazette* newspaper. After Flowers submitted a purchase offer, the State sent yet another certified letter to petitioner at his

record address. That letter, too, was returned to the State marked "unclaimed" after three delivery attempts.

Arkansas' attempts to contact petitioner by certified mail at his "record address," without more, satisfy due process. Because the notices were sent to the address provided by petitioner himself, the State had an especially sound basis for determining that notice would reach him. Moreover, Arkansas exceeded the constitutional minimum by additionally publishing notice in a local newspaper. *See Mullane*. Due process requires nothing more—and certainly not here, where petitioner had a statutory duty to pay his taxes and to report any change of address to the state taxing authority.

My conclusion that Arkansas' notice methods satisfy due process is reinforced by the well-established presumption that individuals, especially those owning property, act in their own interest. […] Consistent with this observation, Arkansas was free to "indulge the assumption" that petitioner had either provided the state taxing authority with a correct and up-to-date mailing address—as required by state law—"or that he … left some caretaker under a duty to let him know that [his property was] being jeopardized."

The Court does not conclude that certified mail is inherently insufficient as a means of notice, but rather that "the government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice." I disagree.

First, whether a method of notice is reasonably calculated to notify the interested party is determined *ex ante*, *i.e.*, from the viewpoint of the government agency at the time its notice is sent. […] Relatedly, we have refused to evaluate the reasonableness of a particular method of notice by comparing it to alternative methods that are identified after the fact. Today the Court appears to abandon both of these practices. Its rejection of Arkansas' selected method of notice—a method this Court has repeatedly concluded is constitutionally sufficient—is based upon information that was unavailable when notice was sent. Indeed, the Court's proposed notice methods—regular mail, posting, and addressing mail to " 'occupant,' "—are entirely the product of *post hoc* considerations, including the discovery that members of petitioner's family continued to live in the house. […]

Second, […] [u]nder the majority's logic, each time a doubt is raised with respect to whether notice has reached an interested party, the State will have to consider additional means better calculated to achieve notice. Because this rule turns on speculative, newly acquired information, it has no natural end point, and, in effect, requires the States to achieve something close to actual notice. […]

The only circumstances in which this Court has found notice by mail and publication inadequate under the Due Process Clause involve situations where the state or local government knew at the outset that its notice efforts were destined to fail and knew how to rectify the problem prior to sending notice. […]

By contrast, Arkansas did not know at the time it sent notice to petitioner that its method would fail, and Arkansas did not know that petitioner no longer lived at the record address simply because letters were returned "unclaimed." […] The State cannot be charged to correct a problem of petitioner's own creation and of which it was not aware. Even if the State had divined that petitioner was no longer at the record address, its publication of notice in a local newspaper would have sufficed because *Mullane* authorizes the use of publication when the record address is unknown. […]

II

The Court's proposed methods, aside from being constitutionally unnecessary, are also burdensome, impractical, and no more likely to effect notice than the methods actually employed by the State.

[…] These administrative burdens are not compelled by the Due Process Clause. Here, Arkansas has determined that its law requiring property owners to maintain a current address with the state taxing authority, in conjunction with its authorization to send property notices to the record address, is an efficient and fair way to administer its tax collection system. The Court's decision today forecloses such a reasonable system and burdens the State with inefficiencies caused by delinquent taxpayers. […]

Accordingly, I would affirm the judgment of the Arkansas Supreme Court.

Notes & Questions

1. Both *Mullane* and *Jones* show one important ramification of due process: effecting service to initiate a proceeding operates to provide notice.
2. Note that in neither *Mullane* nor *Jones* does the Court require the serving party to provide proof that the person being served was in fact notified of the proceeding. Instead, the Court discusses which forms of "constructive" notice suffice to satisfy due process. What does the Court mean by "constructive" notice?
3. Constructive notice must be watched carefully to ensure that the fiction does not swallow the truth. Consider the following cases:
    - May a landlord notify tenants of eviction proceedings by posting notice on the door of the renter's residence? In *Greene v. Lindsey*, 456 U.S. 444 (1982), an administrator of public-housing units employed such a procedure. The tenants sued, alleging that service was defective and that they had no actual notice of the eviction proceedings. The record indicated that "the process servers were well aware [that] notices posted on apartment doors in the area where these tenants lived were 'not infrequently' removed by children or other tenants before they could have their intended effect." The Supreme Court ruled in favor of the tenants, holding that the circumstances required the landlord to mail the notice of eviction.

- Can a person agree by contract to a method of constructive notice in advance? In *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964), a divided Court upheld the validity of a contractual agreement to appoint a third-party to serve as agent for purposes of service of process. The Szukhent family, who lived in Michigan, leased farm equipment from the New York plaintiff. The contract governing the lease, which the Szukhents signed, named as their agent for purposes of service of process Florence Weinberg, a New York resident whom they had never met nor spoken with. When the Szukhents failed to make payments on the farm equipment, the rental company sued and served process on Ms. Weinberg, who in turn mailed a copy of the complaint to the Szukhents. The plaintiff also separately mailed a copy of the complaint to the Szukhents. The Court upheld the notice in part because the Szukhents had received actual notice.

- Can a state require people engaged in certain types of activity within the state to appoint an in-state agent for purposes of service of process? In *Wuchter v. Pizzutti*, 276 U.S. 13 (1928), the Court considered whether a statute requiring all nonresident motorists to appoint the state Secretary of State as their agent for purposes of service of process. The statute did not require that the motorist be given any actual notice of the proceeding. The Court held that the statute violated due process, even though the defendant in the case had actual notice of the proceeding.

4. How long before the proceeding begins must the defendant be notified? In *Roller v. Holly*, 176 U.S. 398 (1900), a Virginia defendant was served only five days before a proceeding against him in Texas was set to begin. The Supreme Court held that the short notice violated due process. How many days do you think would be enough? Would your answer be different in 1900 than it would be today?

5. What information must the notice contain? *Aguchak v. Montgomery Ward Co.*, 520 P.2d 1352 (Alaska 1974), involved the purchase by the Aguchak family of a snowmobile from the defendant. The Aguchaks lived in a remote area of Alaska, which explains their desire for a snowmobile. When the family defaulted on their payments, the department store sued and sent them a summons. Because they lived in a remote area, it would have taken the Aguchaks at least two days to travel to the courthouse at a cost of $186. The Aguchaks defaulted and judgment was entered against them. On appeal, they argued that the notice should have informed them of the option to appear by writing rather than in person and that they had a right to request a change of venue. The Supreme Court of Alaska sided with the Aguchaks and held that summons in small-claims court must inform recipients of these options.

6. Read Federal Rule of Civil Procedure 4, which sets the requirements for serving the complaint in a civil case in federal court. Do you think that

the various methods of service authorized by Rule 4 comply with the constitutional requirement of due process?

7. See if you can answer the following questions about service under Rule 4:

   - What must the summons contain? *See* Rule 4(a)(1).
   - Who is eligible to serve the summons and complaint? *See* Rule 4(c)(2)–(3).
   - What are the benefits of waiving service? What are the potential consequences of refusing to waive service? *See* Rule 4(d).
   - Name one way to effect service upon a domestic, individual defendant that will be sufficient in any federal district court? *See* Rule 4(e)(2).
   - How would you go about serving the United States Department of Agriculture? *See* Rule 4(i)(2).
   - How long does a plaintiff have to effect service? What is the consequence of failing to make timely service? *See* Rule 4(m).

4.2. The Complaint

This section will examine the document that initiates a civil suit: the complaint. In federal court, Rule 8 regulates what the plaintiff must allege in this important filing. By rule, the plaintiff must give "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). As you will see, the practical implications of Rule 8 are more complicated than its simple text suggests.

Read Rules 8(a), 9(b), and 12(b) in the supplement.

Haddle v. Garrison (Complaint)

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|                                          |
| MICHAEL A. HADDLE,                       |
|                          Plaintiff       |
|               v.                         |     Civ. No. 96-00029-CV-1-AAA
| JEANETTE G. GARRISON \[et al.\],         |
|                          Defendants.     |
|                                          |
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COMPLAINT FOR DAMAGES PURSUANT TO 42 U.S.C. § 1985(2) (THE CIVIL RIGHTS ACT OF 1871), THE GEORGIA RICO STATUTE AND GEORGIA LAW OF TORTIOUS INTERFERENCE AND FRAUDULENT CONVEYANCE

NOW COMES Plaintiff MICHAEL A. HADDLE and for this his complaint against Defendants JEANETTE G. GARRISON ("Garrison"), DENNIS KELLY ("Kelly"), PETER MOLLOY ("Molloy"), HEALTHMASTER, INC. ("Healthmaster"), and shows as follows:

Introductory Statement

1. Plaintiff is a citizen and resident of the State of Georgia.

2. Defendant Garrison is a resident of the State of South Carolina.

3. Defendants Molloy [and] Kelly are residents of the Southern District of Georgia.

4. Defendant Healthmaster is a corporation organized and existing under the laws of the State of Georgia with its principal place of business within the Southern District of Georgia.

5. Jurisdiction is proper in this Court over Count I of this Complaint (the Civil Rights Act of 1871) by virtue of 28 U.S.C. § 1331. Jurisdiction over Count II (Georgia RICO), Count III (Tortious Interference) and Count IV (Fraudulent Conveyance) is proper in this Court because these Counts are pendent to Count I.

6. Venue is proper in this Court in that most Defendants reside within the Southern District of Georgia and in that the actions of all Defendants as alleged below occurred within the Southern District of Georgia.

General Factual Allegations

7. From September 22, 1986 until approximately April 13, 1995, Plaintiff was employed by Defendant Healthmaster.

8. From approximately April 13, 1995, until his discharge as alleged below, Plaintiff was employed by Healthmaster Home Health Care, Inc., a Georgia corporation whose stock is owned entirely by Defendant Healthmaster.

9. Defendant Garrison has at all relevant times owned 50% of the stock of Healthmaster and controlled Healthmaster until April or May, 1995, when a trustee was appointed for Healthmaster, then a debtor in possession under Chapter II of the federal Bankruptcy Code, by the United States Bankruptcy Court for the Southern District of Georgia.

10. The individual Defendants herein have all served in various capacities as corporate officers and directors of Defendant Healthmaster and of Healthmaster Home Health Care, Inc.

11. Defendant Molloy has at all relevant times been employed by Defendant Healthmaster or Healthmaster Home Health Care, Inc.

12. On March 8, 1995, a grand jury convened in the United States District Court for the Southern District of Georgia, Augusta Division, filed an indictment against Defendants Garrison, Kelly, Healthmaster, and others charging a total of 133 counts of fraud against various defendants, which indictment is enumerated as number CR-195-11 in this Court.

13. Although not indicted, Defendant Molloy was, on information and belief, a target of the ongoing criminal investigation.

14. Plaintiff cooperated with the investigation by federal agents which preceded this indictment and testified pursuant to subpoena before said grand jury and appeared pursuant to subpoena to testify before said grand jury, although his testimony was not actually taken due to the press of time.* [* The inconsistency here is likely an error. –*Ed.*]

15. As a result of their indictment, Defendants Garrison and Kelly were banned from any participation in the affairs of Healthmaster Home Health Care, Inc., by order of said Bankruptcy Court.

16. On June 21, 1995, after Defendants had become aware that Plaintiff would appear as a witness at the criminal trial of Indictment No. CR 195-11, Defendant Molloy, who was then President of Defendant Healthmaster, having been retained in said position by the trustee, but acting at the direction of Defendants Garrison and Kelly and pursuant to a prior understanding and agreement between these three persons, terminated Plaintiff from his employment at Healthmaster Home Health Care, Inc.

Count I—Conspiracy in Violation of 42 U.S.C. § 1985(2) (The Civil Rights Act of 1871)

17. The allegations contained in paragraphs numbered "1" through "16" are incorporated herein by reference.

18. The decision to terminate Plaintiff was made by Defendants and others not in furtherance of the business interests of Defendant Healthmaster, but instead for the purpose of retaliating against Plaintiff for his cooperation with federal agents and his testimony under subpoena to the federal grand jury, and in order to intimidate Plaintiff and others from cooperating with federal agents or testifying in any criminal matters against them including said indictment.

19. Defendants participated in and carried out the decision to terminate Plaintiff, not in furtherance of the business interests of Defendant Healthmaster, but rather to protect themselves as criminal defendants or potential criminal defendants.

20. By means of the described actions, and their agreement and plan to do the same, Defendants have violated 42 U.S.C. § 1985(2), in that they have conspired within the State of Georgia to deter, by force, intimidation or threat, a party or witness in the United States District Court for the Southern District of Georgia, from attending such court, or from testifying in any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or

property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of the grand jurors of such court.

21. Plaintiff has been injured in his person and property by the acts of Defendants in violation of 42 U.S.C. § 1985(2), and Plaintiff is entitled to recover his damages occasioned by such injury and deprivation against Defendants jointly and severally.

22. Because said Defendants' acts were willful, intentional and malicious, Plaintiff is entitled to recover punitive damages against Defendants jointly and severally.

23. Pursuant to 42 U.S.C. § 1988, Plaintiff is entitled to recover his expenses of litigation including a reasonable attorney's fee from said Defendants jointly and severally.

[Counts alleging statutory and common law claims under Georgia law are omitted.]

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands trial by jury on all counts and judgment as to all Defendants jointly and severally for money damages in such amount for actual damages as the evidence may show and as to all Defendants, jointly and severally, judgment for punitive damages and reasonable attorneys' fees and expenses of litigation, together with all costs of Court and such other and further relief as the Court may deem equitable and just.

Notes & Questions

1. Can you identify in the above complaint the three parts required by Rule 8(a): jurisdictional allegation, "short plain statement of the claim," and prayer for relief?
2. Does the complaint contain more than just these three parts? If so, what else does it contain?
3. How did Haddle's complaint tell the story of what happened to him in a way that made him seem like the good guy and the defendants seem like the bad guys?

Haddle v. Garrison (District Court)

Civ. No. 96-0029-CV-1-AAA (S.D. Ga. 1996)

ALAIMO, J.

Plaintiff, Michael A. Haddle, has brought the current litigation seeking damages under Section 1985(2) of Title 42 of the United States Code, and state law. Presently before the Court are four [defendants'] motions to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the

Federal Rules of Civil Procedure. For the reasons stated below, Defendants' motions will be Granted.

Facts

Haddle is a former employee of Healthmaster Home Health Care, Inc. He claims that he was improperly discharged from his employment by Defendants in an attempt to deter his participation as a witness in a Federal criminal trial. At the times relevant to this litigation, Haddle concedes that he was an at-will employee.

Discussion

I. Rule 12(b)(6)

Rule 12(b)(6) permits a defendant to move to dismiss a complaint on the grounds that the plaintiff has failed to state a claim upon which relief can be granted. A motion under Rule 12(b)(6) attacks the legal sufficiency of the complaint. In essence, the movant says, "Even if everything you allege is true, the law affords you no relief." Consequently, in determining the merits of a 12(b)(6) motion, a court must assume that all of the factual allegations of the complaint are true. A court should not dismiss a complaint for failure to state a claim unless it is clear that the plaintiff can prove "no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

II. 42 U.S.C. § 1985(2)

[…] In the case at bar, Haddle asserts that he can maintain an action under Section 1985(2) despite the fact that he was defined as an at-will employee during the term of his employment. This is directly contrary to binding precedent of the Eleventh Circuit. Case law states:

> [T]o make out a cause of action under § 1985(2) the plaintiff must have suffered an actual injury. Because [Plaintiff] was an at-will employee … he has no constitutionally protected interest in continued employment. Therefore, [Plaintiff's] discharge did not constitute an actual injury under this statute.

Morast v. Lance, 807 F.2d 926, 930 (11th Cir. 1987). Given the clear language of *Morast*, the Court is required to DISMISS Haddle's claim under Section 1985(2).

[…]

Conclusion

The Court has determined that, under Rule 12(b)(6) Haddle has failed to state a federal claim upon which relief can be granted. His claim under Section 1985(2) is DISMISSED with respect to the above-named Defendants. Additionally, all state law claims are DISMISSED WITHOUT PREJUDICE.

Notes & Questions

1. What did the court do in this order?

2. Why did the court dismiss Haddle's case? A factual determination that Haddle had not been fired? That he had been fired in a lawful manner? Or something else?

3. What kind of motion did the defendants file and the court grant?

4. After his case was dismissed, Haddle's only realistic path to victory was to appeal. As is typical with appeals from judgments entered by the U.S. District Court for the Southern District of Georgia, Haddle's appeal went to the U.S. Court of Appeals for the Eleventh Circuit, whose opinion in the case appears below—in its entirety.

Haddle v. Garrison (Court of Appeals)

No. 96-8856 (11th Cir. 1997)

PER CURIAM:

Michael A. Haddle appeals following the district court's dismissal of his 42 U.S.C. § 1985(2) claim for failure to state a claim. We conclude that Haddle's arguments on appeal are foreclosed by this court's decision in *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987). The judgment of the district court is therefore affirmed.

Notes & Questions

1. Who wrote the Eleventh Circuit opinion?

2. Why was the Eleventh Circuit's opinion so short?

3. Most of the time, losing at the Court of Appeals by such a short order spells the end of the federal appellate process. The Courts of Appeals decide tens of thousands of appeals per year, and the Supreme Court typically agrees to review less than 100 of those.

4. But in this case, Mr. Haddle was fortunate. The Supreme Court agreed to hear his case. See if you can discern why by reading the Supreme Court's opinion below.

Haddle v. Garrison (Supreme Court)

REHNQUIST, C.J., delivered the opinion for a unanimous Court. 525 U.S. 121 (1998)

Petitioner Michael A. Haddle, an at-will employee, alleges that respondents conspired to have him fired from his job in retaliation for obeying a federal grand jury subpoena and to deter him from testifying at a federal criminal trial. We hold that such interference with at-will employment may give rise to a claim for damages under the Civil Rights Act of 1871, Rev. Stat. § 1980, 42 U.S.C. § 1985(2).

According to petitioner's complaint, a federal grand jury indictment in March 1995 charged petitioner's employer, Healthmaster, Inc., and respondents Jeanette Garrison and Dennis Kelly, officers of Healthmaster, with Medicare fraud. Petitioner cooperated with the federal agents in the investigation that preceded the indictment. He also appeared to testify before the grand jury pursuant to a subpoena, but did not testify due to the press of time. Petitioner was also expected to appear as a witness in the criminal trial resulting from the indictment.

Although Garrison and Kelly were barred by the Bankruptcy Court from participating in the affairs of Healthmaster, they conspired with G. Peter Molloy, Jr., one of the remaining officers of Healthmaster, to bring about petitioner's termination. They did this both to intimidate petitioner and to retaliate against him for his attendance at the federal-court proceedings.

Petitioner sued for damages in the United States District Court for the Southern District of Georgia, asserting a federal claim under 42 U.S.C. § 1985(2) and various state-law claims. Petitioner stated two grounds for relief under § 1985(2): one for conspiracy to deter him from testifying in the upcoming criminal trial and one for conspiracy to retaliate against him for attending the grand jury proceedings. As § 1985 demands, he also alleged that he had been "injured in his person or property" by the acts of respondents in violation of § 1985(2) and that he was entitled to recover his damages occasioned by such injury against respondents jointly and severally.

Respondents moved to dismiss for failure to state a claim upon which relief can be granted. Because petitioner conceded that he was an at-will employee, the District Court granted the motion on the authority of *Morast v. Lance*, 807 F.2d 926 (1987). In *Morast*, the Eleventh Circuit held that an at-will employee who is dismissed pursuant to a conspiracy proscribed by § 1985(2) has no cause of action. The *Morast* court explained: "[T]o make out a cause of action under § 1985(2) the plaintiff must have suffered an actual injury. Because Morast was an at-will employee, … he had no constitutionally protected interest in continued employment. Therefore, Morast's discharge did not constitute an actual injury under this statute." Relying on its decision in *Morast*, the Court of Appeals affirmed.

The Eleventh Circuit's rule in Morast conflicts with the holdings of the First and Ninth Circuits. We therefore granted certiorari to decide whether peti-

tioner was "injured in his property or person" when respondents induced his employer to terminate petitioner's at-will employment as part of a conspiracy prohibited by § 1985(2).

Section 1985(2), in relevant part, proscribes conspiracies to "deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified."[1] The statute provides that if one or more persons engaged in such a conspiracy "do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, … the party so injured …may have an action for the recovery of damages occasioned by such injury … against any one or more of the conspirators." § 1985(3).[2]

Petitioner's action was dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) because, in the Eleventh Circuit's view, he had not suffered an injury that could give rise to a claim for damages under § 1985(2). We must, of course, assume that the facts as alleged in petitioner's complaint are true and that respondents engaged in a conspiracy prohibited by § 1985(2). Our review in this case is accordingly confined to one question: Can petitioner state a claim for damages by alleging that a conspiracy proscribed by § 1985(2) induced his employer to terminate his at-will employment?

We disagree with the Eleventh Circuit's conclusion that petitioner must suffer an injury to a "constitutionally protected property interest" to state a claim for damages under § 1985(2). Nothing in the language or purpose of the proscriptions in the first clause of § 1985(2), nor in its attendant remedial provisions, establishes such a requirement. The gist of the wrong at which § 1985(2) is directed is not deprivation of property, but intimidation or retaliation against witnesses in federal-court proceedings. The terms "injured in his person or property" define the harm that the victim may suffer as a result of the conspiracy to intimidate or retaliate. Thus, the fact that employment at will is not "property" for purposes of the Due Process Clause does not mean that loss of at-will employment may not "injur[e] [petitioner] in his person or property" for purposes of § 1985(2).

We hold that the sort of harm alleged by petitioner here—essentially third-party interference with at-will employment relationships—states a claim for relief under § 1985(2). Such harm has long been a compensable injury under tort law, and we see no reason to ignore this tradition in this case. As Thomas Cooley recognized:

> "One who maliciously and without justifiable cause, induces an employer to discharge an employee, by means of false statements, threats or putting in fear, or perhaps by means of malevolent advice and persuasion, is liable in an action of tort to the employee for the damages thereby sustained. And it makes no difference whether the employment was for a fixed term not yet expired or is terminable at the will of the employer."

2 Law of Torts 589–591 (3d ed. 1906) (emphasis added).

This Court also recognized in *Truax v. Raich*, 239 U.S. 33 (1915):

> "The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employé has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will."

Id. at 38 (citing cases).

The kind of interference with at-will employment relations alleged here is merely a species of the traditional torts of intentional interference with contractual relations and intentional interference with prospective contractual relations. *See* Restatement (Second) of Torts § 766, Comment g, pp. 10–11 (1977); *see also id.*, § 766B, Comment c, at 22. This protection against third-party interference with at-will employment relations is still afforded by state law today. *See* W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keaton on Law of Torts § 129, pp. 995–996, and n. 83 (5th ed. 1984) (citing cases). For example, the State of Georgia, where the acts underlying the complaint in this case took place, provides a cause of action against third parties for wrongful interference with employment relations. Thus, to the extent that the terms "injured in his person or property" in § 1985 refer to principles of tort law, *see* 3 W. Blackstone, Commentaries on the Laws of England 118 (1768) (describing the universe of common-law torts as "all private wrongs, or civil injuries, which may be offered to the rights of either a man's person or his property"), we find ample support for our holding that the harm occasioned by the conspiracy here may give rise to a claim for damages under § 1985(2).

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Notes & Questions

1. Why did the Supreme Court reverse the Eleventh Circuit?

2. What do you think the next step was after the Supreme Court revived Haddle's suit?

3. Haddle's claims went before a jury in December 1999. The jury awarded him $65,000 in compensatory damages. Afterward, lawyers for both the plaintiff and the defendants said they were pleased with the outcome. How is this possible?

4. Interestingly, the jury trial was not the end of the case. Haddle's lawyers asked that the defendants pay their legal fees and expenses under a federal fee-shifting statute. The court awarded those legal fees—in the amount of $258,113. How do you think the existence of this fee-shifting statute (which allows victorious plaintiffs to recover their legal fees from defendants if they win) affected how the case was litigated?
5. In the saga of *Haddle v. Garrison*, we saw the importance of Federal Rule of Civil Procedure 12(b)(6), which allows a defendant to test the legal sufficiency of a plaintiff's claim at an early stage of the case. The legal standards under Rule 12(b)(6) have changed dramatically over the years. For 50 years, the case that follows provided the test under Rule 12(b)(6), and it was a rule that allowed most complaints to survive a motion to dismiss for failure to state a claim.

Conley v. Gibson

355 U.S. 41 (1957)

MR. JUSTICE BLACK delivered the opinion of the Court.

[…] In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. […]

[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. […]

Notes & Questions

1. According to *Conley v. Gibson*, what is the test for whether a complaint should be dismissed under Rule 12(b)(6)?
2. What kinds of claims would fail *Conley*'s "no set of facts" test?
3. The next case illustrates the *Conley* test in practice.

Swierkiewicz v. Sorema N.A.

Justice Thomas delivered the opinion of the Court. 534 U.S. 506 (2002)

[…]

I

Petitioner Akos Swierkiewicz is a native of Hungary, who at the time of his complaint was 53 years old. In April 1989, petitioner began working for respondent Sorema N.A., a reinsurance company headquartered in New York and principally owned and controlled by a French parent corporation. Petitioner was initially employed in the position of senior vice president and chief underwriting officer (CUO). Nearly six years later, François M. Chavel, respondent's Chief Executive Officer, demoted petitioner to a marketing and services position and transferred the bulk of his underwriting responsibilities to Nicholas Papadopoulo, a 32-year-old who, like Mr. Chavel, is a French national. About a year later, Mr. Chavel stated that he wanted to "energize" the underwriting department and appointed Mr. Papadopoulo as CUO. Petitioner claims that Mr. Papadopoulo had only one year of underwriting experience at the time he was promoted, and therefore was less experienced and less qualified to be CUO than he, since at that point he had 26 years of experience in the insurance industry.

Following his demotion, petitioner contends that he "was isolated by Mr. Chavel … excluded from business decisions and meetings and denied the opportunity to reach his true potential at SOREMA." Petitioner unsuccessfully attempted to meet with Mr. Chavel to discuss his discontent. Finally, in April 1997, petitioner sent a memo to Mr. Chavel outlining his grievances and requesting a severance package. Two weeks later, respondent's general counsel presented petitioner with two options: He could either resign without a severance package or be dismissed. Mr. Chavel fired petitioner after he refused to resign.

Petitioner filed a lawsuit alleging that he had been terminated on account of his national origin in violation of Title VII of the Civil Rights Act of 1964, and on account of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA). The United States District Court for the Southern District of New York dismissed petitioner's complaint because it found that he "ha[d] not adequately alleged a prima facie case, in that he ha[d] not adequately alleged circumstances that support an inference of discrimination." The United States Court of Appeals for the Second Circuit affirmed […]. We granted certiorari, […] and now reverse.

II

Applying Circuit precedent, the Court of Appeals required petitioner to plead a prima facie case of discrimination in order to survive respondent's motion to dismiss. In the Court of Appeals' view, petitioner was thus required to allege in his complaint: (1) membership in a protected group; (2) qualification for the

job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination.

The [requirement of a] prima facie case […], however, is an evidentiary standard, not a pleading requirement. […] [T]his Court has reiterated that the prima facie case relates to the employee's burden of presenting evidence that raises an inference of discrimination.

This Court has never indicated that the requirements for establishing a prima facie case […] also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss. […]

In addition, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because [this] framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case. Under the Second Circuit's heightened pleading standard, a plaintiff without direct evidence of discrimination at the time of his complaint must plead a prima facie case of discrimination, even though discovery might uncover such direct evidence. It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered. […]

Furthermore, imposing the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*. This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. […]

Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts. […]

Applying the relevant standard, petitioner's complaint easily satisfies the requirements of Rule 8(a) because it gives respondent fair notice of the basis for petitioner's claims. Petitioner alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA. His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination. These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest. In addition, they state claims upon which relief could be granted under Title VII and the ADEA.

Respondent argues that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits. Whatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." Furthermore, Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits. "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." […]

Notes & Questions

1. What did Swierkiewicz allege in his complaint?
2. What does the Court mean when it says that the requirement of a prima facie case is "an evidentiary standard, not a pleading requirement"? Pleading requirements govern what a plaintiff must allege in a complaint; evidentiary standards govern how much and what kind of proof the plaintiff must adduce at trial.
3. Notice what the Court says is the appropriate way to change the Federal Rules of Civil Procedure: the formal amendment process. In that vein, consider *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), which involved a civil-rights suit under 42 U.S.C. § 1983. The Court rejected the defendant's argument that Rule 8 imposed a heightened-pleading requirement in such suits: "Perhaps if Rules 8 and 9 were rewritten today, claims […] under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later."
4. The rule of *Conley v. Gibson*, applied in *Swierkiewicz*, is no longer good law. As you read the next case, see if you can figure out the rule that replaced it.

Bell Atlantic Corp. v. Twombly

Justice SOUTER delivered the opinion of the Court. 550 U.S. 544 (2007)

[Federal antitrust law prohibits explicit agreements among competitors to charge a particular price (*i.e.*, price fixing). A group of local telephone subscribers filed a class-action complaint against the major telephone companies, known in telecom jargon as "Incumbent Local Exchange Carriers" (ILECs).

The complaint alleged that the ILECs conspired together to use their market power to exclude upstart Competitive Local Exchange Carriers (CLECs). It also alleged that the ILECs agreed not to compete with one another within their own territories.]

I

[…] The United States District Court for the Southern District of New York dismissed the complaint for failure to state a claim upon which relief can be granted. The District Court acknowledged that "plaintiffs may allege a conspiracy by citing instances of parallel business behavior that suggest an agreement," but emphasized that "while '[c]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy[, …] "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.' " Thus, the District Court understood that allegations of parallel business conduct, taken alone, do not state a claim under § 1; plaintiffs must allege additional facts that "ten[d] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior." The District Court found plaintiffs' allegations of parallel ILEC actions to discourage competition inadequate because "the behavior of each ILEC in resisting the incursion of CLECs is fully explained by the ILEC's own interests in defending its individual territory." As to the ILECs' supposed agreement against competing with each other, the District Court found that the complaint does not "alleg[e] facts … suggesting that refraining from competing in other territories as CLECs was contrary to [the ILECs'] apparent economic interests, and consequently [does] not rais[e] an inference that [the ILECs'] actions were the result of a conspiracy."

The Court of Appeals for the Second Circuit reversed, holding that the District Court tested the complaint by the wrong standard. It held that "plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal." Although the Court of Appeals took the view that plaintiffs must plead facts that "include conspiracy among the realm of 'plausible' possibilities in order to survive a motion to dismiss," it then said that "to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence."

We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct, and now reverse.

II

A

Because § 1 of the Sherman Act "does not prohibit [all] unreasonable restraints of trade … but only restraints effected by a contract, combination, or conspiracy," "[t]he crucial question" is whether the challenged anticompetitive conduct "stem[s] from independent decision or from an agreement, tacit or express." While a showing of parallel "business behavior is admissible circum-

stantial evidence from which the fact finder may infer agreement," it falls short of "conclusively establish[ing] agreement or … itself constitut[ing] a Sherman Act offense." Even "conscious parallelism," a common reaction of "firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions" is "not in itself unlawful." […]

B

This case presents the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the … claim is and the grounds upon which it rests." While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and "that a recovery is very remote and unlikely." In identifying facts that are suggestive enough to render a § 1 conspiracy plausible, we have the benefit of the prior rulings and considered views of leading commentators, already quoted, that lawful parallel conduct fails to be-speak unlawful agreement. It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. […]

Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago […] "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *See also* […] Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000) (reporting that discovery

accounts for as much as 90 percent of litigation costs when discovery is actively employed). That potential expense is obvious enough in the present case: plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years.

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. And it is self-evident that the problem of discovery abuse cannot be solved by "careful scrutiny of evidence at the summary judgment stage," much less "lucid instructions to juries"; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no " 'reasonably founded hope that the [discovery] process will reveal relevant evidence' " to support a § 1 claim.

Plaintiffs do not, of course, dispute the requirement of plausibility and the need for something more than merely parallel behavior […], and their main argument against the plausibility standard at the pleading stage is its ostensible conflict with an early statement of ours construing Rule 8. Justice Black's opinion for the Court in *Conley v. Gibson* spoke not only of the need for fair notice of the grounds for entitlement to relief but of "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." This "no set of facts" language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard.

On such a focused and literal reading of *Conley*'s "no set of facts," a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some "set of [undisclosed] facts" to support recovery. So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement. It seems fair to say that this approach to pleading would dispense with any showing of a " 'reasonably founded hope' " that a plaintiff would be able to make a case; Mr. Micawber's optimism would be enough.

Seeing this, a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard. […] We could go on, but there is no need to pile up further citations to show that *Conley*'s "no set

of facts" language has been questioned, criticized, and explained away long enough. To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. *Conley,* then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.

When we look for plausibility in this complaint, we agree with the District Court that plaintiffs' claim of conspiracy in restraint of trade comes up short. To begin with, the complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs. Although in form a few stray statements speak directly of agreement, on fair reading these are merely legal conclusions resting on the prior allegations. […] The nub of the complaint, then, is the ILECs' parallel behavior, consisting of steps to keep the CLECs out and manifest disinterest in becoming CLECs themselves, and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience.

[…] [T]here is no reason to infer that the companies had agreed among themselves to do what was only natural anyway; so natural, in fact, that if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing. […]

Plaintiffs' second conspiracy theory rests on the competitive reticence among the ILECs themselves in the wake of the 1996 Act […]. […]

But [a lack of competition is] not suggestive of conspiracy, not if history teaches anything. In a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, but here we have an obvious alternative explanation. In the decade preceding the 1996 Act and well before that, monopoly was the norm in telecommunications, not the exception. The ILECs were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.

In fact, the complaint itself gives reasons to believe that the ILECs would see their best interests in keeping to their old turf. Although the complaint says generally that the ILECs passed up "especially attractive business opportunit[ies]" by declining to compete as CLECs against other ILECs, Complaint

¶ 40, it does not allege that competition as CLECs was potentially any more lucrative than other opportunities being pursued by the ILECs during the same period, and the complaint is replete with indications that any CLEC faced nearly insurmountable barriers to profitability owing to the ILECs' flagrant resistance to the network sharing requirements of the 1996 Act, *id.* ¶ 47. […]

Plaintiffs say that our analysis runs counter to *Swierkiewicz* […]. […] Even though Swierkiewicz's pleadings "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination," the Court of Appeals dismissed his complaint for failing to allege certain additional facts that Swierkiewicz would need at the trial stage to support his claim in the absence of direct evidence of discrimination. We reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading requirement by insisting that Swierkiewicz allege "specific facts" beyond those necessary to state his claim and the grounds showing entitlement to relief.

Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.

* * *

The judgment of the Court of Appeals for the Second Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, with whom Justice GINSBURG joins except as to Part IV, dissenting.

[…] [T]his is a case in which there is no dispute about the substantive law. If the defendants acted independently, their conduct was perfectly lawful. If, however, that conduct is the product of a horizontal agreement among potential competitors, it was unlawful. The plaintiffs have alleged such an agreement and, because the complaint was dismissed in advance of answer, the allegation has not even been denied. Why, then, does the case not proceed? Does a judicial opinion that the charge is not "plausible" provide a legally acceptable reason for dismissing the complaint? I think not.

Respondents' amended complaint describes a variety of circumstantial evidence and makes the straightforward allegation that petitioners

> "entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another."

[Amended Complaint] ¶ 51.

The complaint explains that, contrary to Congress' expectation when it enacted the 1996 Telecommunications Act, and consistent with their own economic self-interests, [the ILECs] have assiduously avoided infringing upon each other's markets and have refused to permit nonincumbent competitors to access their networks. The complaint quotes […] the former chief executive officer of one such ILEC, as saying that competing in a neighboring ILEC's territory "'might be a good way to turn a quick dollar but that doesn't make it right.'" *Id.*, ¶ 42. Moreover, respondents allege that petitioners "communicate amongst themselves" through numerous industry associations. *Id.*, ¶ 46. In sum, respondents allege that petitioners entered into an agreement that has long been recognized as a classic *per se* violation of the Sherman Act.

Under rules of procedure that have been well settled […], a judge ruling on a defendant's motion to dismiss a complaint "must accept as true all of the factual allegations contained in the complaint." *Swierkiewicz*. But instead of requiring knowledgeable executives […] to respond to these allegations by way of sworn depositions or other limited discovery—and indeed without so much as requiring petitioners to file an answer denying that they entered into any agreement—the majority permits immediate dismissal based on the assurances of company lawyers that nothing untoward was afoot. […]

The Court and petitioners' legal team are no doubt correct that the parallel conduct alleged is consistent with the absence of any contract, combination, or conspiracy. But that conduct is also entirely consistent with the *presence* of the illegal agreement alleged in the complaint. And the charge that petitioners "agreed not to compete with one another" is not just one of "a few stray statements," it is an allegation describing unlawful conduct. As such, the Federal Rules of Civil Procedure, our longstanding precedent, and sound practice mandate that the District Court at least require some sort of response from petitioners before dismissing the case.

Two practical concerns presumably explain the Court's dramatic departure from settled procedural law. Private antitrust litigation can be enormously expensive, and there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions. Those concerns merit careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries; they do not, however, justify the dismissal of an adequately pleaded complaint without even requiring the defendants to file answers denying a charge that they in fact engaged in collective decisionmaking. More importantly, they do not justify an interpretation of Federal Rule of Civil Procedure 12(b)(6) that seems to be driven by the majority's appraisal of the plausibility of the ultimate factual allegation rather than its legal sufficiency.

I

[…] Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a

claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial. […]

II

[…] Consistent with the design of the Federal Rules, *Conley*'s "no set of facts" formulation permits outright dismissal only when proceeding to discovery or beyond would be futile. Once it is clear that a plaintiff has stated a claim that, if true, would entitle him to relief, matters of proof are appropriately relegated to other stages of the trial process. Today, however, in its explanation of a decision to dismiss a complaint that it regards as a fishing expedition, the Court scraps *Conley*'s "no set of facts" language. Concluding that the phrase has been "questioned, criticized, and explained away long enough," the Court dismisses it as careless composition.

If *Conley*'s "no set of facts" language is to be interred, let it not be without a eulogy. That exact language, which the majority says has "puzzl[ed] the profession for 50 years," has been cited as authority in a dozen opinions of this Court and four separate writings. In not one of those 16 opinions was the language "questioned," "criticized," or "explained away." Indeed today's opinion is the first by any Member of this Court to express *any* doubt as to the adequacy of the *Conley* formulation. Taking their cues from the federal courts, 26 States and the District of Columbia utilize as their standard for dismissal of a complaint the very language the majority repudiates: whether it appears "beyond doubt" that "no set of facts" in support of the claim would entitle the plaintiff to relief.

Petitioners have not requested that the *Conley* formulation be retired, nor have any of the six *amici* who filed briefs in support of petitioners. I would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so. Congress has established a process—a rulemaking process—for revisions of that order.

[…] The "pleading standard" label the majority gives to what it reads into the *Conley* opinion—a statement of the permissible factual support for an adequately pleaded complaint—would not, therefore, have impressed the *Conley* Court itself. Rather, that Court would have understood the majority's remodeling of its language to express an *evidentiary* standard, which the *Conley* Court had neither need nor want to explicate. Second, it is pellucidly clear that the *Conley* Court was interested in what a complaint *must* contain, not what it *may* contain. […]

[…] *Conley*'s statement that a complaint is not to be dismissed unless "no set of facts" in support thereof would entitle the plaintiff to relief is hardly "puzzling." It reflects a philosophy that, unlike in the days of code pleading, separating the wheat from the chaff is a task assigned to the pretrial and trial process. *Conley*'s language, in short, captures the policy choice embodied in the Federal Rules and binding on the federal courts.

We have consistently reaffirmed that basic understanding of the Federal Rules in the half century since *Conley*. […]

Everything today's majority says would […] make perfect sense if it were ruling on a Rule 56 motion for summary judgment and the evidence included nothing more than the Court has described. But it should go without saying in the wake of *Swierkiewicz* that a heightened production burden at the summary judgment stage does not translate into a heightened pleading burden at the complaint stage. The majority rejects the complaint in this case because—in light of the fact that the parallel conduct alleged is consistent with ordinary market behavior—the claimed conspiracy is "conceivable" but not "plausible." I have my doubts about the majority's assessment of the plausibility of this alleged conspiracy. But even if the majority's speculation is correct, its "plausibility" standard is irreconcilable with Rule 8 and with our governing precedents. [F]ear of the burdens of litigation does not justify factual conclusions supported only by lawyers' arguments rather than sworn denials or admissible evidence.

[…]

III

[…] [T]he theory on which the Court permits dismissal is that, so far as the Federal Rules are concerned, no agreement has been alleged at all. This is a mind-boggling conclusion.

[…] I am […] willing to entertain the majority's belief that any agreement among the companies was unlikely. But the plaintiffs allege in three places in their complaint, ¶¶ 4, 51, 64, that the ILECs did in fact agree both to prevent competitors from entering into their local markets and to forgo competition with each other. And as the Court recognizes, at the motion to dismiss stage, a judge assumes "that all the allegations in the complaint are true (even if doubtful in fact)."

The majority circumvents this obvious obstacle to dismissal by pretending that it does not exist. The Court admits that "in form a few stray statements in the complaint speak directly of agreement," but disregards those allegations by saying that "on fair reading these are merely legal conclusions resting on the prior allegations" of parallel conduct. The Court's dichotomy between factual allegations and "legal conclusions" is the stuff of a bygone era. That distinction was a defining feature of code pleading, but was conspicuously abolished when the Federal Rules were enacted in 1938. […]

[…] To be clear, if I had been the trial judge in this case, I would not have permitted the plaintiffs to engage in massive discovery based solely on the allegations in this complaint. On the other hand, I surely would not have dismissed the complaint without requiring the defendants to answer the charge that they "have agreed not to compete with one another and otherwise allocated customers and markets to one another." ¶ 51, App. 27. Even a sworn denial of that charge would not justify a summary dismissal without giving the

plaintiffs the opportunity to take depositions from […] at least one responsible executive representing each of the […] defendants.

[…]

IV

[…] Whether the Court's actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer. But that the Court has announced a significant new rule that does not even purport to respond to any congressional command is glaringly obvious.

The transparent policy concern that drives the decision is the interest in protecting antitrust defendants—who in this case are some of the wealthiest corporations in our economy—from the burdens of pretrial discovery. Even if it were not apparent that the legal fees petitioners have incurred in arguing the merits of their Rule 12(b) motion have far exceeded the cost of limited discovery, or that those discovery costs would burden respondents as well as petitioners, that concern would not provide an adequate justification for this law-changing decision. For in the final analysis it is only a lack of confidence in the ability of trial judges to control discovery, buttressed by appellate judges' independent appraisal of the plausibility of profoundly serious factual allegations, that could account for this stark break from precedent.

[…]

Notes & Questions

1. Did the *Twombly* Court overrule *Conley v. Gibson*?
2. How much of *Twombly* was about antitrust law, and how much was about Rule 12(b)(6) more generally?
3. It is often said that the Federal Rules of Civil Procedure are *transsubstantive*—meaning they apply equally to all cases, regardless of their subject matter. The next case illustrates well the power of the Rules' transsubstantivity.

Ashcroft v. Iqbal

556 U.S. 662 (2009)

JUSTICE KENNEDY delivered the opinion of the Court.

Javaid Iqbal (hereinafter respondent) is a citizen of Pakistan and a Muslim. In the wake of the September 11, 2001, terrorist attacks he was arrested in the United States on criminal charges and detained by federal officials. Respondent claims he was deprived of various constitutional protections while in federal custody. To redress the alleged deprivations, respondent filed a complaint

against numerous federal officials, including John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the Federal Bureau of Investigation (FBI). Ashcroft and Mueller are the petitioners in the case now before us. As to these two petitioners, the complaint alleges that they adopted an unconstitutional policy that subjected respondent to harsh conditions of confinement on account of his race, religion, or national origin.

In the District Court petitioners raised the defense of qualified immunity and moved to dismiss the suit, contending the complaint was not sufficient to state a claim against them. The District Court denied the motion to dismiss, concluding the complaint was sufficient to state a claim despite petitioners' official status at the times in question. Petitioners brought an interlocutory appeal in the Court of Appeals for the Second Circuit. The court, without discussion, assumed it had jurisdiction over the order denying the motion to dismiss; and it affirmed the District Court's decision.

Respondent's account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some governmental actors. But the allegations and pleadings with respect to these actors are not before us here. This case instead turns on a narrower question: Did respondent, as the plaintiff in the District Court, plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights. […]

I

Following the 2001 attacks, the FBI and other entities within the Department of Justice began an investigation of vast reach to identify the assailants and prevent them from attacking anew. The FBI dedicated more than 4,000 special agents and 3,000 support personnel to the endeavor. By September 18 "the FBI had received more than 96,000 tips or potential leads from the public."

In the ensuing months the FBI questioned more than 1,000 people with suspected links to the attacks in particular or to terrorism in general. Of those individuals, some 762 were held on immigration charges; and a 184-member subset of that group was deemed to be "of 'high interest' " to the investigation. The high-interest detainees were held under restrictive conditions designed to prevent them from communicating with the general prison population or the outside world.

Respondent was one of the detainees. According to his complaint, in November 2001 agents of the FBI and Immigration and Naturalization Service arrested him on charges of fraud in relation to identification documents and conspiracy to defraud the United States. Pending trial for those crimes, respondent was housed at the Metropolitan Detention Center (MDC) in Brooklyn, New York. Respondent was designated a person "of high interest" to the September 11 investigation and in January 2002 was placed in a section of the MDC known as the Administrative Maximum Special Housing Unit (ADMAX SHU). As the facility's name indicates, the ADMAX SHU incorporates the maximum security conditions allowable under Federal Bureau of Prisons regulations. ADMAX

SHU detainees were kept in lockdown 23 hours a day, spending the remaining hour outside their cells in handcuffs and leg irons accompanied by a four-officer escort.

Respondent pleaded guilty to the criminal charges, served a term of imprisonment, and was removed to his native Pakistan. He then filed a *Bivens*[*] action in the United States District Court for the Eastern District of New York against 34 current and former federal officials […]. The defendants range from the correctional officers who had day-to-day contact with respondent during the term of his confinement, to the wardens of the MDC facility, all the way to petitioners—officials who were at the highest level of the federal law enforcement hierarchy.

[*] [*Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), recognized a cause of action against federal officers for violations of Constitutional rights. Such claims are now colloquially known as "*Bivens* claims." *–Ed.*]

[…] The allegations against petitioners are the only ones relevant here. The complaint contends that petitioners designated respondent a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution. The complaint alleges that "the [FBI], under the direction of Defendant Mueller, arrested and detained thousands of Arab Muslim men … as part of its investigation of the events of September 11." *Id.*, ¶ 47. It further alleges that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants Ashcroft and Mueller in discussions in the weeks after September 11, 2001." *Id.*, ¶ 69. Lastly, the complaint posits that petitioners "each knew of, condoned, and willfully and maliciously agreed to subject" respondent to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." *Id.*, ¶ 96. The pleading names Ashcroft as the "principal architect" of the policy, *id.*, ¶ 10, and identifies Mueller as "instrumental in [its] adoption, promulgation, and implementation," *id.*, ¶ 11.

Petitioners moved to dismiss the complaint for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct. The District Court denied their motion. Accepting all of the allegations in respondent's complaint as true, the court held that "it cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief as against" petitioners. […] While [this] appeal was pending, this Court decided *Bell Atlantic Corp. v. Twombly*, which discussed the standard for evaluating whether a complaint is sufficient to survive a motion to dismiss.

The Court of Appeals considered *Twombly*'s applicability to this case. […] It concluded that *Twombly* called for a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." The court found that petitioners' appeal did not present one of "those contexts" requiring amplification. As a consequence, it held respondent's pleading adequate to allege petitioners' personal involvement in discriminatory decisions which, if true, violated clearly established constitutional law.

[…]

IV

A

We turn to respondent's complaint. Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in *Twombly*, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement."

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' "

Two working principles underlie our decision in *Twombly.* First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Our decision in *Twombly* illustrates the two-pronged approach. There, we considered the sufficiency of a complaint alleging that incumbent telecommunications providers had entered an agreement not to compete and to forestall com-

petitive entry, in violation of the Sherman Act. Recognizing that § 1 enjoins only anticompetitive conduct "effected by a contract, combination, or conspiracy," the plaintiffs in *Twombly* flatly pleaded that the defendants "ha[d] entered into a contract, combination or conspiracy to prevent competitive entry … and ha[d] agreed not to compete with one another." The complaint also alleged that the defendants' "parallel course of conduct … to prevent competition" and inflate prices was indicative of the unlawful agreement alleged.

The Court held the plaintiffs' complaint deficient under Rule 8. In doing so it first noted that the plaintiffs' assertion of an unlawful agreement was a " 'legal conclusion' " and, as such, was not entitled to the assumption of truth. Had the Court simply credited the allegation of a conspiracy, the plaintiffs would have stated a claim for relief and been entitled to proceed perforce. The Court next addressed the "nub" of the plaintiffs' complaint—the well-pleaded, nonconclusory factual allegation of parallel behavior—to determine whether it gave rise to a "plausible suggestion of conspiracy." Acknowledging that parallel conduct was consistent with an unlawful agreement, the Court nevertheless concluded that it did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior. Because the well-pleaded fact of parallel conduct, accepted as true, did not plausibly suggest an unlawful agreement, the Court held the plaintiffs' complaint must be dismissed.

B

Under *Twombly*'s construction of Rule 8, we conclude that respondent's complaint has not "nudged [his] claims" of invidious discrimination "across the line from conceivable to plausible."

We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. Respondent pleads that petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Complaint ¶ 96. The complaint alleges that Ashcroft was the "principal architect" of this invidious policy, *id.*, ¶ 10, and that Mueller was "instrumental" in adopting and executing it, *id.*, ¶ 11. These bare assertions, much like the pleading of conspiracy in *Twombly,* amount to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim, namely, that petitioners adopted a policy " 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." As such, the allegations are conclusory and not entitled to be assumed true. To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. We do not so characterize them any more than the Court in *Twombly* rejected the plaintiffs' express allegation of a " 'contract, combination or conspiracy to prevent competitive entry,' " because it thought that claim too chimerical to be maintained. It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.

We next consider the factual allegations in respondent's complaint to determine if they plausibly suggest an entitlement to relief. The complaint alleges that "the [FBI], under the direction of Defendant Mueller, arrested and detained thousands of Arab Muslim men … as part of its investigation of the events of September 11." Complaint ¶ 47. It further claims that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants Ashcroft and Mueller in discussions in the weeks after September 11, 2001." *Id.*, ¶ 69. Taken as true, these allegations are consistent with petitioners' purposefully designating detainees "of high interest" because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that "obvious alternative explanation" for the arrests, *Twombly*, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.

But even if the complaint's well-pleaded facts give rise to a plausible inference that respondent's arrest was the result of unconstitutional discrimination, that inference alone would not entitle respondent to relief. It is important to recall that respondent's complaint challenges neither the constitutionality of his arrest nor his initial detention in the MDC. Respondent's constitutional claims against petitioners rest solely on their ostensible "policy of holding post-September-11th detainees" in the ADMAX SHU once they were categorized as "of high interest." Complaint ¶ 69. To prevail on that theory, the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as "of high interest" because of their race, religion, or national origin.

This the complaint fails to do. Though respondent alleges that various other defendants, who are not before us, may have labeled him a person "of high interest" for impermissible reasons, his only factual allegation against petitioners accuses them of adopting a policy approving "restrictive conditions of confinement" for post-September-11 detainees until they were "'cleared' by the FBI." Accepting the truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that

the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. Respondent does not argue, nor can he, that such a motive would violate petitioners' constitutional obligations. He would need to allege more by way of factual content to "nudg[e]" his claim of purposeful discrimination "across the line from conceivable to plausible." *Twombly*.

[…] It is important to note, however, that we express no opinion concerning the sufficiency of respondent's complaint against the defendants who are not before us. Respondent's account of his prison ordeal alleges serious official misconduct that we need not address here. Our decision is limited to the determination that respondent's complaint does not entitle him to relief from petitioners.

C

Respondent offers three arguments that bear on our disposition of his case, but none is persuasive.

1

Respondent first says that our decision in *Twombly* should be limited to pleadings made in the context of an antitrust dispute. This argument is not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure. Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. That Rule in turn governs the pleading standard "in all civil actions and proceedings in the United States district courts." Fed. Rule Civ. Proc. 1. Our decision in *Twombly* expounded the pleading standard for "all civil actions," and it applies to antitrust and discrimination suits alike.

2

Respondent next implies that our construction of Rule 8 should be tempered where, as here, the Court of Appeals has "instructed the district court to cabin discovery in such a way as to preserve" petitioners' defense of qualified immunity "as much as possible in anticipation of a summary judgment motion." We have held, however, that the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process.

Our rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity. The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including "avoidance of disruptive discovery." There are serious and legitimate reasons for this. If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that

officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. […]

It is no answer to these concerns to say that discovery for petitioners can be deferred while pretrial proceedings continue for other defendants. It is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.

[…] Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.

3

Respondent finally maintains that the Federal Rules expressly allow him to allege petitioners' discriminatory intent "generally," which he equates with a conclusory allegation (citing Fed. Rule Civ. Proc. 9). It follows, respondent says, that his complaint is sufficiently well pleaded because it claims that petitioners discriminated against him "on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Complaint ¶ 96. Were we required to accept this allegation as true, respondent's complaint would survive petitioners' motion to dismiss. But the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context.

It is true that Rule 9(b) requires particularity when pleading "fraud or mistake," while allowing "[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally." But "generally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8. […]

V

We hold that respondent's complaint fails to plead sufficient facts to state a claim for purposeful and unlawful discrimination against petitioners. The Court of Appeals should decide in the first instance whether to remand to the District Court so that respondent can seek leave to amend his deficient complaint.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

[…] Ashcroft and Mueller admit they are liable for their subordinates' conduct if they "had actual knowledge of the assertedly discriminatory nature of the classification of suspects as being 'of high interest' and they were deliberately indifferent to that discrimination." Iqbal alleges that after the September 11 attacks the FBI "arrested and detained thousands of Arab Muslim men," Complaint ¶ 47, that many of these men were designated by high-ranking FBI officials as being "'of high interest,'" *id.*, ¶¶ 48, 50, and that in many cases, including Iqbal's, this designation was made "because of the race, religion, and national origin of the detainees, and not because of any evidence of the detainees' involvement in supporting terrorist activity," *id.*, ¶ 49. The complaint further alleges that Ashcroft was the "principal architect of the policies and practices challenged," *id.*, ¶ 10, and that Mueller "was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged," *id.*, ¶ 11. According to the complaint, Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." *Id.*, ¶ 96. The complaint thus alleges, at a bare minimum, that Ashcroft and Mueller knew of and condoned the discriminatory policy their subordinates carried out. Actually, the complaint goes further in alleging that Ashcroft and Mueller affirmatively acted to create the discriminatory detention policy. If these factual allegations are true, Ashcroft and Mueller were, at the very least, aware of the discriminatory policy being implemented and deliberately indifferent to it.

Ashcroft and Mueller argue that these allegations fail to satisfy the "plausibility standard" of *Twombly.* They contend that Iqbal's claims are implausible because such high-ranking officials "tend not to be personally involved in the specific actions of lower-level officers down the bureaucratic chain of command." But this response bespeaks a fundamental misunderstanding of the enquiry that *Twombly* demands. *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here.

[…] I do not understand the majority to disagree with this understanding of "plausibility" under *Twombly.* Rather, the majority discards the allegations discussed above with regard to Ashcroft and Mueller as conclusory, and is left considering only two statements in the complaint: that "the [FBI], under the direction of Defendant Mueller, arrested and detained thousands of Arab Muslim men … as part of its investigation of the events of September 11," Complaint ¶ 47, and that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants Ashcroft and Mueller in discussions in the weeks after September 11, 2001," *id.*, ¶ 69. I think the majority is right in saying that these allegations suggest only that Ashcroft and Mueller "sought to keep

suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity," and that this produced "a disparate, incidental impact on Arab Muslims." And I agree that the two allegations selected by the majority, standing alone, do not state a plausible entitlement to relief for unconstitutional discrimination.

But these allegations do not stand alone as the only significant, nonconclusory statements in the complaint, for the complaint contains many allegations linking Ashcroft and Mueller to the discriminatory practices of their subordinates. […]

The majority says that these are "bare assertions" that, "much like the pleading of conspiracy in *Twombly*, amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim" and therefore are "not entitled to be assumed true." The fallacy of the majority's position, however, lies in looking at the relevant assertions in isolation. The complaint contains specific allegations that, in the aftermath of the September 11 attacks, the Chief of the FBI's International Terrorism Operations Section and the Assistant Special Agent in Charge for the FBI's New York Field Office implemented a policy that discriminated against Arab Muslim men, including Iqbal, solely on account of their race, religion, or national origin. *See* Complaint ¶¶ 47–53. Viewed in light of these subsidiary allegations, the allegations singled out by the majority as "conclusory" are no such thing. Iqbal's claim is not that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject" him to a discriminatory practice that is left undefined; his allegation is that "they knew of, condoned, and willfully and maliciously agreed to subject" him to a particular, discrete, discriminatory policy detailed in the complaint. Iqbal does not say merely that Ashcroft was the architect of some amorphous discrimination, or that Mueller was instrumental in an ill-defined constitutional violation; he alleges that they helped to create the discriminatory policy he has described. Taking the complaint as a whole, it gives Ashcroft and Mueller "'fair notice of what the … claim is and the grounds upon which it rests.'" […]

I respectfully dissent.

Justice BREYER, dissenting.

I agree with Justice Souter and join his dissent. I write separately to point out that, like the Court, I believe it important to prevent unwarranted litigation from interfering with "the proper execution of the work of the Government." But I cannot find in that need adequate justification for the Court's interpretation of *Bell Atlantic Corp. v. Twombly* and Federal Rule of Civil Procedure 8. The law, after all, provides trial courts with other legal weapons designed to prevent unwarranted interference. As the Second Circuit explained, where a Government defendant asserts a qualified immunity defense, a trial court, responsible for managing a case and "mindful of the need to vindicate the purpose of the qualified immunity defense," can structure discovery in ways that diminish the risk of imposing unwarranted burdens upon public officials. A district court, for example, can begin discovery with lower level Government

defendants before determining whether a case can be made to allow discovery related to higher level Government officials. Neither the briefs nor the Court's opinion provides convincing grounds for finding these alternative case-management tools inadequate, either in general or in the case before us. For this reason, as well as for the independently sufficient reasons set forth in Justice Souter's opinion, I would affirm the Second Circuit.

Notes & Questions

1. Why did Iqbal's complaint fail to satisfy Rule 8(a)? The Court builds on its opinion in *Twombly* and announces a two-step test for evaluating the sufficiency of complaints at the motion-to-dismiss stage:
    - First, disregard all allegations that are merely "conclusory." Which of Iqbal's allegations were disregarded in this way?
    - Second, evaluate the remaining allegations to determine whether, if accepted as true, they "plausibly" give rise to an inference that the defendant is liable. Which of Iqbal's allegations (or inferences drawn therefrom) were disregarded as implausible?
2. Recall Justice Stevens's dissent in *Twombly*, where he criticized the majority in that case for "rewrit[ing] the Nation's civil procedure textbooks" when "Congress has established a process—a rulemaking process—for revisions of that order." Does *Iqbal* (taken together with *Twombly*) effectively amend the standards for adequate pleading under Rule 8?
3. Notice who wrote the principal dissent in *Iqbal*: Justice Souter, who also wrote the majority opinion in *Twombly*. Much of the discussion in *Iqbal* is about what exactly the Court held in *Iqbal*. Does it make sense that a majority of the Court could disagree with the author of the majority opinion in *Twombly* about what it held?
4. How big of a deal is the pleading revolution heralded by *Twombly* and *Iqbal*? Scholars disagree as an empirical matter about how big the impact has been. One study estimated that approximately 20% of plaintiffs will have more difficulty satisfying the new standards than they would have under the rule of *Conley v. Gibson*. *See* Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 Yale L.J. 2270, 2277–78 (2012).
5. Will certain types of plaintiffs have a harder or easier time satisfying *Twombly* and *Iqbal*'s standards? Consider how difficult you think it might be to allege plausible claims for: breach of contract; employment discrimination; assault; trespass; and patent infringement.
6. What tradeoffs are embedded in the choice between the rule of *Conley v. Gibson* and the rule of *Ashcroft v. Iqbal*? Which rule do you think is superior? Why?

7. Read Rule 9(b). Consider how and why it differs from Rule 8(a), then read the next case, which illustrates Rule 9(b) in practice.

Stradford v. Zurich Insurance Co.

BUCHWALD, District J.

2002 WL 31027517 (S.D.N.Y. 2002)

Dr. Stradford[, the plaintiff,] is a dentist who maintains an office in Staten Island, New York. […] Defendants are affiliated corporate insurers. Northern issued a policy of insurance […] on Dr. Stradford's office effective August 18, 1999, thereby insuring the premises until August 19, 2000. During this term, Dr. Stradford apparently failed to pay the required insurance premiums, and Northern cancelled the Policy from October 10, 1999 to December 13, 1999. On or about December 6, 1999, however, Dr. Stradford submitted a "no claims" letter certifying that he had no losses from October 19, 1999, to that date. He also apparently resumed paying the premiums, and National reinstated the Policy on or about December 14, 1999. Dr. Stradford was notified of the reinstatement on or about January 9, 2000.

Less than ten days later, Dr. Stradford filed a claim on the Policy. Dr. Stradford notified Northern that, "[o]n January 17, 2000, [he] returned to his office from his vacation and found water dripping from frozen pipes and extensive water damage to his personal property and the interior of his office." He further notified Northern that certain dental implants, worth more than $100,000, which had apparently been stored in his office, "had become wet and [therefore] ruined." Dr. Stradford submitted a claim under the Policy for $151,154.74, and Northern made payments to Dr. Stradford in this amount. After receiving these payments, Dr. Stradford "submitted a revised claim under the Policy totaling $1,385,456.70, consisting of $168,000.00 for property damage, and a business interruption claim of $1,209,456 .70."

Northern continued to investigate Dr. Stradford's claimed loss[and ultimately concluded that the damage occurred during the time when the policy's coverage had lapsed.]

Slightly less than one year later, plaintiffs commenced this suit seeking $1,385,456.70 on the Policy, less the $151,154.74 already paid, or $1,234,301.96. Defendants counterclaimed, asserting, *inter alia,* that Dr. Stradford "knowingly and willfully devised a scheme and artifice … to defraud defendants and obtain money by false pretenses and representations," and seeking the return of the $151,154.74, punitive damages, and investigation expenses. Dr. Stradford now moves, *inter alia*, to dismiss those counterclaims that are based in fraud for failure to state their claims with sufficient "particularity" under Rule 9(b), and to dismiss certain other counterclaims for failure to state a claim.

Rule 9(b) provides, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Here, defendants' counterclaims succeed in alleging facts that "give rise

to a strong inference of fraudulent intent" as required by the second sentence of Rule 9(b). The timing of Dr. Stradford's claim, just ten days after the Policy was reinstated, his alleged refusal to cooperate with [defendants'] investigation of his claim, and the size of his claim can fairly be said to satisfy this requirement.

We find, however, that the counterclaims do not satisfy the first sentence of Rule 9(b), which requires that the "time, place, and nature of the [alleged] misrepresentations" be disclosed to the party accused of fraud. Here, defendants' counterclaims simply fail to identify the statement made by Dr. Stradford that they claim to be false. Thus, it is unclear from the face of the counterclaims whether defendants assert that Dr. Stradford's claimed losses are improperly inflated, that Dr. Stradford's office never even flooded, or that the offices flooded, but not during the term of the Policy. In essence, defendants claim that Dr. Stradford lied, but fail to identify the lie.

The "primary purpose" of Rule 9(b) is to afford a litigant accused of fraud "fair notice of the [ ] claim and the factual ground upon which it is based." Here, defendants' counterclaims fail to provide Dr. Stradford with fair notice of precisely which statement, or which aspect of his claim on the Policy, they allege to be false. The counterclaims are therefore insufficient under Rule 9(b), and must be dismissed.

Nevertheless, it is the usual practice in this Circuit, when there was no prior opportunity to replead, to grant a litigant who has suffered a dismissal under Rule 9(b) leave to amend so that he may conform his pleadings to the Rule. Indeed, defendants have already moved for leave to amend and submitted a proposed amended pleading. This pleading cures the defects we found in the counterclaims dismissed above because it makes clear that defendants allege that Dr. Stradford's office was flooded at a time when he permitted the Policy to lapse, and that Dr. Stradford "misrepresented the date of the loss in an effort to bring the date of loss within the coverage period." Accordingly, we hereby grant defendants leave to amend their counterclaims. […]

Notes & Questions

1. Notice the differences in how demanding Rules 8(a) and 9(b) are. What more does Rule 9 require of plaintiffs alleging fraud or mistake?
2. Notice also that the fraud allegations were a counterclaim raised by the *defendants* in response to the plaintiffs' complaint. Such counterclaims are authorized by Federal Rule 13. You should further recognize that, in response to defendants' counterclaims, the *plaintiffs* filed a motion to dismiss. And in the context of that motion, the defendants/counterclaim-plaintiffs must satisfy the pleading requirements of Rule 9(b).
3. Consider that the district court allowed the defendants to amend and refile their counterclaims to provide the requisite specificity under Rule 9. When should courts allow amendment? When should they not?

4. Dr. Stradford's alleged conduct raises a tricky question about legal ethics: can a plaintiff allege anything he wants—including facts he has made up—in his complaint? The next case tackles that question, which is addressed by, among other ethical rules, Federal Rule 11.

4.3. Ethical Limitations

Christian v. Mattel, Inc.

McKEOWN, Circuit J.

286 F.3d 1118 (9th Cir. 2003)

It is difficult to imagine that the Barbie doll, so perfect in her sculpture and presentation, and so comfortable in every setting, from "California girl" to "Chief Executive Officer Barbie," could spawn such acrimonious litigation and such egregious conduct on the part of her challenger. In her wildest dreams, Barbie could not have imagined herself in the middle of Rule 11 proceedings. But the intersection of copyrights on Barbie sculptures and the scope of Rule 11 is precisely what defines this case.

[Plaintiff's attorney] James Hicks appeals from a district court order requiring him, pursuant to Federal Rule of Civil Procedure 11, to pay Mattel, Inc. $501,565 in attorneys' fees that it incurred in defending against what the district court determined to be a frivolous action. […]

Mattel is a toy company that is perhaps best recognized as the manufacturer of the world-famous Barbie doll. Since Barbie's creation in 1959, Mattel has outfitted her in fashions and accessories that have evolved over time. In perhaps the most classic embodiment, Barbie is depicted as a slender-figured doll with long blonde hair and blue eyes. Mattel has sought to protect its intellectual property by registering various Barbie-related copyrights, including copyrights protecting the doll's head sculpture. Mattel has vigorously litigated against putative infringers.

In 1990, Claudene Christian, then an undergraduate student at the University of Southern California, decided to create and market a collegiate cheerleader doll. The doll, which the parties refer to throughout their papers as "Claudene," had blonde hair and blue eyes and was outfitted to resemble a USC cheerleader.

[…] Christian […] retained Hicks as […] counsel and filed a federal court action against Mattel. In the complaint, which Hicks signed, Christian alleged that Mattel obtained a copy of the copyrighted Claudene doll in 1996, the year of its creation, and then infringed its overall appearance, including its face paint, by developing a new Barbie line called "Cool Blue" that was substantially similar to Claudene. Christian sought damages in the amount of $2.4 billion and various forms of injunctive relief. […]

Two months after the complaint was filed, Mattel moved for summary judgment. In support of its motion, Mattel proffered evidence that the Cool Blue Barbie doll contained a 1991 copyright notice on the back of its head, indicating that it predated Claudene's head sculpture copyright by approximately six years. Mattel therefore argued that Cool Blue Barbie could not as a matter of law infringe Claudene's head sculpture copyright. […]

At a follow-up counsel meeting required by a local rule, Mattel's counsel attempted to convince Hicks that his complaint was frivolous. During the videotaped meeting, they presented Hicks with copies of various Barbie dolls that not only had been created prior to 1996 (the date of Claudene's creation), but also had copyright designations on their heads that pre-dated Claudene's creation. Additionally, Mattel's counsel noted that the face paint on some of the earlier-created Barbie dolls was virtually identical to that used on Claudene. Hicks declined Mattel's invitation to inspect the dolls and, later during the meeting, hurled them in disgust from a conference table.

Having been unsuccessful in convincing Hicks to dismiss Christian's action voluntarily, Mattel served Hicks with a motion for Rule 11 sanctions. In its motion papers, Mattel argued, among other things, that Hicks had signed and filed a frivolous complaint based on a legally meritless theory that Mattel's prior-created head sculptures infringed Claudene's 1997 copyright. Hicks declined to withdraw the complaint during the 21-day safe harbor period provided by Rule 11, and Mattel filed its motion.

[…] The district court granted Mattel's motions for summary judgment and Rule 11 sanctions. The court ruled that Mattel did not infringe the 1997 Claudene copyright because it could not possibly have accessed the Claudene doll at the time it created the head sculptures of the Cool Blue (copyrighted in 1991) and Virginia Tech (copyrighted in 1976) Barbies. […]

As for Mattel's Rule 11 motion, the district court found that Hicks had "filed a meritless claim against defendant Mattel. A reasonable investigation by Mr. Hicks would have revealed that there was no factual foundation for [Christian's] copyright claim." Indeed, the district court noted that Hicks needed to do little more than examine "the back of the heads of the Barbie dolls he claims were infringing," because such a perfunctory inquiry would have revealed "the pre-1996 copyright notices on the Cool Blue and [Virginia Tech] Barbie doll heads."

Additionally, the district court made other findings regarding Hicks' misconduct in litigating against Mattel, all of which demonstrated that his conduct fell "below the standards of attorneys practicing in the Central District of California." The district court singled out the following conduct:

- Sanctions imposed by the district court against Hicks in a related action against Mattel for failing, among other things, to file a memorandum of law in support of papers styled as a motion to dismiss and failing to appear at oral argument;

- Hicks' behavior during the Early Meeting of Counsel, in which he "toss[ed] Barbie dolls off a table";
- Hicks' interruption of Christian's deposition after Christian made a "damaging admission … that a pre-1996 Barbie doll allegedly infringed the later created Claudene doll head … ." When asked whether the prior-created Pioneer Barbie doll infringed Claudene, Christian stated, "I think so … [b]ecause it's got the look … ." At that juncture, Hicks requested an immediate recess, during which he lambasted his client in plain view of Mattel's attorneys and the video camera.
- Hicks' misrepresentations during oral argument on Mattel's summary judgment motion about the number of dolls alleged in the complaint to be infringing and whether he had ever reviewed a particular Barbie catalogue (when a videotape presented to the district court by Mattel demonstrated that Hicks had reviewed it during a deposition);
- Hicks' misstatement of law in a summary judgment opposition brief about the circuit's holdings regarding joint authorship of copyrightable works.

[…] The district court awarded Mattel $501,565 in attorneys' fees.

[…] The district court did not abuse its discretion in concluding that Hicks' failure to investigate fell below the requisite standard established by Rule 11. […]

Hicks argues that even if the district court were justified in sanctioning him under Rule 11 based on Christian's complaint and the follow-on motions, its conclusion was tainted because it impermissibly considered other misconduct that cannot be sanctioned under Rule 11, such as discovery abuses, misstatements made during oral argument, and conduct in other litigation.

Hicks' argument has merit. While Rule 11 permits the district court to sanction an attorney for conduct regarding "pleading[s], written motion[s], and other paper[s]" that have been signed and filed in a given case, Fed. R. Civ. P. 11(a), it does not authorize sanctions for, among other things, discovery abuses or misstatements made to the court during an oral presentation. […]

[…] The orders clearly demonstrate that the district court decided, at least in part, to sanction Hicks because he signed and filed a factually and legally meritless complaint and for misrepresentations in subsequent briefing. But the orders, coupled with the supporting examples, also strongly suggest that the court considered extra-pleadings conduct as a basis for Rule 11 sanctions. […]

The laundry list of Hicks' outlandish conduct is a long one and raises serious questions as to his respect for the judicial process. Nonetheless, Rule 11 sanctions are limited to "paper[s]" signed in violation of the rule. Conduct in depositions, discovery meetings of counsel, oral representations at hearings, and behavior in prior proceedings do not fall within the ambit of Rule 11. Because we do not know for certain whether the district court granted Mattel's Rule

11 motion as a result of an impermissible intertwining of its conclusion about the complaint's frivolity and Hicks' extrinsic misconduct, we must vacate the district court's Rule 11 orders.

We decline Mattel's suggestion that the district court's sanctions orders could be supported in their entirety under the court's inherent authority. To impose sanctions under its inherent authority, the district court must "make an explicit finding [which it did not do here] that counsel's conduct constituted or was tantamount to bad faith." We acknowledge that the district court has a broad array of sanctions options at its disposal: Rule 11, 28 U.S.C. § 1927,[11] and the court's inherent authority. Each of these sanctions alternatives has its own particular requirements, and it is important that the grounds be separately articulated to assure that the conduct at issue falls within the scope of the sanctions remedy. On remand, the district court will have an opportunity to delineate the factual and legal basis for its sanctions orders.

[11] Section 1927 provides for imposition of "excess costs, expenses, and attorneys' fees" on counsel who "multiplies the proceedings in any case unreasonably and vexatiously."

Notes & Questions

1. The Ninth Circuit ultimately held that the district court sanctioned Hicks in part for conduct during the discovery process, which is not subject to Rule 11. Which part of Rule 11 says that it does not apply to attorneys' conduct during discovery?
2. Although Hicks won vacatur of the sanctions order against him, he was still in a good bit of trouble. Not only would Hicks have to face the threat of renewed sanctions from the district court, but also he faced the possibility of disciplinary action by the state bar of California for his conduct.
3. Although the focus is on Rule 11, notice that the court talks about two other authorities that permit district courts to impose sanctions: 28 U.S.C. § 1927 and "the court's inherent authority." Each has its own requirements and procedures. In particular, the Ninth Circuit emphasizes the special findings a district court must make before invoking its inherent authority to impose sanctions. Why do you think such a special showing might be required?

4.4. Responding to the Complaint

Answers: Denials and Affirmative Defenses

Rule 8(b) sets the rules for how a party must respond to a complaint. This responsive pleading is typically called an answer. Rule 8(b) requires that answers must "state in short and plain terms" any defenses to the claims in the complaint, Rule 8(b)(1)(A), and either admit or deny the factual allegations asserted in the complaint, Rule 8(b)(1)(B).

When admitting or denying the complaint's allegations, an answering defendant must beware of the distinction between general and specific denials. *See* Rule 8(b)(3). A general denial is appropriate "to deny all the allegations of a pleading," whereas specific denials are required when a party wishes to "specifically deny designated allegations." Because most complaints contain at least some facts that the defendant cannot deny—for example, his name—it is common for answers to admit or deny the complaint's allegations on a paragraph-by-paragraph basis. In fact, Rule 8(b)(4) requires that a party responding to a paragraph in a complaint that contains more than one allegation must make clear which allegations are admitted and which are denied (or, as is sometimes appropriate, which the defendant lacks knowledge either to admit or deny).

The following case is a study in what can go wrong if a answer fails to pay heed to Rule 8(b)(4) and denies more than they intend to.

Zielinski v. Philadelphia Piers, Inc.

VAN DUSEN, J. 139 F. Supp. 408 (E.D. Pa. 1956)

Plaintiff requests a ruling that, for the purposes of this case, the motor-driven fork lift operated by Sandy Johnson on February 9, 1953, was owned by defendant and that Sandy Johnson was its agent acting in the course of his employment on that date. The following facts are established by the pleadings, interrogatories, depositions and uncontradicted portions of affidavits:

Plaintiff filed his complaint on April 28, 1953, for personal injuries received on February 9, 1953, while working on Pier 96, Philadelphia, for J.A. McCarthy, as a result of a collision of two motor-driven fork lifts.

Paragraph 5 of this complaint stated that "a motor-driven vehicle known as a fork lift or chisel, owned, operated and controlled by the defendant, its agents, servants and employees, was so negligently and carelessly managed … that the same … did come into contact with the plaintiff causing him to sustain the injuries more fully hereinafter set forth."

The "First Defense" of the Answer stated "Defendant … (c) denies the averments of paragraph 5 … ."

The motor-driven vehicle known as a fork lift or chisel, which collided with the McCarthy fork lift on which plaintiff was riding, had on it the initials "P.P.I."

On February 10, 1953, Carload Contractors, Inc. made a report of this accident to its insurance company, whose policy No. CL 3964 insured Carload Contractors, Inc. against potential liability for the negligence of its employees contributing to a collision of the type described in paragraph 2 above.

By letter of April 29, 1953, the complaint served on defendant was forwarded to the above-mentioned insurance company. This letter read as follows:

> Gentlemen:
>
> As per telephone conversation today with your office, we attach hereto "Complaint in Trespass" as brought against Philadelphia Piers, Inc. by one Frank Zielinski for supposed injuries sustained by him on February 9, 1953.
>
> We find that a fork lift truck operated by an employee of Carload Contractors, Inc. also insured by yourselves was involved in an accident with another chisel truck, which, was alleged [sic], did cause injury to Frank Zielinski, and same was reported to you by Carload Contractors, Inc. at the time, and you assigned Claim Number OL 0153-94 to this claim.
>
> Should not this Complaint in Trespass be issued against Carload Contractors, Inc. and not Philadelphia Piers, Inc.?
>
> We forward for your handling.

Interrogatories 1 [and 2] and the answers thereto, which were sworn to by defendant's General Manager on June 12, 1953, and filed on June 22, 1953, read as follows:

> 1. State whether you have received any information of an injury sustained by the plaintiff on February 9, 1953, South Wharves. If so, state when and from whom you first received notice of such injury.
>
> > A. We were first notified of this accident on or about February 9, 1953 by Thomas Wilson.
>
> 2. State whether you caused an investigation to be made of the circumstances of said injury and if so, state who made such investigation and when it was made.
>
> > A. We made a very brief investigation on February 9, 1953 and turned the matter over to (our insurance company) for further investigation. […]

At a deposition taken August 18, 1953, Sandy Johnson testified that he was the employee of defendant on February 9, 1953, and had been their employee for approximately fifteen years.

At a pre-trial conference held on September 27, 1955, plaintiff first learned that over a year before February 9, 1953, the business of moving freight on piers in Philadelphia, formerly conducted by defendant, had been sold by it to Carload Contractors, Inc. and Sandy Johnson had been transferred to the payroll of this corporation without apparently realizing it, since the nature or location of his work had not changed.

[…]

Defendant now admits that on February 9, 1953, it owned the fork lift in the custody of Sandy Johnson and that this fork lift was leased to Carload Contractors, Inc. It is also admitted that the pier on which the accident occurred was leased by defendant.

There is no indication of action by either party in bad faith and there is no proof of inaccurate statements being made with intent to deceive. Because defendant made a prompt investigation of the accident […] its insurance company has been representing the defendant since suit was brought, and this company insures Carload Contractors, Inc. also, requiring defendant to defend this suit, will not prejudice it. Under these circumstances, and for the purposes of this action, it is ordered that the following shall be stated to the jury at the trial:

> It is admitted that, on February 9, 1953, the towmotor or fork lift bearing the initials "P.P.I." was owned by defendant and that Sandy Johnson was a servant in the employ of defendant and doing its work on that date.

This ruling is based on the following principles:

Under the circumstances of this case, the answer contains an ineffective denial of that part of paragraph 5 of the complaint which alleges that "a motor driven vehicle known as a fork lift or chisel (was) owned, operated and controlled by the defendant, its agents, servants and employees."

Fed. R. Civ. P. 8(b), 28 U.S.C. provides:

> A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. … Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder.

For example, it is quite clear that defendant does not deny the averment in paragraph 5 that the fork lift came into contact with plaintiff, since it admits, in the answers to interrogatories, that an investigation of an occurrence of the accident had been made and that a report dated February 10, 1953, was sent to its insurance company stating "While Frank Zielinski was riding on bumper of chisel and holding rope to secure cargo, the chisel truck collided with another chisel truck operated by Sandy Johnson causing injuries to Frank Zielinski's legs and hurt head of Sandy Johnson." Compliance with the above-mentioned rule required that defendant file a more specific answer than a general denial. A specific denial of parts of this paragraph and specific admission of other parts would have warned plaintiff that he had sued the wrong defendant.

Paragraph 8.23 of Moore's Federal Practice (2nd Edition) Vol. II, p. 1680, says: "In such a case, the defendant should make clear just what he is denying and what he is admitting." This answer to paragraph 5 does not make clear to plaintiff the defenses he must be prepared to meet.

4. Pleadings

[…]

Under the circumstances of this case, principles of equity require that defendant be estopped from denying agency because, otherwise, its inaccurate statements and statements in the record, which it knew (or had the means of knowing within its control) were inaccurate, will have deprived plaintiff of his right of action.

If Interrogatory 2 had been answered accurately by saying that employees of Carload Contractors, Inc. had turned the matter over to the insurance company,[11] it seems clear that plaintiff would have realized his mistake. The fact that if Sandy Johnson had testified accurately, the plaintiff could have brought its action against the proper party defendant within the statutory period of limitations is also a factor to be considered, since defendant was represented at the deposition and received knowledge of the inaccurate testimony.

[11] Pages 73 and 85 of the depositions of October 14, 1955, indicate that the answer to Interrogatory 2 was also inaccurate in saying that defendant made the investigation of the accident; but actually the employees of Carload Contractors, Inc. made the investigation.

At least one appellate court has stated that the doctrine of equitable estoppel will be applied to prevent a party from taking advantage of the statute of limitations where the plaintiff has been misled by conduct of such party. *See Peters v. Public Service Corporation*. In that case, the court said,

> "Of course, defendants were under no duty to advise complainants' attorney of his error, other than by appropriate pleadings, but neither did defendants have a right, knowing of the mistake, to foster it by its acts of omission."

This doctrine has been held to estop a party from taking advantage of a document of record where the misleading conduct occurred after the recording, so that application of this doctrine would not necessarily be precluded in a case such as this where the misleading answers to interrogatories and depositions were subsequent to the filing of the answer, even if the denial in the answer had been sufficient.

Since this is a pre-trial order, it may be modified at the trial if the trial judge determines from the facts which then appear that justice so requires.

Notes & Questions

1. Under a rule of tort law called *respondeat superior*, an employer is legally responsible for its employees' workplace negligence. As a result, whoever "operated and controlled" the forklift was responsible for Zielienski's injuries (assuming Sandy Johnson had been negligent).

2. Pay close attention to Paragraph 5 of the complaint (quoted in the court's opinion). The defendant *generally* denied that paragraph. Under Rule 8(b)(3), what was the legal consequence of that general denial? Do you think the defendant intended that consequence?

3. At some point, it became clear that Philadelphia Piers was the wrong defendant for Zielinski's claims, and that Carload Contractors was the appropriate defendant. Why do you think the plaintiff didn't dismiss his complaint against Philadelphia Piers and file a new one against Carload Contractors?

4. Even though Philadelphia Piers seems like the wrong defendant, the court nevertheless barred Philadelphia Piers from denying that it was in control of the forklift. Why do you think the court might have done that? (As an evergreen hint: keep your eyes on the insurance companies.)

5. Note that the exact problem at the heart of this case is unlikely to recur because of the addition of Rule 15(c)(1)(C), which we will read about shortly. But the larger lessons about general denials are still important.

4.5. Amending Pleadings

If a party wants to change the factual allegations or legal claims made in a pleading such as a complaint or answer, it must comply with Rule 15. Rule 15 sets out a complex set of procedures governing when and to what extent such amendments are permitted.

Especially when it comes to complaints, amendment is not always necessary. A party wishing to add additional claims or sue additional parties can typically file a new lawsuit, perhaps one that will be consolidated with the existing suit. This will achieve many of the same goals as amending without requiring the procedural hoop-jumping called for by Rule 15.

The major exception to this pattern is when the statute of limitations has run on the proposed claims to be added via the amendment. When that happens, the new claims will be barred as untimely unless they can "relate back" to the date of the original complaint. If an amended pleading relates back, it is treated as though it was filed on the day of the original pleading. *See* Rule 15(c).

For this reason, whether an amended pleading relates back to the date of the original pleading is often a decisive issue in litigation. The materials that follow explore when relation back is allowed. The first case, *Beeck*, concerns whether to allow a defendant to amend its answer when it is too late for the plaintiff to amend her complaint in response. The second and third cases, *Moore* and *Bonerb*, contemplate whether a plaintiff should be allowed to amend her complaint when the statute of limitations on bringing new claims has already passed. The final case, *Krupski*, explains when a plaintiff may amend her complaint to add an entirely new defendant, even after the statute of limitations to sue that defendant has passed.

As you read each of these four cases, track the language of Rule 15(a) & (c) carefully. Doing so will help you to understand the Rule's complex logic.

Beeck v. Aquaslide 'N' Dive Corp.

562 F.2d 537 (8th Cir. 1977)

BENSON, J.

This case is an appeal from the trial court's exercise of discretion on procedural matters in a diversity personal injury action.

Jerry A. Beeck was severely injured on July 15, 1972, while using a water slide. He and his wife, Judy A. Beeck, sued Aquaslide 'N' Dive Corporation (Aquaslide), a Texas corporation, alleging it manufactured the slide involved in the accident, and sought to recover substantial damages on theories of negligence, strict liability and breach of implied warranty.

Aquaslide initially admitted manufacture of the slide, but later moved to amend its answer to deny manufacture; the motion was resisted. The district court granted leave to amend. On motion of the defendant, a separate trial was held on the issue of "whether the defendant designed, manufactured or sold the slide in question." This motion was also resisted by the plaintiffs. The issue was tried to a jury, which returned a verdict for the defendant, after which the trial court entered summary judgment of dismissal of the case. Plaintiffs took this appeal, and stated the issue[] presented for review to be:

> Where the manufacturer of the product, a water slide, admitted in its Answer and later in its Answer to Interrogatories both filed prior to the running of the statute of limitations that it designed, manufactured and sold the water slide in question, was it an abuse of the trial court's discretion to grant leave to amend to the manufacturer in order to deny these admissions after the running of the statute of limitations? […]

I. Facts.

A brief review of the facts found by the trial court in its order granting leave to amend, and which do not appear to have been in dispute, is essential to a full understanding of appellants' claims.

In 1971 Kimberly Village Home Association of Davenport, Iowa, ordered an Aquaslide product from one George Boldt, who was a local distributor handling defendant's products. The order was forwarded by Boldt to Sentry Pool and Chemical Supply Co. in Rock Island, Illinois, and Sentry forwarded the order to Purity Swimming Pool Supply in Hammond, Indiana. A slide was delivered from a Purity warehouse to Kimberly Village, and was installed by Kimberly employees. On July 15, 1972, Jerry A. Beeck was injured while using the slide at a social gathering sponsored at Kimberly Village by his employer, Harker Wholesale Meats, Inc. Soon after the accident investigations were undertaken by representatives of the separate insurers of Harker and Kimberly Village. On October 31, 1972, Aquaslide first learned of the accident through a letter sent by a representative of Kimberly's insurer to Aquaslide, advising that "one of your Queen Model # Q-3D slides" was involved in the accident.

Aquaslide forwarded this notification to its insurer. Aquaslide's insurance adjuster made an on-site investigation of the slide in May, 1973, and also interviewed persons connected with the ordering and assembly of the slide. An inter-office letter dated September 23, 1973, indicates that Aquaslide's insurer was of the opinion the "Aquaslide in question was definitely manufactured by our insured." The complaint was filed October 15, 1973. Investigators for three different insurance companies, representing Harker, Kimberly and the defendant, had concluded that the slide had been manufactured by Aquaslide, and the defendant, with no information to the contrary, answered the complaint on December 12, 1973, and admitted that it "designed, manufactured, assembled and sold" the slide in question.

The statute of limitations on plaintiff's personal injury claim expired on July 15, 1974. About six and one-half months later Carl Meyer, president and owner of Aquaslide, visited the site of the accident prior to the taking of his deposition by the plaintiff. From his on-site inspection of the slide, he determined it was not a product of the defendant. Thereafter, Aquaslide moved the court for leave to amend its answer to deny manufacture of the slide.

II. Leave to Amend.

Amendment of pleadings in civil actions is governed by Rule 15(a), which provides in part that once issue is joined in a lawsuit, a party may amend his pleading [only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."][*]

[*] [When this case was decided, Rule 15 permitted amendment after a responsive pleading "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." *–Ed.*]

In *Foman v. Davis*, 371 U.S. 178 (1962), the Supreme Court had occasion to construe that portion of Rule 15(a) set out above:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires," this mandate is to be heeded. … If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, … .

This Court in *Hanson v. Hunt Oil Co.* held that "[p]rejudice *must be shown*." (Emphasis added). The burden is on the party opposing the amendment to show such prejudice. In ruling on a motion for leave to amend, the trial court must inquire into the issue of prejudice to the opposing party, in light of the particular facts of the case.

Certain principles apply to appellate review of a trial court's grant or denial of a motion to amend pleadings. First, as noted in *Foman v. Davis*, allowance or denial of leave to amend lies within the sound discretion of the trial court, The

appellate court must view the case in the posture in which the trial court acted in ruling on the motion to amend.

It is evident from the order of the district court that in the exercise of its discretion in ruling on defendant's motion for leave to amend, it searched the record for evidence of bad faith, prejudice and undue delay which might be sufficient to overbalance the mandate of Rule 15(a) and *Foman v. Davis* that leave to amend should be "freely given." Plaintiffs had not at any time conceded that the slide in question had not been manufactured by the defendant, and at the time the motion for leave to amend was at issue, the court had to decide whether the defendant should be permitted to litigate a material factual issue on its merits.

In inquiring into the issue of bad faith, the court noted the fact that the defendant, in initially concluding that it had manufactured the slide, relied upon the conclusions of three different insurance companies, each of which had conducted an investigation into the circumstances surrounding the accident. This reliance upon investigations of three insurance companies, and the fact that "no contention has been made by anyone that the defendant influenced this possibly erroneous conclusion," persuaded the court that "defendant has not acted in such bad faith as to be precluded from contesting the issue of manufacture at trial." The court further found "[t]o the extent that 'blame' is to be spread regarding the original identification, the record indicates that it should be shared equally."

In considering the issue of prejudice that might result to the plaintiffs from the granting of the motion for leave to amend, the trial court held that the facts presented to it did not support plaintiffs' assertion that, because of the running of the two-year Iowa statute of limitations on personal injury claims, the allowance of the amendment would sound the "death knell" of the litigation. In order to accept plaintiffs' argument, the court would have had to assume that the defendant would prevail at trial on the factual issue of manufacture of the slide, and further that plaintiffs would be foreclosed, should the amendment be allowed, from proceeding against other parties if they were unsuccessful in pressing their claim against Aquaslide. On the state of the record before it, the trial court was unwilling to make such assumptions and concluded "[u]nder these circumstances, the Court deems that the possible prejudice to the plaintiffs is an insufficient basis on which to deny the proposed amendment." The court reasoned that the amendment would merely allow the defendant to contest a disputed factual issue at trial, and further that it would be prejudicial to the defendant to deny the amendment.

The court also held that defendant and its insurance carrier, in investigating the circumstances surrounding the accident, had not been so lacking in diligence as to dictate a denial of the right to litigate the factual issue of manufacture of the slide.

On this record we hold that the trial court did not abuse its discretion in allowing the defendant to amend its answer.

[…] The judgment of the district court is affirmed.

Notes & Questions

1. What was the defendant's excuse for mispleading its answer on the allegation that it manufactured the water slide? Does this strike you as a good excuse?
2. What is the prejudice to the plaintiffs of allowing Aquaslide to amend its complaint? Does this strike you as unfair?
3. How can we explain the court's decision to allow Aquaslide to amend its answer even after the statute of limitations has run? One possibility is to imagine how Aquaslide would have defended itself at trial against plaintiffs' claims of negligent manufacture. Should it present evidence about how the actual (non-Aquaslide) slide was manufactured, or should it instead offer evidence that its own slides were safe? Either choice seems absurd.

Moore v. Baker

MORGAN, J. 989 F.2d 1129 (11th Cir. 1993)

[…] Appellant, Judith Moore, was suffering from a partial blockage of her left common carotid artery, which impeded the flow of oxygen to her brain and caused her to feel dizzy and tired. In April of 1989, she consulted with appellee Dr. Roy Baker […] about her symptoms. Dr. Baker diagnosed a blockage of her left carotid artery […] and recommended that she undergo [surgery] to correct her medical problem.

Dr. Baker discussed the proposed procedure with Moore and advised her of the risks of undergoing the surgery. He did not advise her, however, of an alternative treatment [that did not involve surgery]. Moore signed a written consent allowing Dr. Baker to perform [surgery]. Following surgery, she appeared to recover well, but soon the hospital staff discovered that Moore was weak on one side. Dr. Baker reopened the operative wound and removed a blood clot that had formed in the artery. Although the clot was removed and the area repaired, Moore suffered permanent brain damage. As a result, Moore is permanently and severely disabled.

On April 8, 1991, the last day permitted by the statute of limitations, Moore filed a complaint alleging that Dr. Baker committed medical malpractice by failing to inform her of the availability of EDTA therapy as an alternative to surgery in violation of Georgia's informed consent law, O.C.G.A. § 31-9-6.1 (1991). According to Moore's complaint, EDTA therapy is as effective as carotid endarterectomy in treating coronary blockages, but it does not entail those risks that accompany invasive surgery.

On August 6, 1991, Dr. Baker filed a motion for summary judgment on the issue of informed consent. On August 26, 1991, Moore moved to amend her complaint to assert allegations of negligence by Dr. Baker in the performance

of the surgery and in his post-operative care of Moore. […] [The district court denied Moore's motion to amend.]

I

Moore claims that the district court abused its discretion by […] denying Moore's motion to amend her complaint […] on the ground that the newly-asserted claim was barred by the applicable statute of limitations. […]

Moore filed her original complaint on the last day permitted by Georgia's statute of limitations. Accordingly, the statute of limitations bars the claim asserted in Moore's proposed amended complaint unless the amended complaint relates back to the date of the original complaint. An amendment relates back to the original filing [when] "[the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)[(1)(B)]. The critical issue in Rule 15(c) determinations is whether the original complaint gave notice to the defendant of the claim now being asserted.

Moore relies heavily on *Azarbal v. Medical Center of Delaware, Inc.*, 724 F. Supp. 279 (D. Del. 1989), which addressed the doctrine of relation back in the context of a medical malpractice case. In *Azarbal*, the original complaint alleged negligence in the performance of an amniocentesis on the plaintiff, resulting in injury to the fetus. After the statute of limitations had expired, the plaintiff sought to amend the complaint to add a claim that the doctor failed to obtain her informed consent prior to performing a sterilization procedure on her because the doctor did not tell her that the fetus had probably been injured by the amniocentesis. The district court [in *Azarbal*] found that "the original complaint provided adequate notice of any claims Ms. Azarbal would have arising from the amniocentesis, including a claim that Dr. Palacio should have revealed that the procedure had caused fetal injury." The instant case is clearly distinguishable from *Azarbal*. Unlike the complaint in *Azarbal*, the allegations asserted in Moore's original complaint contain nothing to put Dr. Baker on notice that the new claims of negligence might be asserted. Even when given a liberal construction, there is nothing in Moore's original complaint which makes reference to any acts of alleged negligence by Dr. Baker either during or after surgery.[1] The original complaint focuses on Baker's actions before Moore decided to undergo surgery, but the amended complaint focuses on Baker's actions during and after the surgery. The alleged acts of negligence occurred at different times and involved separate and distinct conduct. In order to recover on the negligence claim contained in her amended complaint, Moore would have to prove completely different facts than would otherwise have been required to recover on the informed consent claim in the original complaint.

We must conclude that Moore's new claim does not arise out of the same conduct, transaction, or occurrence as the claims in the original complaint. Therefore, the amended complaint does not relate back to the original complaint, and the proposed new claims are barred by the applicable statute of limitations. Since the amended complaint could not withstand a motion to dismiss,

[1] Moore's original complaint is very specific and focuses solely on Dr. Baker's failure to inform Moore of EDTA therapy as an alternative to surgery. Although the complaint recounts the details of the operation and subsequent recovery, it does not hint that Dr. Baker's actions were negligent. In fact, the only references in the original complaint relating to the surgery or post-operative care suggest that Dr. Baker acted with reasonable care. […]

we hold that the district court did not abuse its discretion in denying Moore's motion to amend her complaint. […]

For all of the foregoing reasons, we AFFIRM the judgment of the district court.

Bonerb v. Richard J. Caron Foundation

HECKMAN, U.S. Magistrate Judge 159 F.R.D. 16 (W.D.N.Y. 1994)

[…]

BACKGROUND

In this diversity action, plaintiff seeks damages for personal injuries allegedly sustained when he slipped and fell while playing basketball on defendant's recreational basketball court on November 29, 1991. Defendant is a not-for-profit corporation licensed and doing business as a drug and alcohol rehabilitation facility in Westfield, Pennsylvania. Plaintiff is a resident of Western New York.

The original complaint, filed on October 1, 1993, alleges that plaintiff was injured while he was a rehabilitation patient at defendant's Westfield facility, and was participating in a mandatory exercise program. Plaintiff claims that the basketball court was negligently maintained by defendant.

On July 25, 1994, this court granted plaintiff's motion for substitution of new counsel. On September 1, 1994, plaintiff moved to amend his complaint to add a new cause of action for "counseling malpractice." According to plaintiff's counsel, investigation and discussions undertaken after his substitution as counsel indicated to him that a malpractice claim was warranted under the circumstances. Defendant objects to the amendment on the grounds that the counseling malpractice claim does not relate back to the original pleading and is therefore barred by Pennsylvania's two-year statute of limitations.

DISCUSSION

Rule 15 of the Federal Rules of Civil Procedure provides that once time for amending a pleading as of right has expired, a party may request leave of court to amend, [and "The court should freely give leave when justice so requires."] Fed. R. Civ. P. 15(a)[(2)]. […]

Rule 15(c)(2) provides that where a party seeks to amend its pleading to assert a claim that would otherwise be time-barred, the claim may be saved by "relation back" to the date of the original pleading when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading … ." In determining whether a claim relates back, courts look to the "operational facts" set forth in the original complaint to determine whether the defendant was put on notice of the claim that the plaintiff later seeks to add. As stated in *Tri–Ex Enterprises, Inc. v. Morgan Guaranty Trust Co.*, 586 F. Supp. 930, 932 (S.D.N.Y. 1984):

> "[T]he relation back doctrine is based upon the principle that one who has been given notice of litigation concerning a given transaction or occurrence has been provided with all the protection that statutes of limitation are designed to afford. Thus, if the litigant has been advised at the outset of the general facts from which the belatedly asserted claim arises, the amendment will relate back even though the statute of limitations may have run in the interim."

An amendment which changes the legal theory of the case is appropriate if the factual situation upon which the action depends remains the same and has been brought to the defendant's attention by the original pleading.

In this case, the original complaint alleges that plaintiff was injured when he slipped and fell on a wet, muddy basketball court "while participating in a mandatory exercise program" at defendant's rehabilitation facility. Plaintiff alleges several instances of defendant's negligent conduct, such as failure to maintain the premises safely, failure to warn, failure to inspect and failure to "properly supervise and/or instruct plaintiff." The proposed amendment seeks to allege that plaintiff "was caused to fall while playing in an outdoor basketball court … in an exercise program mandated as part of his treatment in the rehabilitation program," and that "the rehabilitation and counseling care rendered … was negligently, carelessly and unskillfully performed."

The allegations in the original and amended complaints derive from the same nucleus of operative facts involving the injury suffered by plaintiff on November 29, 1991. It is true that a claim for professional malpractice invokes an entirely different duty and conduct on the part of the defendant than does a claim for negligent maintenance of the premises. However, the original complaint advised defendant of the same transaction or occurrence giving rise to these different theories of negligence. Indeed, the original complaint alleged that participation in the exercise program was mandatory, and that the injury was caused by defendant's failure to "properly supervise and/or instruct plaintiff." These allegations not only gave defendant sufficient notice of the general facts surrounding the occurrence, but also alerted defendant to the possibility of a claim based on negligent performance of professional duties. This is all that is required for relation back under Rule 15(c).

Defendant contends that it will be unduly prejudiced by the amendment because it will have to return to the drawing board to prepare an entirely new defense. However, as plaintiff points out, the period for discovery has not yet expired, depositions of defendant's personnel have not yet been taken, and expert witness information has not been exchanged. In addition, the parties have consented to trial before the undersigned, thereby simplifying any further supervision of discovery and the conduct and review of pretrial matters and dispositive motions.

Finally, there has been no showing of undue delay or bad faith on the part of plaintiff. […]

Notes & Questions

1. Rule 15 allows amended pleadings to "relate back" to the date on which the original pleading was filed. When amended pleadings "relate back" in this way, they are treated as though they were filed on the day that the original filing was made.
2. What is the test for determining whether an amendment relates back under Rule 15(c)(1)(B)?
3. Stop to see why the relation-back question is so important in *Bonerb*. Why can't the plaintiff simply file an amended complaint? Or dismiss the pending action and file a new lawsuit that includes the new legal theory? The answer is that the statute of limitations has expired, meaning any new lawsuit is likely to be barred. This pattern is common in relation-back disputes.
4. *Bonerb* concerns whether an amended complaint alleging a new claim against the same defendant should be allowed to relate back. The next case involves a different situation: whether an amended complaint alleging the same claims against a new defendant should be allowed to relate back.

Krupski v. Costa Crociere S.p.A.

Justice Sotomayor delivered the opinion of the Court. .

560 U.S. 538 (2010)

Rule 15(c) of the Federal Rules of Civil Procedure governs when an amended pleading "relates back" to the date of a timely filed original pleading and is thus itself timely even though it was filed outside an applicable statute of limitations. Where an amended pleading changes a party or a party's name, the Rule requires, among other things, that "the party to be brought in by amendment … knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Rule 15(c)(1)(C). In this case, the Court of Appeals held that Rule 15(c) was not satisfied because the plaintiff knew or should have known of the proper defendant before filing her original complaint. The court also held that relation back was not appropriate because the plaintiff had unduly delayed in seeking to amend. We hold that relation back under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party's knowledge or its timeliness in seeking to amend the pleading. Accordingly, we reverse the judgment of the Court of Appeals.

I

On February 21, 2007, petitioner, Wanda Krupski, tripped over a cable and fractured her femur while she was on board the cruise ship Costa Magica. Upon her return home, she acquired counsel and began the process of seeking compensation for her injuries. Krupski's passenger ticket—which explained that it

was the sole contract between each passenger and the carrier […] included a variety of requirements for obtaining damages for an injury suffered on board one of the carrier's ships. The ticket identified the carrier as

> "Costa Crociere S. p. A., an Italian corporation, and all Vessels and other ships owned, chartered, operated, marketed or provided by Costa Crociere, S. p. A., and all officers, staff members, crew members, independent contractors, medical providers, concessionaires, pilots, suppliers, agents and assigns onboard said Vessels, and the manufacturers of said Vessels and all their component parts."

The ticket required an injured party to submit "written notice of the claim with full particulars … to the carrier or its duly authorized agent within 185 days after the date of injury." The ticket further required any lawsuit to be "filed within one year after the date of injury" and to be "served upon the carrier within 120 days after filing." For cases arising from voyages departing from or returning to a United States port in which the amount in controversy exceeded $75,000, the ticket designated the United States District Court for the Southern District of Florida in Broward County, Florida, as the exclusive forum for a lawsuit. The ticket extended the "defenses, limitations and exceptions … that may be invoked by the CARRIER" to "all persons who may act on behalf of the CARRIER or on whose behalf the CARRIER may act," including "the CARRIER'S parents, subsidiaries, affiliates, successors, assigns, representatives, agents, employees, servants, concessionaires and contractors" as well as "Costa Cruise Lines N.V.," identified as the "sales and marketing agent for the CARRIER and the issuer of this Passage Ticket Contract." The front of the ticket listed Costa Cruise Lines' address in Florida and stated that an entity called "Costa Cruises" was "the first cruise company in the world" to obtain a certain certification of quality.

On July 2, 2007, Krupski's counsel notified Costa Cruise Lines of Krupski's claims. On July 9, 2007, the claims administrator for Costa Cruise requested additional information from Krupski "[i]n order to facilitate our future attempts to achieve a pre-litigation settlement." The parties were unable to reach a settlement, however, and on February 1, 2008—three weeks before the 1-year limitations period expired—Krupski filed a negligence action against Costa Cruise, invoking the diversity jurisdiction of the Federal District Court for the Southern District of Florida. The complaint alleged that Costa Cruise "owned, operated, managed, supervised and controlled" the ship on which Krupski had injured herself; that Costa Cruise had extended to its passengers an invitation to enter onto the ship; and that Costa Cruise owed Krupski a duty of care, which it breached by failing to take steps that would have prevented her accident. The complaint further stated that venue was proper under the passenger ticket's forum selection clause and averred that, by the July 2007 notice of her claims, Krupski had complied with the ticket's presuit requirements. Krupski served Costa Cruise on February 4, 2008.

Over the next several months—after the limitations period had expired—Costa Cruise brought Costa Crociere's existence to Krupski's attention three times.

First, on February 25, 2008, Costa Cruise filed its answer, asserting that it was not the proper defendant, as it was merely the North American sales and marketing agent for Costa Crociere, which was the actual carrier and vessel operator. Second, on March 20, 2008, Costa Cruise listed Costa Crociere as an interested party in its corporate disclosure statement. Finally, on May 6, 2008, Costa Cruise moved for summary judgment, again stating that Costa Crociere was the proper defendant.

On June 13, 2008, Krupski responded to Costa Cruise's motion for summary judgment, arguing for limited discovery to determine whether Costa Cruise should be dismissed. According to Krupski, the following sources of information led her to believe Costa Cruise was the responsible party: The travel documents prominently identified Costa Cruise and gave its Florida address; Costa Cruise's Web site listed Costa Cruise in Florida as the United States office for the Italian company Costa Crociere; and the Web site of the Florida Department of State listed Costa Cruise as the only "Costa" company registered to do business in that State. Krupski also observed that Costa Cruise's claims administrator had responded to her claims notification without indicating that Costa Cruise was not a responsible party. With her response, Krupski simultaneously moved to amend her complaint to add Costa Crociere as a defendant.

On July 2, 2008, after oral argument, the District Court denied Costa Cruise's motion for summary judgment without prejudice and granted Krupski leave to amend, ordering that Krupski effect proper service on Costa Crociere by September 16, 2008. Complying with the court's deadline, Krupski filed an amended complaint on July 11, 2008, and served Costa Crociere on August 21, 2008. On that same date, the District Court issued an order dismissing Costa Cruise from the case pursuant to the parties' joint stipulation, Krupski apparently having concluded that Costa Cruise was correct that it bore no responsibility for her injuries.

Shortly thereafter, Costa Crociere—represented by the same counsel who had represented Costa Cruise moved to dismiss, contending that the amended complaint did not relate back under Rule 15(c) and was therefore untimely. The District Court agreed. Rule 15(c), the court explained, imposes three requirements before an amended complaint against a newly named defendant can relate back to the original complaint. First, the claim against the newly named defendant must have arisen "out of the conduct, transaction, or occurrence set out — or attempted to be set out—in the original pleading." Fed. Rules Civ. Proc. 15(c)(1)(B), (C). Second, "within the period provided by Rule 4(m) for serving the summons and complaint" (which is ordinarily 120 days from when the complaint is filed, *see* Rule 4(m)), the newly named defendant must have "received such notice of the action that it will not be prejudiced in defending on the merits." Rule 15(c)(1)(C)(i). Finally, the plaintiff must show that, within the Rule 4(m) period, the newly named defendant "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Rule 15(c)(1)(C)(ii).

The first two conditions posed no problem, the court explained: The claim against Costa Crociere clearly involved the same occurrence as the original

claim against Costa Cruise, and Costa Crociere had constructive notice of the action and had not shown that any unfair prejudice would result from relation back. But the court found the third condition fatal to Krupski's attempt to relate back, concluding that Krupski had not made a mistake concerning the identity of the proper party. Relying on Eleventh Circuit precedent, the court explained that the word "mistake" should not be construed to encompass a deliberate decision not to sue a party whose identity the plaintiff knew before the statute of limitations had run. Because Costa Cruise informed Krupski that Costa Crociere was the proper defendant in its answer, corporate disclosure statement, and motion for summary judgment, and yet Krupski delayed for months in moving to amend and then in filing an amended complaint, the court concluded that Krupski knew of the proper defendant and made no mistake.

Rather than relying on the information contained in Costa Cruise's filings, all of which were made after the statute of limitations had expired, as evidence that Krupski did not make a mistake, the Court of Appeals noted that the relevant information was located within Krupski's passenger ticket, which she had furnished to her counsel well before the end of the limitations period. Because the ticket clearly identified Costa Crociere as the carrier, the court stated, Krupski either knew or should have known of Costa Crociere's identity as a potential party. It was therefore appropriate to treat Krupski as having chosen to sue one potential party over another. Alternatively, even assuming that she first learned of Costa Crociere's identity as the correct party from Costa Cruise's answer, the Court of Appeals observed that Krupski waited 133 days from the time she filed her original complaint to seek leave to amend and did not file an amended complaint for another month after that. In light of this delay, the Court of Appeals concluded that the District Court did not abuse its discretion in denying relation back.

We granted certiorari to resolve tension among the Circuits over the breadth of Rule 15(c)(1)(C)(ii), and we now reverse.

II

Under the Federal Rules of Civil Procedure, an amendment to a pleading relates back to the date of the original pleading when:

> "(A) the law that provides the applicable statute of limitations allows relation back;
>
> "(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or
>
> "(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> "(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

> "(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."

Rule 15(c)(1).

In our view, neither of the Court of Appeals' reasons for denying relation back under Rule 15(c)(1)(C)(ii) finds support in the text of the Rule. We consider each reason in turn.

A

The Court of Appeals first decided that Krupski either knew or should have known of the proper party's identity and thus determined that she had made a deliberate choice instead of a mistake in not naming Costa Crociere as a party in her original pleading. By focusing on Krupski's knowledge, the Court of Appeals chose the wrong starting point. The question under Rule 15(c)(1)(C)(ii) is not whether Krupski knew or should have known the identity of Costa Crociere as the proper defendant, but whether Costa Crociere knew or should have known that it would have been named as a defendant but for an error. Rule 15(c)(1)(C)(ii) asks what the prospective defendant knew or should have known during the Rule 4(m) period, not what the plaintiff knew or should have known at the time of filing her original complaint.

Information in the plaintiff's possession is relevant only if it bears on the defendant's understanding of whether the plaintiff made a mistake regarding the proper party's identity. For purposes of that inquiry, it would be error to conflate knowledge of a party's existence with the absence of mistake. A mistake is "[a]n error, misconception, or misunderstanding; an erroneous belief." Black's Law Dictionary 1092 (9th ed. 2009); *see also* Webster's Third New International Dictionary 1446 (2002) (defining "mistake" as "a misunderstanding of the meaning or implication of something"; "a wrong action or statement proceeding from faulty judgment, inadequate knowledge, or inattention"; "an erroneous belief"; or "a state of mind not in accordance with the facts"). That a plaintiff knows of a party's existence does not preclude her from making a mistake with respect to that party's identity. A plaintiff may know that a prospective defendant—call him party A—exists, while erroneously believing him to have the status of party B. Similarly, a plaintiff may know generally what party A does while misunderstanding the roles that party A and party B played in the "conduct, transaction, or occurrence" giving rise to her claim. If the plaintiff sues party B instead of party A under these circumstances, she has made a "mistake concerning the proper party's identity" notwithstanding her knowledge of the existence of both parties. The only question under Rule 15(c)(1)(C)(ii), then, is whether party A knew or should have known that, absent some mistake, the action would have been brought against him.

Respondent urges that the key issue under Rule 15(c)(1)(C)(ii) is whether the plaintiff made a deliberate choice to sue one party over another. We agree that making a deliberate choice to sue one party instead of another while fully understanding the factual and legal differences between the two parties is the

antithesis of making a mistake concerning the proper party's identity. We disagree, however, with respondent's position that any time a plaintiff is aware of the existence of two parties and chooses to sue the wrong one, the proper defendant could reasonably believe that the plaintiff made no mistake. The reasonableness of the mistake is not itself at issue. As noted, a plaintiff might know that the prospective defendant exists but nonetheless harbor a misunderstanding about his status or role in the events giving rise to the claim at issue, and she may mistakenly choose to sue a different defendant based on that misimpression. That kind of deliberate but mistaken choice does not foreclose a finding that Rule 15(c)(1)(C)(ii) has been satisfied.

This reading is consistent with the purpose of relation back: to balance the interests of the defendant protected by the statute of limitations with the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits. *See, e.g.*, Advisory Committee's 1966 Notes 122. A prospective defendant who legitimately believed that the limitations period had passed without any attempt to sue him has a strong interest in repose. But repose would be a windfall for a prospective defendant who understood, or who should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity. Because a plaintiff's knowledge of the existence of a party does not foreclose the possibility that she has made a mistake of identity about which that party should have been aware, such knowledge does not support that party's interest in repose.

[…]

B

The Court of Appeals offered a second reason why Krupski's amended complaint did not relate back: Krupski had unduly delayed in seeking to file, and in eventually filing, an amended complaint. The Court of Appeals offered no support for its view that a plaintiff's dilatory conduct can justify the denial of relation back under Rule 15(c)(1)(C), and we find none. The Rule plainly sets forth an exclusive list of requirements for relation back, and the amending party's diligence is not among them. Moreover, the Rule mandates relation back once the Rule's requirements are satisfied; it does not leave the decision whether to grant relation back to the district court's equitable discretion. *See* Rule 15(c)(1) ("An amendment … relates back … when" the three listed requirements are met (emphasis added)).

The mandatory nature of the inquiry for relation back under Rule 15(c) is particularly striking in contrast to the inquiry under Rule 15(a), which sets forth the circumstances in which a party may amend its pleading before trial. By its terms, Rule 15(a) gives discretion to the district court in deciding whether to grant a motion to amend a pleading to add a party or a claim. Following an initial period after filing a pleading during which a party may amend once "as a matter of course," "a party may amend its pleading only with the opposing party's written consent or the court's leave," which the court "should freely

give … when justice so requires." Rules 15(a)(1)-(2). We have previously explained that a court may consider a movant's "undue delay" or "dilatory motive" in deciding whether to grant leave to amend under Rule 15(a). As the contrast between Rule 15(a) and Rule 15(c) makes clear, however, the speed with which a plaintiff moves to amend her complaint or files an amended complaint after obtaining leave to do so has no bearing on whether the amended complaint relates back.

Rule 15(c)(1)(C) does permit a court to examine a plaintiff's conduct during the Rule 4(m) period, but not in the way or for the purpose respondent or the Court of Appeals suggests. As we have explained, the question under Rule 15(c)(1)(C)(ii) is what the prospective defendant reasonably should have understood about the plaintiff's intent in filing the original complaint against the first defendant. To the extent the plaintiff's postfiling conduct informs the prospective defendant's understanding of whether the plaintiff initially made a "mistake concerning the proper party's identity," a court may consider the conduct. The plaintiff's postfiling conduct is otherwise immaterial to the question whether an amended complaint relates back.

C

Applying these principles to the facts of this case, we think it clear that the courts below erred in denying relation back under Rule 15(c)(1)(C)(ii). The District Court held that Costa Crociere had "constructive notice" of Krupski's complaint within the Rule 4(m) period. Costa Crociere has not challenged this finding. Because the complaint made clear that Krupski meant to sue the company that "owned, operated, managed, supervised and controlled" the ship on which she was injured, and also indicated (mistakenly) that Costa Cruise performed those roles, Costa Crociere should have known, within the Rule 4(m) period, that it was not named as a defendant in that complaint only because of Krupski's misunderstanding about which "Costa" entity was in charge of the ship—clearly a "mistake concerning the proper party's identity."

Respondent contends that because the original complaint referred to the ticket's forum requirement and presuit claims notification procedure, Krupski was clearly aware of the contents of the ticket, and because the ticket identified Costa Crociere as the carrier and proper party for a lawsuit, respondent was entitled to think that she made a deliberate choice to sue Costa Cruise instead of Costa Crociere. As we have explained, however, that Krupski may have known the contents of the ticket does not foreclose the possibility that she nonetheless misunderstood crucial facts regarding the two companies' identities. Especially because the face of the complaint plainly indicated such a misunderstanding, respondent's contention is not persuasive. Moreover, respondent has articulated no strategy that it could reasonably have thought Krupski was pursuing in suing a defendant that was legally unable to provide relief.

Respondent also argues that Krupski's failure to move to amend her complaint during the Rule 4(m) period shows that she made no mistake in that period. But as discussed, any delay on Krupski's part is relevant only to the extent it may

have informed Costa Crociere's understanding during the Rule 4(m) period of whether she made a mistake originally. Krupski's failure to add Costa Crociere during the Rule 4(m) period is not sufficient to make reasonable any belief that she had made a deliberate and informed decision not to sue Costa Crociere in the first instance. Nothing in Krupski's conduct during the Rule 4(m) period suggests that she failed to name Costa Crociere because of anything other than a mistake.

It is also worth noting that Costa Cruise and Costa Crociere are related corporate entities with very similar names; "crociera" even means "cruise" in Italian. Cassell's Italian Dictionary 137, 670 (1967). This interrelationship and similarity heighten the expectation that Costa Crociere should suspect a mistake has been made when Costa Cruise is named in a complaint that actually describes Costa Crociere's activities. In addition, Costa Crociere's own actions contributed to passenger confusion over "the proper party" for a lawsuit. The front of the ticket advertises that "Costa Cruises" has achieved a certification of quality, without clarifying whether "Costa Cruises" is Costa Cruise Lines, Costa Crociere, or some other related "Costa" company. Indeed, Costa Crociere is evidently aware that the difference between Costa Cruise and Costa Crociere can be confusing for cruise ship passengers. *See, e.g.*, *Suppa v. Costa Crociere, S. p. A.*, No. 07-60526-CIV, 2007 WL 4287508, *1 (SD Fla., Dec. 4, 2007) (denying Costa Crociere's motion to dismiss the amended complaint where the original complaint had named Costa Cruise as a defendant after "find[ing] it simply inconceivable that Defendant Costa Crociere was not on notice … that … but for the mistake in the original Complaint, Costa Crociere was the appropriate party to be named in the action").

In light of these facts, Costa Crociere should have known that Krupski's failure to name it as a defendant in her original complaint was due to a mistake concerning the proper party's identity. We therefore reverse the judgment of the Court of Appeals for the Eleventh Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice Scalia, concurring in part and concurring in the judgment.

I join the Court's opinion except for its reliance on the Notes of the Advisory Committee as establishing the meaning of Federal Rule of Civil Procedure 15(c)(1)(C). The Advisory Committee's insights into the proper interpretation of a Rule's text are useful to the same extent as any scholarly commentary. But the Committee's intentions have no effect on the Rule's meaning. Even assuming that we and the Congress that allowed the Rule to take effect read and agreed with those intentions, it is the text of the Rule that controls.

Notes & Questions

1. What evidence does the Court rely on in concluding that Costa Crociere "knew or should have known that" that it would have been made the

defendant but for the plaintiff's mistake?

2. How much do you think the outcome in this case depends on the fact that Costa Cruise and Costa Crociere are closely related corporate entities that are engaged together in a systematic course of business? How much should that matter?

3. Why does Justice Scalia not join the part of the Court's opinion relying on the Notes of the Advisory Committee? What makes them different from the text of the Rules themselves? By contrast, why did the Court think the Advisory Committee Notes were helpful in understanding the requirements of Rule 15?

5. Discovery

5.1. Introduction

Discovery is both the most distinctive and one of the most expensive aspects of American civil litigation. This phase of litigation most commonly begins after the defendant has answered the complaint (whether or not a motion to dismiss was filed). It consists of a formalized exchange of documents, information, and testimony between the parties and, occasionally, from third parties. Information gained in discovery is often the pivotal moment in a case. Incriminating emails, telling admissions, and smoking-gun evidence are the needles lawyers seek in the haystack of discovery. Even when evidence revealed in discovery doesn't force parties into a settlement, it often plays a starring role at trial.

5.2. Timing and Types of Discovery

Rule 26 sets out the general rules of, and timeline for, discovery. That timeline looks roughly as follows, with specific dates to be set by the judge in consultation with the parties:

1. First, "as soon as practicable," the parties must confer with each other to "consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case." Rule 26(f)(2). They must also "develop a proposed discovery plan," including how they will "preserv[e] discoverable information."

2. Next, the parties must exchange their initial disclosures, which are basic information about the parties' claims, as well as potential witnesses and evidence. *See* Rule 26(a)(1)(A). Failing to disclose information required at this stage can result in witnesses or evidence being barred from being used in the case. *See* Rule 37(c)(1).

3. After the Rule 26(f) conference, the judge must issue a scheduling order. *See* Rule 16(b). The scheduling order "must limit the time to join other parties, amend the pleadings, complete discovery, and file motions." Rule 16(b)(3)(A). It may also set the limits of discovery, govern how electronically stored information should be shared, and set dates for future conferences and trial. Rule 16(b)(3)(B).

4. With the scheduling order in place, the parties may begin exchanging discovery requests. There are three major types of discovery requests:

    - Requests for Production (Rules 34 and 35): at this point, the parties may ask each other for documents or any other tangible or electronic item that is relevant, proportional and nonprivileged. A typical case will involve thousands and sometimes millions of pages of documents and communications.

    - Interrogatories and Requests for Admissions (Rules 33 and 36): As the parties are exchanging documents, they can also pose written questions directly to each other. However, each pair of parties may pose only 25 interrogatories (including sub-parts of questions) to each other, limiting their overall value. Relatedly, under Rule 36, parties may request that other parties admit certain facts not in dispute. Unlike interrogatories, requests for admissions are unlimited in number.

    - Depositions (Rule 30) and Examinations (Rule 35): Finally, the parties may depose witnesses who may have knowledge of the case. Depositions (governed by Rule 30), are typically seven-hour long interviews that are recorded under oath. The deposing party must bear the cost of the deposition (conference room, stenographer, etc.). By default, each side (plaintiffs, defendants) may take only 10 depositions. Rule 35 allows physical and mental examinations of parties, including medical and mental examinations, but these are relatively rare.

5. Next, in cases that employ expert witnesses, the parties must exchange expert reports and schedule expert depositions. Rule 26(a)(2), (b)(4).

6. At the close of the party-driven phase of discovery, the case is often ripe for one last phase of dispositive motions (summary judgment). Then the parties exchange pretrial disclosures, including witness lists and exhibit lists. Rule 26(a)(3).

7. Finally, the court must hold a final pretrial conference to set the plan for trial. Rule 16(e). This conference must happen "as close to the start of trial as is reasonable." *Id.*

5.3. Limits on Discovery

As you can begin to appreciate, the discovery process unlocks a series of powerful tools. If not safeguarded, the parties may use these tools in ways that are excessive or abusive. For that reason, the Rules impose a series of limits on what kinds of information is discoverable. The three main limits are *relevance*, *proportionality*, and *privilege*. *See* Rule 26(b)(1). The next section will consider each of those limits in turn.

Favale v. Roman Catholic Diocese of Bridgeport

SQUATRITO, J. 233 F.R.D. 243 (D. Conn. 2005)

Now pending in the above-captioned matter is plaintiffs' motion to compel and defendant's motion for a protective order. […] For the reasons that follow, plaintiffs' motion to compel is DENIED and defendant's motion for a protective order is GRANTED.

Background

Plaintiff Maryann Favale worked as an administrative assistant at Saint Joseph's School in Brookfield, Connecticut, for approximately twenty-one years. During this time period, in November of 2002, Sister Bernice Stobierski became the new interim principal. Then, in May 2003, Sister Stobierski assumed the position of full-time principal. Maryann Favale alleges that Sister Stobierski subjected her to "severe and repeated sexual harassment" in the workplace from December 2002 to June 2003. Specifically, plaintiff alleges that Sister Stobierski touched her inappropriately, made sexually suggestive comments, exhibited lewd behavior, and requested physical affection. Plaintiff first informed her employer, the Roman Catholic Diocese of Bridgeport, ("the Diocese") of the alleged sexual harassment on June 11, 2003. Maryann Favale, who no longer works at Saint Joseph's School, seeks damages against the Diocese for sexual harassment, retaliation, defamation, intentional and negligent infliction of emotional distress, negligent hiring, negligent supervision, and other causes of action. In addition, co-plaintiff Mark Favale asserts a claim for loss of consortium against the defendant. Sister Stobierski is not a party to this case.

Plaintiffs now seek to compel Sister Stobierski to testify to any prior treatment she may have received for her alleged anger management history and psychological or psychiatric conditions. Plaintiffs also move to compel the Diocese to produce any records it has of any such treatment. The Diocese objects to these requests on the grounds that this information is irrelevant […] .

Sister Stobierski's Testimony

Plaintiffs assert that Sister Stobierski's testimony regarding the treatment she received for her alleged anger management, psychological, and psychiatric conditions is relevant to their claims of negligent hiring and negligent supervision. To assert a negligent hiring claim under Connecticut law, a plaintiff must "[p]lead and prove that she was injured by the defendant's own negligence in failing to select as its employee a person who was fit and competent to perform the job in question and that her injuries resulted from the employee's unfit or incompetent performance of his work." Similarly, Connecticut law requires that a plaintiff bringing a negligent supervision claim

> [p]lead and prove that he suffered an injury due to the defendant's failure to supervise an employee whom the defendant had a duty to supervise. A defendant does not owe a duty of care to protect a plaintiff from another employee's tortious acts unless the defendant

> knew or reasonably should have known of the employee's propensity to engage in that type of tortious conduct.

Both negligent hiring and negligent supervision claims turn upon the type of wrongful conduct that actually precipitated the harm suffered by plaintiff. "It is well settled that defendants cannot be held liable for their alleged negligent hiring, training, supervision or retention of an employee accused of wrongful conduct unless they had notice of said employee's propensity for the type of behavior causing the plaintiff's harm."

Plaintiffs allege that the defendant negligently hired and supervised an individual who was not fit to be the principal of an elementary school. They contend that the "defendant knew or reasonably should have known that Sister Stobierski was unfit to be the principal of St. Joseph's School as a result of her prior emotional and anger management issues, and limited school administration experience." […] Yet, plaintiffs do not allege that Sister Stobierski's prior emotional and anger management issues harmed plaintiff.

Rather, the only type of harm alleged to have been suffered by Maryann Favale was harm resulting from repeated acts of sexual harassment, and plaintiffs do not maintain that Sister Stobierski's alleged anger management and psychological or psychiatric conditions contributed to the sexual harassment. Accordingly, Sister Stobierski's testimony pertaining to the treatment she allegedly received for her anger management, psychological, or psychiatric conditions is not relevant because it does not pertain to the defense or claim of any party.

Indeed, even if the Diocese was aware of Sister Stobierski's alleged anger management history or psychological or psychiatric conditions, this knowledge would have no bearing on plaintiffs' claims for negligent supervision and negligent hiring because the wrongful conduct of which the Diocese would have had notice was not the same type of wrongful conduct that caused Maryann Favale harm. Notice of Sister Stobierski's alleged anger management history or psychological or psychiatric conditions does not equate to notice of Sister Stobierski's propensity to commit acts of sexual harassment. The Diocese's objection to plaintiffs' motion to compel the testimony of Sister Stobierski is sustained, and plaintiffs' motion is denied.

The Production of Defendant's Records Relating to Sister Stobierski

Plaintiffs assert that any documentation that the Roman Catholic Diocese of Bridgeport may have regarding Sister Stobierski's treatment for anger management or psychological and psychiatric conditions is relevant to their claims of negligent hiring and negligent supervision. The elements of these claims are discussed above. […] [E]ven if the defendant possessed documents relating to treatment Sister Stobierski received for her alleged anger management or psychological and psychiatric 482conditions, these records would not establish Sister Stobierski's propensity for the type of behavior that caused Maryann Favale harm because they would not demonstrate a propensity for sexual harassment. Again, it is significant that plaintiffs do not allege that Maryann Favale was harmed by Sister Stobierski's alleged inability to control her anger

or her alleged psychological or psychiatric conditions. Sexual harassment is the only type of harm alleged by plaintiffs. […]

Defendant's motion for a protective order is granted. A protective order shall enter barring future discovery into Sister Stobierski's anger management or psychological and psychiatric treatment as the court finds that this information is profoundly personal and, as stated herein, not relevant to the claims in this case.

Notes & Questions

1. The lesson of *Favale* is that relevance is judged in light of the parties' actual claims and defenses. Only if evidence would tend to prove or disprove a claim or defenses is it considered relevant within the meaning of Rule 26(b).
2. What might the plaintiff have done differently at the pleading stage in order to make her discovery request relevant under Rule 26?

Cerrato v. Nutribullet, LLC

SNEED, M.J.

2017 WL 3608266 (M.D. Fla. 2017)

ORDER ON PLAINTIFF'S MOTION TO COMPEL

This matter is before the Court on Plaintiff's Motion to Compel Prior Accident/Injury Reports and Consumer Complaints Regarding Product at Issue and Defendant's Response in Opposition. Upon consideration, the Motion to Compel is granted in part and denied in part.

Background

Plaintiffs Phyllis and German Cerrato bring this products liability action against Defendants for injuries allegedly sustained by Plaintiff Phillis Cerrato while using a blender designed and manufactured by Defendants. Plaintiffs allege that the blender exploded and resulted in hot liquids burning Plaintiff Phyllis Cerrato and causing property damage to Plaintiffs' kitchen. Plaintiffs bring negligence, strict liability, and breach of warranty claims against Defendants. […]

Analysis

[…] Request Number 4 seeks "[a]ll accident reports and records relating to any injury allegedly caused by the product." Request Number 5 seeks "[a]ll consumer complaints of any type relating to the product." Plaintiff defined the term "product" as the "MagicBullet/Nutribullet Pro 900 series that is the subject of this litigation." In response, Defendant objected to both requests

as vague, ambiguous, overbroad, not reasonably calculated to lead to the discovery of admissible evidence, [and] not proportional to the needs of the case. […]

[T]he Court agrees that Plaintiff's requests are overbroad and not proportional to the needs of the case. The requests contain no time limitation and no limitation as to the type of injury at issue, the subject matter of the complaints requested, the alleged defect at issue, or the circumstances of the incident in the materials requested. Defendant asserts that if Plaintiff's Motion to Compel is granted, Plaintiff should only be entitled to discovery of incidents "similar enough" to the incident Plaintiff describes in her deposition. Specifically, Defendant states the requests should be limited to similar incidents where "the Nutribullet Pro 900 cup could not be untwisted from the base to turn it off." Defendant further asserts that Plaintiff should not be entitled to discovery of information concerning other incidents that occurred subsequent to the subject incident as subsequent incidents are irrelevant. Nevertheless, evidence of subsequent incidents is admissible to prove a particular theory of causation, particularly where the exact circumstances of an accident are unknown.

Given the overbroad nature of Plaintiff's requests, the Court finds that the requests are unduly burdensome and seek information that is disproportionate to the needs of this case. However, with an appropriate time limitation, a request for accident reports and consumer complaints concerning incidents where the MagicBullet/ Nutribullet Pro 900 Series could not be turned off is relevant and proportional to the needs of the case. The Motion to Compel is therefore granted in part, and Defendant shall supplement its response by producing all accident reports and consumer complaints occurring within five years prior to Plaintiff's incident through the date of Plaintiff's Complaint concerning incidents where the MagicBullet/Nutribullet Pro 900 Series could not be turned off. *See Moore v. Armour Pharmaceutical Co.*, 927 F.2d 1194, 1197 (11th Cir. 1991) (stating that the trial court "has wide discretion in setting the limits of discovery"); *Farnsworth*, 758 F.2d at 1547 (same); *Commercial Union Ins. Co.*, 730 F.2d at 731 ("Case law states that a motion to compel discovery is committed to the discretion of the trial court").

Last, Defendant objected to Plaintiff's Requests Number 4 and 5 as seeking confidential and private information, including private information concerning other consumers. The confidential and private information of other consumers is irrelevant to Plaintiffs' claims. Therefore, Defendant shall redact all accident reports and consumer complaints produced to Plaintiffs for the consumers' private and confidential information, including any names, addresses, telephone numbers, and social security numbers. […]

Wagoner v. Lewis Gale Medical Center, LLC

2016 WL 3893135 (W.D. Va. 2016)

BALLOU, M.J.

Order

Plaintiff, Jim David Wagoner ("Wagoner") seeks to compel defendant Lewis Gale Medical Center, LLC ("Lewis Gale") to conduct a search of its computer systems for certain electronically stored information ("ESI"). Lewis Gale objects because of the "difficulty and unreasonable expense in performing plaintiff's requested searches." Alternatively, Lewis Gale asks that Wagoner pay for the related costs of conducting this search. The motion to compel is GRANTED.

I. Background

Wagoner worked as a security guard for Lewis Gale from April 4, 2014 until he was terminated on June 12, 2014. He worked approximately 16 hours per week and earned $12.49 per hour. He filed suit against Lewis Gale on October 23, 2015, alleging that he suffered from dyslexia and that Lewis Gale wrongfully terminated his employment in violation of the Americans with Disabilities Act ("ADA"). Wagoner asserts claims related to discrimination, retaliation, and failure to accommodate in violation of the ADA.

Wagoner propounded requests for production of documents to Lewis Gale seeking production of ESI maintained by two custodians, Frank Caballos and Bobby Baker, who were Wagoner's supervisors. Wagoner limited the dates for any ESI search to only four months and requested the following search terms:

> Jim OR Wagoner AND dyslexia OR dyslexic OR read OR reading OR slow OR ADA OR disabled OR disability OR security OR schedule OR copy OR copying.

Lewis Gale conceded that it does not have the capability to perform this global search and obtained an estimate of $21,570 from a third-party vendor to collect the requested ESI, with an additional $24,000 estimated to review the documents retrieved. The ESI search would involve seven computers that the two custodians had access to and an exchange server located in Tennessee. Lewis Gale argues that the discovery plaintiff seeks is not proportional because Wagoner only worked for two months as a security guard, and his potential damages are less than the cost to perform the ESI search. Lewis Gale further asserts that it has produced considerable ESI in the form of "e-mails gathered manually from the computers of key custodians."

II. Analysis

A. Relevance

Rule 26 of the Federal Rules of Civil Procedure provides that a party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case … ." Fed. R. Civ. P. 26(b). Thus, as a threshold matter, I must determine whether Wagoner's discovery requests are relevant under Rule 26.

Wagoner contends that his dyslexia caused him to have difficulty reading and copying his posted work schedule, that Lewis Gale denied his request for a written copy of the schedule, and that his termination violated the ADA. E-mails or other memoranda written by Wagoner's supervisors, Frank Caballos

and Bobby Baker, between April and July 2014 and containing the search terms listed above are relevant to Wagoner's claim. Indeed, Lewis Gale largely conceded at the hearing that Wagoner's request was relevant, arguing only that the keyword searches were too broad. Accordingly, I find that Wagoner's requested ESI search is relevant to the claims and defenses asserted in this case. […]

B. Reasonable Accessibility

Lewis Gale argues that the discovery in this case should not be permitted because [it] is not proportional, considering the high cost of performing the ESI search compared to Wagoner's limited potential recovery. Lewis Gale further states that, if the court does order it to obtain the requested discovery, the court should shift the cost of the ESI search to Wagoner. Relevant ESI may still not be discoverable under Rule 26 if the party can show that the information is "not reasonably accessible because of undue burden or cost." Fed. R. Civ. P. 26(b)(2)(B). The court may also specify conditions for the discovery which may include cost sharing. Here I find that Lewis Gale has not shown that the burdens and costs of obtaining the ESI discovery makes the requested information not reasonably accessible, nor has Lewis Gale shown that the requested ESI discovery is not proportional.

Lewis Gale claims that the fact that it cannot perform the requested ESI search in-house, and must contract with a third party vendor at significant cost, requires the court to find that the information is not reasonably accessible. Lewis relies upon the declarations of Karyn Hayes, Systems Manager for HCA Management Services, which provides computer systems services to Lewis Gale, and of Austin Maddox, Senior Litigation Technology Consultant for Document Solutions, Inc., the third-party vendor that provided an estimate to Lewis Gale for performing the ESI search. Ms. Hayes indicated that there were approximately 30,598 [responsive] e-mails […] . She further stated that a third-party vendor would be required to perform the ESI search on seven computers located at Lewis Gale, and the "computers would require forensic extraction of data, data processing, data hosting, project management, production, and review" with an estimated cost of $45,570.00. Mr. Maddox indicated that Wagoner's ESI request would involve:

> the remote collection of at least seven laptops and email archive data. The data would be processed and loaded into a Catalyst Repository Systems web-hosted review platform. Once the data has been loaded to Catalyst, the [Document Solutions, Inc.] Client Services team would work with the hospital to cull data through objective filters (date range, email domain, file type, etc.) to identify and promote documents for review by counsel.

Mr. Maddox further estimated that, "Reasonable parameters and metrics suggest that after search terms and date filters have been applied, approximately five gigabytes of data consisting of an estimated 3500 documents per gigabyte would need to be reviewed at an estimated 292 hours of expended time, which would cost approximately $24,000."

Whether production of documents is unduly burdensome or expensive turns primarily on whether the data is kept in an accessible or inaccessible format. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003). […] Lewis Gale has not carried its burden to show that the data on the seven computers or exchange server is inaccessible, *i.e.* must be restored, de-fragmented, or reconstructed. Instead, Lewis Gale has stated that it is not capable of performing the ESI searches requested by plaintiff in-house, and would be required to contract with an expensive outside vendor.

Moreover, it is difficult to conclude that the ESI sought is not proportional or "not reasonably accessible" due to undue burden and expense because Lewis Gale apparently chose to use a system that did not automatically preserve e-mails for more than three days, and did not preserve e-mails in a readily searchable format, making it costly to produce relevant e-mails when faced with a lawsuit. *See AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 443 (2007) (noting "the Court cannot relieve Defendant of its duty to produce those documents merely because Defendant has chosen a means to preserve the evidence which makes ultimate production of relevant documents expensive.").

Proportionality consists of more than whether the particular discovery method is expensive. Here, Lewis Gale advances no other reasonable alternative to obtain the requested information. Lewis Gale simply proposes to have the very person who may have authored relevant documents search their computer for responsive information. No insurance exists that this search method would yield any ESI deleted prior to the search. Employment discovery presents particular challenges to the employees where most, and sometimes all, relevant discovery is in the control of the employer. Here, in light of the limited request, restricted by custodian, search terms, and time period, I find the request proportional to the needs of the case.

Finally, because I find that the ESI sought is reasonably accessible without undue burden or expense, cost-shifting is not appropriate. Accordingly, I will not shift the cost of discovery, and the general rule that the party responding to a discovery request bears the cost will apply.

III. Conclusion

Accordingly, Wagoner's motion to compel is GRANTED. […]

It is so ORDERED.

Rengifo v. Erevos Enterprises, Inc.

ELLIS, M.J. 2007 WL 894376 (S.D.N.Y. Mar. 20, 2007)

Plaintiff, Willy Rengifo ("Rengifo")[, who is suing his former employers to recover unpaid overtime wages under the federal Fair Labor Standards Act (FLSA) and New York Labor Law, along with other claims] requests this Court

to issue a protective order pursuant to Federal Rule of Civil Procedure 26(c) barring discovery related to his immigration status, social security number, and authorization to work in the United States. […]

Rule 26(c) authorizes courts, for good cause, to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including … that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters … ." Fed. R. Civ. P. 26(c). "[T]he burden is upon the party seeking non-disclosure or a protective order to show good cause."

Rengifo argues that discovery related to his immigration status, authorization to work in this country, and social security number are not relevant to his right to recover unpaid wages. Further, Rengifo argues that the intimidating effect of requiring disclosure of immigration status is sufficient to establish "good cause" when the question of immigration status only goes to a collateral issue. Defendants argue that documents containing Rengifo's social security number or tax identification number, such as tax returns, are relevant to the issue of whether he is entitled to overtime wages, which is a central issue in this case. Additionally, defendants argue that the validity of Rengifo's social security number, his immigration status and authorization to work in this country are relevant to his credibility. […]

Courts have recognized the in terrorem effect of inquiring into a party's immigration status and authorization to work in this country when irrelevant to any material claim because it presents a "danger of intimidation [that] would inhibit plaintiffs in pursuing their rights." Here, Rengifo's immigration status and authority to work is a collateral issue. The protective order becomes necessary as "[i]t is entirely likely that any undocumented [litigant] forced to produce documents related to his or her immigration status will withdraw from the suit rather than produce such documents and face … potential deportation." […]

Rengifo also seeks to prevent disclosure of his social security number or tax identification number. Defendants note that, in support of his claim for unpaid overtime wages, Rengifo has produced an incomplete set of pay stubs that do not reflect all of the compensation he has received from corporate defendants, and that he has not produced any records regarding the number of hours he has worked on a weekly basis. Defendants contend, therefore, that discovery of documents containing his tax identification number or social security number, such as tax returns, is necessary and relevant to obtain this information. [The court rejects defendants' argument, reasoning that t]he information sought is not relevant to the claims in this case. Even if it were, however, the corporate defendants possess relevant data on hours and compensation, and there is no reason to assume that defendants' records are less reliable than any records maintained by Rengifo. […]

Defendants also assert that the documents requested would allow them to test the truthfulness of Rengifo's representations to his employer. They argue that

by applying for a job and providing his social security number, Rengifo represented to defendants that he was a legal resident and they are entitled to test the truthfulness of that information. Defendants further argue that if Rengifo filed tax returns, this information would be relevant to his overtime claim, but if he failed to file tax returns, this fact would affect the veracity of statements he would potentially make at trial.

While it is true that credibility is always at issue, that "does not by itself warrant unlimited inquiry into the subject of immigration status when such examination would impose an undue burden on private enforcement of employment discrimination laws." A party's attempt to discover tax identification numbers on the basis of testing credibility appears to be a back door attempt to learn of immigration status. Further, the opportunity to test the credibility of a party based on representations made when seeking employment does not outweigh the chilling effect that disclosure of immigration status has on employees seeking to enforce their rights. "While documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution." Granting employers the right to inquire into immigration status in employment cases would allow them to implicitly raise threats of such negative consequences when a worker reports illegal practices.

While defendants suggest a compromise whereby discovery would be limited to the present litigation and not disclosed to any third party for any purpose beyond this litigation, the limitation does not abate the chilling effect of such disclosure. "Even if the parties were to enter into a confidentiality agreement restricting the disclosure of such discovery … , there would still remain 'the danger of intimidation, the danger of destroying the cause of action' and would inhibit plaintiffs in pursuing their rights." This Court finds that defendants' opportunity to test the credibility of Rengifo does not outweigh the public interest in allowing employees to enforce their rights.

For the foregoing reasons, Rengifo's application for a protective order barring defendants from inquiring into his immigration status, social security number or tax identification number, and authorization to work in the United States is GRANTED.

Notes & Questions

1. Whereas *Favale* concerned relevance, *Cerrato*, *Wagoner*, and *Rengifo* concern proportionality. What principles did the courts in those cases rely on to decide whether to narrow the discovery requests at issue?

2. What might have led the plaintiff in *Cerrato* to seek broader discovery than the court ultimately allowed? What might have led the defendant in *Rengifo* to seek broader discovery than the court ultimately allowed?

3. Why might the defendant try to limit the scope of discovery in a case like this *Cerrato*? What about the plaintiff in *Rengifo*?

4. Note that *Wagoner* rejects the idea that simply because discovery is expensive to produce, it is not proportional to the case. In particular, expense that is caused by a defendant's own choices about how to store information is unlikely to count as a good reason. Why?

Coca-Cola Bottling Co. v. Coca-Cola Co.

107 F.R.D. 288 (D. Del. 1985)

MURRAY M. SCHWARTZ, Chief Judge.

The complete formula for Coca-Cola is one of the best-kept trade secrets in the world. Although most of the ingredients are public knowledge, the ingredient that gives Coca-Cola its distinctive taste is a secret combination of flavoring oils and ingredients known as "Merchandise 7X." The formula for Merchandise 7X has been tightly guarded since Coca-Cola was first invented and is known by only two persons within The Coca-Cola Company ("the Company"). The only written record of the secret formula is kept in a security vault at the Trust Company Bank in Atlanta, Georgia, which can only be opened upon a resolution from the Company's Board of Directors.

The impregnable barriers which the Company has erected to protect its valuable trade secret are now threatened by pretrial discovery requests in two connected cases before this Court. Plaintiffs in these lawsuits are bottlers of Coca-Cola products who seek declaratory, injunctive and monetary relief against the Company based upon allegations of breach of contract, violation of two 1921 Consent Decrees, trademark infringement, dilution of trademark value, and violation of federal antitrust laws, all of which allegedly occurred when the Company introduced diet Coke in 1982. Stripped to bare essentials, the plaintiffs' contention is that the Company is obligated to sell them the syrup used in the bottling of diet Coke under the terms of their existing contracts covering the syrup used in the bottling of Coca-Cola. The primary issue arising from this contention is whether the contractual term "Coca-Cola Bottler's Syrup" includes the syrup used to make diet Coke. Plaintiffs contend that in order to prevail on this issue, they need to discover the complete formula, including the secret ingredients, for Coca-Cola, as well as the complete formulae, also secret, for diet Coke and other Coca-Cola soft drinks. Accordingly, plaintiffs have filed a motion to compel production of the complete formulae under Fed. R. Civ. P. 37(a). Defendant, which has resisted disclosure of its secret formulae at every turn, contests the relevance of the complete formulae to the instant litigation and avers that disclosure of the secret formulae would cause great damage to the Company.

The issue squarely presented by plaintiffs' motion to compel is whether plaintiffs' need for the secret formulae outweighs defendant's need for protection of its trade secrets. In considering this dispute, I am well aware of the fact that

disclosure of trade secrets in litigation, even with the use of an appropriate protective order, could "become by indirection the means of ruining an honest and profitable enterprise." 8 J. Wigmore, Evidence § 2212, at 155 (McNaughton rev. 1961). Moreover, I am also aware that an order compelling disclosure of the Company's secret formulae could be a bludgeon in the hands of plaintiffs to force a favorable settlement. On the other hand, unless defendant is required to respond to plaintiffs' discovery, plaintiffs will be unable to learn whether defendant has done them a wrong. Except for a few privileged matters, nothing is sacred in civil litigation; even the legendary barriers erected by The Coca-Cola Company to keep its formulae from the world must fall if the formulae are needed to allow plaintiffs and the Court to determine the truth in these disputes.

I. Factual Background

Since the turn of the century, Coca-Cola has been produced in a two-stage process: the Company manufactures "Coca-Cola Bottler's Syrup" ("Bottler's Syrup") and sells it to bottlers, who add carbonated water to the syrup and place the resulting product in bottles and cans. In 1921, following litigation between bottler groups and the Company concerning their contracts for Bottler's Syrup, the Company entered into Consent Decrees which established certain contractual terms between the Company and its bottlers. The Consent Decrees provided, inter alia: first, that Coca-Cola Bottler's Syrup contain no less than 5.32 pounds of sugar per gallon; second, that bottlers would pay a maximum of $1.30 per gallon for the syrup; third, that the price of Bottler's Syrup could increase based upon the increase in the market price of sugar as quoted quarterly by the ten largest refiners in the United States. Until 1978, the price of Bottler's Syrup for virtually all bottlers was governed by the price formula established by the 1921 Consent Decrees.

Beginning in 1978, due to inflationary pressures and declining sales, the Company sought price relief from the existing price formula in its contracts with bottlers. After negotiations, most of the bottlers agreed to an amendment ("the 1978 Amendment") to their contracts in exchange for a clause requiring the Company to pass on any cost savings if the Company decided to substitute a lower cost sweetener for granulated sugar. The 1978 Amendment established a new price formula for Bottler's Syrup which utilizes a "sugar element," a "base element," and the Consumer Price Index. The sugar element provides for adjustments based on the quoted market price of any sweetening ingredient used in Bottler's Syrup. The great majority of the bottlers, representing approximately 90 percent of domestic sales, have signed the 1978 Amendment. These bottlers are generally known as the "amended bottlers." The remaining bottlers, known as the "unamended bottlers," refused to sign the amendment and continue to operate under Bottler's Contracts which basically conform to the contracts entered into after the 1921 Consent Decrees. In 1980, the amended bottlers began obtaining some benefit from the 1978 Amendment when the Company decided to substitute high fructose corn syrup ("HFCS–55"), a less expensive sweetener than granulated sugar, for approximately 50 percent of the granulated sugar in Bottler's Syrup.

On July 8, 1982, the Company introduced diet Coke to the market with great fanfare. The name was chosen carefully and focused on the descriptive nature of the word "diet" and the tremendous market recognition of "Coke." The advertising emphasized the taste of the new cola and its relationship to Coke. The public response to diet Coke has been phenomenal—in just three years, it has become the third largest selling soft drink in the United States and the best-selling diet soft drink in the world.

The introduction of diet Coke immediately gave rise to a dispute between Coke bottlers and the Company over what price bottlers must pay for diet Coke syrup. The Company took the position that diet Coke was not within the scope of the existing contracts, and a new contract term with flexible pricing would have to be developed. Many of the bottlers—both amended and unamended—believed that the Company was obligated to provide diet Coke under the terms of their existing Bottler's Contracts for Coca-Cola. This dispute led to the filing of these lawsuits in early 1983.

[…]

II. Plaintiffs' Motion to Compel

After extensive discovery, plaintiffs filed the instant motion that, in essence, seeks to compel the Company to produce the complete formulae, including secret ingredients, for Coca-Cola [and] diet Coke […] . Defendant's responses to the discovery requests at issue, which plaintiffs filed as an appendix to their motion, demonstrate that defendant has objected to plaintiffs' discovery wherever it approached matters related to the secret formulae. Thus, plaintiffs have been foreclosed both from learning the formulae themselves and from learning about other matters that relate to the formulae.

In support of their motion to compel, plaintiffs have contended that the secret formulae are relevant and necessary to prove their contentions and respond to defendant's argument that Coca-Cola and diet Coke are two different products. In response, the Company denies that the formulae are relevant and essential to resolve the central issues in these cases, and also contends that disclosure of these trade secrets is inappropriate at this stage of the litigation.

[…]

C. Relevance and Necessity of the Formulae

Plaintiffs contend that discovery of these secret formulae is required because they are relevant and necessary to the presentation of plaintiffs' case. In order to determine whether these trade secrets are in fact relevant and necessary, a review of the issues in the two cases is warranted.

1. Unamended Bottlers

The unamended bottlers claim that defendant must furnish diet Coke syrup to them pursuant to the terms of their Bottler's Contracts and the 1921 Consent Decrees. The standard form contract for unamended bottlers states, in pertinent part: "COMPANY agrees to furnish to BOTTLER … sufficient syrup for bottling purposes to meet the requirements of BOTTLER in the territory

herein described … . COMPANY does hereby select BOTTLER as its sole and exclusive customer and licensee for the purpose of bottling the Bottlers' bottle syrup, COCA–COLA, in the territory herein described." The contract further provides that "BOTTLER agrees … [t]o bottle COCA–COLA in the following manner: to have it thoroughly carbonated, put in bottles, using one ounce of Bottlers' Coca-Cola syrup in a standard bottle for Coca-Cola … decorated with the name Coca-Cola in the characteristic script … ." The terms "bottle syrup" and "Bottlers' Coca-Cola syrup" are not defined in the contract.

Plaintiffs contend that the terms "Bottlers' Coca-Cola syrup" and "bottle syrup" include any syrups manufactured by the Company for the purpose of providing any packaged soft drink sold under the names "Coca-Cola" or "Coke," including diet Coke. In addition, plaintiffs allege that Coca-Cola and diet Coke are just two versions of the same product, except that one is sweetened with caloric sweeteners and the other with non-caloric sweeteners. Defendant's response to these contentions has been that only syrup for sugar-sweetened Coca-Cola is covered by the unamended bottlers' contracts, and that diet Coke and Coca-Cola are two separate products.

2. Amended Bottlers

The amended bottlers rely on different contractual language to argue that the Company must furnish them diet Coke syrup on the same terms as Coca-Cola syrup. The 1978 Amendment, which all of the amended bottlers signed, replaced the pricing formula used for the unamended bottlers with one that was tied to the "Sugar Element," a term defined in the contract. The Amendment then provides: "In the event that the formula for Bottle Syrup is modified to replace sugar, in whole or in part, with another sweetening ingredient, the Company will modify the method for computing the Sugar Element in such a way as to give the Bottler the savings realized as a result of such modification through an appropriate objective quarterly measure of the market price of any such sweetening ingredient." The amended bottlers have contended that "another sweetening ingredient" includes saccharin or aspartame, the sweeteners that the Company has used in diet Coke.

The Company argues that this contractual language is inapplicable because diet Coke is a new and different product and is not modified Coca-Cola. Plaintiffs' response is that diet Coke is "simply a version of a product which has undergone evolutionary change but which retains its identity as Coke," and "that any differences between Coke and diet Coke Bottler's Syrup are either insignificant or reflect attempts to achieve taste identity." […]

3. Relevancy of the Secret Ingredients

A major issue common to both actions is whether diet Coke and Coca-Cola are the same product. The Company's primary defense has been that Coca-Cola and diet Coke are two separate and distinct products. Plaintiffs contend that the complete formulae for diet Coke and Coca-Cola would be relevant to rebut this defense by showing that the two colas share common attributes and that any differences between the two are insignificant and merely reflect attempts to achieve taste identity. With the introduction of new Coke, plaintiffs argue

that because new Coke was derived in part from the secret formula for diet Coke, it may be true that new Coke is more like diet Coke than new Coke is like old Coke. In response, defendant argues that except for the difference in sweeteners, ingredient similarities and differences are not relevant to the determination of whether diet Coke and Coca-Cola are the same product. Instead, defendant relies upon the difference in taste, different essential characteristics of the beverages, different consumer markets for the beverages, and different consumer perceptions of the beverages.

Defendant's response is unavailing. […] Although defendant has attempted to define the issues so that the only relevant ingredient is the sweetener, all the ingredients are relevant to determine whether the two colas are the same product. In fact, the secret ingredients may be the most relevant ones because the secret ingredients are what gives these drinks their distinctive tastes.

Plaintiffs could use the secret formulae to prove one of several product identity theories. An analysis of the secret ingredients in diet Coke and old Coke might show that diet Coke was designed to taste as much like old Coke as a low calorie cola could, and that any differences in secret ingredients reflect defendant's attempts to achieve taste identity. […] [Thus, t]he complete formulae, once known, will tend to make a disputed fact more (or less) likely: that, for purposes of this litigation, diet Coke syrup is Bottler's Syrup.

[…]

4. Necessity of Discovery of This Information

As in most disputes over the discoverability of trade secrets, the necessity of the discovery of the complete formulae follows logically from the determination that the formulae are relevant. Plaintiffs need the complete formulae in order to address the product identity issue by comparing the ingredients of the various soft drinks involved. Plaintiffs cannot respond to the assertions of defendant's experts that diet Coke and Coca-Cola are two products unless plaintiffs' experts can analyze the complete formulae and explain why the products are the same. Merely using the publicly-disclosed ingredients is obviously insufficient, because they would present an incomplete picture, and because the secret ingredients are the key to the taste of Coca-Cola. The differences in the public ingredients, including sweeteners, cannot be understood unless they are put in context through disclosure of the similarities and differences in the secret ingredients. Without the complete formulae, plaintiffs will be foreclosed from presenting all the relevant evidence in support of their position.

In addition, plaintiffs need the complete formulae in order to explore on cross-examination the bases for the opinions of Company witnesses that Coca-Cola and diet Coke are two separate products. As plaintiffs' counsel stated at oral argument, plaintiffs' cross-examination of defendant's witnesses has been foreclosed by defendant's objections that plaintiffs' questions relate to trade secrets. Plaintiffs cannot be expected to discover the truth without full cross-examination. Moreover, the formula information is not available from any other source, and no adequate substitute exists for this information. It follows that discovery of the complete formulae is necessary.

After the hearing, defendant attempted to remove the necessity for the information by offering to stipulate that the secret ingredients in old Coke, new Coke and diet Coke are identical. Defendant contends that this result is the most favorable set of facts that plaintiffs could hope to find through discovery. It is evident, however, that the actual formulae could be more favorable to plaintiffs than this stipulation. For example, […] discovery may show that the secret ingredients in old Coke were modified to make diet Coke, and that those modifications were intended to counterbalance the taste change caused by substituting artificial sweeteners for sugar. The effect of the secret ingredient change may have been to cancel out the changes in other ingredients and make diet Coke taste like Coke. Further, defendant's proposed stipulation does not reveal the number of ingredients that are secret ingredients. If the secret ingredients in Coke and diet Coke are composed of the same 100 ingredients, so that the vast majority of all the ingredients in the two colas are identical, that fact would be more favorable to plaintiffs than if the secret ingredients were only a few in number. Finally, defendant's proposed stipulation does not solve the problem of plaintiffs being foreclosed from full cross-examination by defendant's assertion of trade secret privilege. In sum, defendant's proposed stipulation is not as favorable to plaintiffs as discovery might be and does not remove the necessity for disclosure.

5. Need Balanced Against Harm

The final part of the test for discoverability of trade secrets is to balance the need for disclosure against the harm that would ensue from disclosure. The potential harm that would come from public disclosure of the formulae […] is great, but virtually all of that harm can be eliminated with stringent protective orders and other safeguards. Because plaintiffs are Coca-Cola bottlers, they will have an incentive to keep the formulae secret. The likelihood of harm is less than if defendant's trade secrets were disclosed in litigation to competitors. The potential for harm from protected disclosure of the formulae […] is outweighed by the plaintiffs' need for the information. While plaintiffs' need for the experimental cola formulae is less strong, this lesser need is counterbalanced by the fact that the harm resulting from disclosure of these formulae would be less severe, because those colas have never been marketed and are less valuable trade secrets.

In sum, the product identity issue is important in these two cases, and analyses of the complete formulae will be a significant part of the proof on that issue. Plaintiffs' need for this information outweighs the harm that disclosure under protective order would cause. Disclosure will be ordered.

Notes & Questions

1. Why did the plaintiffs say they needed the formulae for various Coca-Cola products to prove their claims?

2. The court notes that disclosure of the formulae "could be a bludgeon in the hands of plaintiffs to force a favorable settlement." How could the plaintiffs use the formulae in this way? What does the court do to prevent that possibility? Do you think those protections are enough?

Coca-Cola Bottling Co. v. Coca-Cola Co. (II)

110 F.R.D. 363 (D. Del. 1986)

MURRAY M. SCHWARTZ, Chief Judge.

On August 20, 1985, this Court granted plaintiffs' motion to compel production of certain formulae and taste-test results, subject to an agreed-upon protective order. Defendant has refused to comply with the discovery order as it pertains to the formulae. Presently before the Court is plaintiffs' motion for sanctions.

[…]

By letter dated September 9, 1985, counsel for the Company informed the Court that the Company would not disclose its formulae, "[i]n light of the overriding commercial importance of the secrecy of formulae to the entire Coca-Cola system, … even under the terms of a stringent protective order … ." The Company acknowledged the Court "may order … a sanction" for that refusal, and requested an opportunity to be heard on the sanctions issue.

Plaintiffs moved for the entry of an order under Fed. R. Civ. P. 37(b)(2)(C) striking the Company's answer and entering judgment in favor of plaintiffs on [several of plaintiffs' claims]. In addition, they moved for expenses and attorney's fees. Defendant contended a limited preclusion order is the proper sanction and argued the award of expenses and attorney's fees is unwarranted.

The Court's substantive sanctions will include a preclusion order under Rule 37(b)(2)(A). The Court has already held that the formulae sought by plaintiffs are relevant and disclosure necessary for a fair trial on the merits. Because defendant refuses to supply that information, in the face of this Court's disclosure order, plaintiffs are entitled to the advantage of every possible inference that fairly could be drawn from the formulae evidence sought.

For the purposes of making formulae comparisons, plaintiffs are entitled to compare the entire formulae, and to obtain a favorable comparison of the entire formulae. Defendant may not qualify those comparisons by noting the difference in sweetener. Defendant forfeited that opportunity by refusing to divulge the formulae that could put the sweetener difference into context. The Court's Order will provide plaintiffs the best possible formula context for the sweetener difference, a context that "overcomes" the difference for formulae comparison purposes.

[…]

Conclusion

The Court's previous Opinion in this litigation noted an order to compel disclosure of the Company's secret formulae could be "a bludgeon in the hands

of plaintiffs to force a favorable settlement." The Court now declines to wield on plaintiffs' behalf the ultimate bludgeon in this litigation, default judgment, when careful use of a scalpel is far more appropriate. In the accompanying Order, the Court will […] strictly limit defendant's use of formulae evidence for the purposes of this litigation. In addition, the Court will order defendant to pay the reasonable expenses and attorney's fees incurred by plaintiffs in prosecuting the motion for sanctions. Hopefully, the litigants will be able to amicably resolve payment of attorneys' fees and costs.

Notes & Questions

1. Note that Coca-Cola refused to comply with the court's order requiring disclosure of the formulae to the plaintiffs. You might expect this behavior to get Coca-Cola in big trouble.
2. What sanction did the plaintiffs ask the court to impose on Coca-Cola for their non-compliance? What alternative (and less harsh) sanction did Coca-Cola argue should be imposed instead? What sanctions did the court end up imposing?
3. Do you think the sanctions were fair under the circumstances?
4. The cases above discuss the difficulties that can arise when a party seeks its adversary's trade secrets in discovery. A more typical attempt to resist discovery is a claim of "work product," a doctrine recognized by the case that follows.

Hickman v. Taylor

Murphy, J., delivered the opinion of the Court. 329 U.S. 495 (1947)

This case presents an important problem under the Federal Rules of Civil Procedure as to the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen. […]

On February 7, 1943, the tug "J.M. Taylor" sank while engaged in helping to tow a car float of the Baltimore & Ohio Railroad across the Delaware River at Philadelphia. The accident was apparently unusual in nature, the cause of it still being unknown. Five of the nine crew members were drowned. Three days later the tug owners and the underwriters employed a law firm, of which respondent Fortenbaugh is a member, to defend them against potential suits by representatives of the deceased crew members and to sue the railroad for damages to the tug.

A public hearing was held on March 4, 1943, before the United States Steamboat Inspectors, at which the four survivors were examined. This testimony

was recorded and made available to all interested parties. Shortly thereafter, Fortenbaugh privately interviewed the survivors and took statements from them with an eye toward the anticipated litigation; the survivors signed these statements on March 29. Fortenbaugh also interviewed other persons believed to have some information relating to the accident and in some cases he made memoranda of what they told him. […]

One year later, petitioner[, who was one of the surivors,] filed 39 interrogatories directed to the tug owners. The 38th interrogatory read: "State whether any statements of the members of the crews of the Tugs 'J.M. Taylor' and 'Philadelphia' or of any other vessel were taken in connection with the towing of the car float and the sinking of the Tug 'John M. Taylor.' Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports."

Supplemental interrogatories asked whether any oral or written statements, records, reports or other memoranda had been made concerning any matter relative to the towing operation, the sinking of the tug, the salvaging and repair of the tug, and the death of the deceased. If the answer was in the affirmative, the tug owners were then requested to set forth the nature of all such records, reports, statements or other memoranda.

The tug owners, through Fortenbaugh, answered all of the interrogatories except No. 38 and the supplemental ones just described. While admitting that statements of the survivors had been taken, they declined to summarize or set forth the contents. They did so on the ground that such requests called "for privileged matter obtained in preparation for litigation" and constituted "an attempt to obtain indirectly counsel's private files." It was claimed that answering these requests "would involve practically turning over not only the complete files, but also the telephone records and, almost, the thoughts of counsel."

[The district court ruled that the requested information was not privileged and ordered it produced. After Fortenbaugh refused, the district court ordered him imprisoned for contempt but stayed the order while Fortenbaugh appealed. The Court of Appeals reversed.] […]

The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now

clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

[…]

We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries. […]

We also agree that the memoranda, statements and mental impressions in issue in this case fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis. It is unnecessary here to delineate the content and scope of that privilege as recognized in the federal courts. For present purposes, it suffices to note that the protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories.

But the impropriety of invoking that privilege does not provide an answer to the problem before us. Petitioner has made more than an ordinary request for relevant, non-privileged facts in the possession of his adversaries or their counsel. He has sought discovery as of right of oral and written statements of witnesses whose identity is well known and whose availability to petitioner appears unimpaired. He has sought production of these matters after making the most searching inquiries of his opponents as to the circumstances surrounding the fatal accident, which inquiries were sworn to have been answered to the best of their information and belief. Interrogatories were directed toward all the events prior to, during and subsequent to the sinking of the tug. Full and honest answers to such broad inquiries would necessarily have included all pertinent information gleaned by Fortenbaugh through his interviews with the witnesses. Petitioner makes no suggestion, and we cannot assume, that the tug owners or Fortenbaugh were incomplete or dishonest in the framing of their answers. In addition, petitioner was free to examine the public testimony of the witnesses taken before the United States Steamboat Inspectors. We are thus dealing with an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney Fortenbaugh without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice. For aught that appears, the essence of

what petitioner seeks either has been revealed to him already through the interrogatories or is readily available to him direct from the witnesses for the asking.

[…]

In our opinion, neither Rule 26 nor any other rule dealing with discovery contemplates production under such circumstances. […] Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. […]

[…]

But as to oral statements made by witnesses to Fortenbaugh, whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. […]

Denial of production of this nature does not mean that any material, non-privileged facts can be hidden from the petitioner in this case. He need not be unduly hindered in the preparation of his case, in the discovery of facts or in his anticipation of his opponents' position. Searching interrogatories directed to Fortenbaugh and the tug owners, production of written documents and statements upon a proper showing and direct interviews with the witnesses themselves all serve to reveal the facts in Fortenbaugh's possession to the fullest possible extent consistent with public policy. Petitioner's counsel frankly admits that he wants the oral statements only to help prepare himself to examine witnesses and to make sure that he has overlooked nothing. That is insufficient under the circumstances to permit him an exception to the policy underlying the privacy of Fortenbaugh's professional activities. If there should be a rare situation justifying production of these matters, petitioner's case is not of that type.

We fully appreciate the wide-spread controversy among the members of the legal profession over the problem raised by this case. It is a problem that rests on what has been one of the most hazy frontiers of the discovery process. But until some rule or statute definitely prescribes otherwise, we are not justified in permitting discovery in a situation of this nature as a matter of unqualified right. When Rule 26 and the other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of lawyers were thereby opened to the free scrutiny of their adversaries. And we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result.

We therefore affirm the judgment of the Circuit Court of Appeals.

Affirmed.

MR. JUSTICE JACKSON, concurring.

[…] Counsel for the petitioner candidly said on argument that he wanted this information to help prepare himself to examine witnesses, to make sure he overlooked nothing. He bases his claim to it in his brief on the view that the Rules were to do away with the old situation where a law suit developed into "a battle of wits between counsel." But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.

The real purpose and the probable effect of the practice ordered by the district court would be to put trials on a level even lower than a "battle of wits." I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him. […]

MR. JUSTICE FRANKFURTER joins in this opinion.

Notes & Questions

1. What source of law authorizes the Court to deny the requested discovery on work-product grounds?
2. What does the Court say counts as work product?
3. Is all work product created equally?
4. Can a claim of work product ever be overcome by a party seeking discovery? If so, when?
5. The work-product doctrine is now codified in Rule 26(b)(3). Read that Rule and the following case to see how it is applied alongside the related but distinct doctrine of attorney-client privilege.

Upjohn Co. v. United States

449 U.S. 383 (1981)

JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to address important questions concerning the scope of the attorney-client privilege in the corporate context and the applicability of the work-product doctrine in proceedings to enforce tax summonses. With respect to the privilege question the parties and various *amici* have described our task as one of choosing between two "tests" which have gained adherents in the courts of appeals. We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so. We can and do, however, conclude that the attorney-client privilege protects the communications involved in this case from compelled disclosure and that the work-product doctrine does apply in tax summons enforcement proceedings.

I

Petitioner Upjohn Co. manufactures and sells pharmaceuticals here and abroad. In January 1976 independent accountants conducting an audit of one of Upjohn's foreign subsidiaries discovered that the subsidiary made payments to or for the benefit of foreign government officials in order to secure government business. The accountants so informed petitioner Mr. Gerard Thomas, Upjohn's Vice President, Secretary, and General Counsel. […] He consulted with outside counsel and R. T. Parfet, Jr., Upjohn's Chairman of the Board. It was decided that the company would conduct an internal investigation of what were termed "questionable payments." As part of this investigation the attorneys prepared a letter containing a questionnaire which was sent to "All Foreign General and Area Managers" over the Chairman's signature. The letter began by noting recent disclosures that several American companies made "possibly illegal" payments to foreign government officials and emphasized that the management needed full information concerning any such payments made by Upjohn. The letter indicated that the Chairman had

asked Thomas, identified as "the company's General Counsel," "to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government." The questionnaire sought detailed information concerning such payments. Managers were instructed to treat the investigation as "highly confidential" and not to discuss it with anyone other than Upjohn employees who might be helpful in providing the requested information. Responses were to be sent directly to Thomas. Thomas and outside counsel also interviewed the recipients of the questionnaire and some 33 other Upjohn officers or employees as part of the investigation.

On March 26, 1976, the company voluntarily submitted a preliminary report to the Securities and Exchange Commission on Form 8-K disclosing certain questionable payments. A copy of the report was simultaneously submitted to the Internal Revenue Service, which immediately began an investigation to determine the tax consequences of the payments. Special agents conducting the investigation were given lists by Upjohn of all those interviewed and all who had responded to the questionnaire. On November 23, 1976, the Service issued a summons pursuant to 26 U.S.C. § 7602 demanding production of:

> "All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period.
>
> "The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries."

The company declined to produce the documents specified in the second paragraph on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. On August 31, 1977, the United States filed a petition seeking enforcement of the summons under 26 U.S.C. §§ 7402(b) and 7604(a) in the United States District Court for the Western District of Michigan. That court adopted the recommendation of a Magistrate who concluded that the summons should be enforced. Petitioners appealed to the Court of Appeals for the Sixth Circuit which rejected the Magistrate's finding of a waiver of the attorney-client privilege, but agreed that the privilege did not apply "[t]o the extent that the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice … for the simple reason that the communications were not the 'client's.' " The court reasoned that accepting petitioners' claim for a broader application of the privilege would encourage upper-echelon management to ignore unpleasant facts and create

too broad a "zone of silence." Noting that Upjohn's counsel had interviewed officials such as the Chairman and President, the Court of Appeals remanded to the District Court so that a determination of who was within the "control group" could be made. In a concluding footnote the court stated that the work-product doctrine "is not applicable to administrative summonses issued under 26 U.S. C. § 7602."

II

Federal Rule of Evidence 501 provides that "the privilege of a witness … shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. […] Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation […] .

The Court of Appeals, however, considered the application of the privilege in the corporate context to present a "different problem," since the client was an inanimate entity and "only the senior management, guiding and integrating the several operations, … can be said to possess an identity analogous to the corporation as a whole." […]

Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant. […] *See also Hickman v. Taylor*.

In the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below—"officers and agents … responsible for directing [the company's] actions in response to legal advice"—who will possess the information needed by the corporation's lawyers. Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. […]

The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant informa-

tion by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy.

The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, "constantly go to lawyers to find out how to obey the law[.]" […] [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application. The test restricts the availability of the privilege to those officers who play a "substantial role" in deciding and directing a corporation's legal response. […]

The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. […] Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. The questionnaire identified Thomas as "the company's General Counsel" and referred in its opening sentence to the possible illegality of payments such as the ones on which information was sought. A statement of policy accompanying the questionnaire clearly indicated the legal implications of the investigation. The policy statement was issued "in order that there be no uncertainty in the future as to the policy with respect to the practices which are the subject of this investigation." It began "Upjohn will comply with all laws and regulations," and stated that commissions or payments "will not be used as a subterfuge for bribes or illegal payments" and that all payments must be "proper and legal." Any future agreements with foreign distributors or agents were to be approved "by a company attorney" and any questions concerning the policy were to be referred "to the company's General Counsel." This statement was issued to Upjohn employees worldwide, so that even those interviewees not receiving a questionnaire were aware of the legal implications of the interviews. Pursuant to explicit instructions from the Chairman of the Board, the communications were considered "highly confidential" when made, and have been kept confidential by the company. Consistent with the underlying purposes of

the attorney-client privilege, these communications must be protected against compelled disclosure.

The Court of Appeals declined to extend the attorney-client privilege beyond the limits of the control group test for fear that doing so would entail severe burdens on discovery and create a broad "zone of silence" over corporate affairs. Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney […]

Here the Government was free to question the employees who communicated with Thomas and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them. While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege. As Justice Jackson noted in his concurring opinion in *Hickman v. Taylor*: "Discovery was hardly intended to enable a learned profession to perform its functions … on wits borrowed from the adversary."

[…]

III

Our decision that the communications by Upjohn employees to counsel are covered by the attorney-client privilege disposes of the case so far as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned. […] To the extent that the material subject to the summons is not protected by the attorney-client privilege as disclosing communications between an employee and counsel, we must reach the ruling by the Court of Appeals that the work-product doctrine does not apply to summonses issued under 26 U.S.C. § 7602.

The Government concedes, wisely, that the Court of Appeals erred and that the work-product doctrine does apply to IRS summonses. This doctrine was announced by the Court over 30 years ago in *Hickman v. Taylor*. In that case the Court rejected "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." The Court noted that "it is essential that a lawyer work with a certain degree of privacy[.]" […]

The "strong public policy" underlying the work-product doctrine […] has been substantially incorporated in Federal Rule of Civil Procedure 26(b)(3).

[…] Nothing in the language of the IRS summons provisions or their legislative history suggests an intent on the part of Congress to preclude application of the work-product doctrine. Rule 26(b)(3) codifies the work-product doctrine, and

the Federal Rules of Civil Procedure are made applicable to summons enforcement proceedings by Rule 81(a)(3). While conceding the applicability of the work-product doctrine, the Government asserts that it has made a sufficient showing of necessity to overcome its protections. […]

The Government stresses that interviewees are scattered across the globe and that Upjohn has forbidden its employees to answer questions it considers irrelevant. The above-quoted language from *Hickman,* however, did not apply to "oral statements made by witnesses … whether presently in the form of [the attorney's] mental impressions or memoranda." As to such material the Court did "not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. … If there should be a rare situation justifying production of these matters, petitioner's case is not of that type." Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes.

Rule 26 accords special protection to work product revealing the attorney's mental processes. The Rule permits disclosure of documents and tangible things constituting attorney work product upon a showing of substantial need and inability to obtain the equivalent without undue hardship. […] Rule 26 goes on, however, to state that "[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." Although this language does not specifically refer to memoranda based on oral statements of witnesses, the *Hickman* court stressed the danger that compelled disclosure of such memoranda would reveal the attorney's mental processes. It is clear that this is the sort of material the draftsmen of the Rule had in mind as deserving special protection.

[…] It is clear that the Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine. The Magistrate applied the "substantial need" and "without undue hardship" standard articulated in the first part of Rule 26(b)(3). The notes and memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorneys' mental processes in evaluating the communications. As Rule 26 and *Hickman* make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.

While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we think a far stronger showing of necessity and unavailability by other means […] would be necessary to compel disclosure. […]

Accordingly, the judgment of the Court of Appeals is reversed, and the case remanded for further proceedings.

It is so ordered.

Notes & Questions

1. The first of the Court's holdings concerns attorney-client privilege. The basic requirements of that doctrine are as follows:

   - Asserted holder of privilege is or sought to be a client;
   - The material sought is a communication between that client and a member of the bar (or subordinate) acting in her capacity as an attorney;
   - The communication relates to a fact of which attorney was informed by the client;
   - The communication was made without the presence of strangers;
   - for the purpose of securing a legal opinion, services, or assistance;
   - but not for the committing of a crime or tort; and
   - The privilege has been claimed and not waived.

2. The defining feature of corporations is that they are artificial persons, meaning they may act only through their employees, agents, officers, or shareholders. The key question in *Upjohn* was which actual persons count as the "client" when the client is a corporation: all employees, or only a subset? What test did the Court of Appeals apply below to determine which part of a corporation is "the client"? What test did the Supreme Court adopt?

3. Second, consider the Court's holdings on work product. What if anything does *Upjohn* add to our understanding of work product beyond what the Court said in *Hickman*? Which part of the work-product doctrine was at issue in the case?

4. Although the doctrines of work product and attorney-client privilege overlap in many ways and often arise alongside one another (witness *Upjohn* as just one example), they are distinct. In what circumstances does attorney-client privilege apply but not work product? Vice versa? Note that if *either* doctrine applies, discovery is likely prohibited.

5.4. Ensuring Compliance and Controlling Abuses

Perhaps more than any other phase of civil litigation, discovery is notorious for perceived and real abuses. To control the process and ensure parties comply with the rules, courts have broad power to punish misbehavior during discovery. These next cases explore this power.

Zubulake v. UBS Warburg LLP

SCHEINDLIN, J. 229 F.R.D. 422 (S.D.N.Y. 2003)

[…] What is true in love is equally true at law: Lawyers and their clients need to communicate clearly and effectively with one another to ensure that litigation proceeds efficiently. When communication between counsel and client breaks down, conversation becomes "just crossfire," and there are usually casualties.

I. Introduction

This is the fifth written opinion in this case, a relatively routine employment discrimination dispute in which discovery has now lasted over two years. Laura Zubulake is once again moving to sanction UBS for its failure to produce relevant information and for its tardy production of such material. […]

II. Facts

[…] Zubulake is an equities trader specializing in Asian securities who is suing her former employer for gender discrimination, failure to promote, and retaliation under federal, state, and city law.

A. Background

Zubulake filed an initial charge of gender discrimination with the EEOC on August 16, 2001. Well before that, however—as early as April 2001—UBS employees were on notice of Zubulake's impending court action. After she received a right-to-sue letter from the EEOC, Zubulake filed this lawsuit on February 15, 2002.

Fully aware of their common law duty to preserve relevant evidence, UBS's in-house attorneys gave oral instructions in August 2001—immediately after Zubulake filed her EEOC charge—instructing employees not to destroy or delete material potentially relevant to Zubulake's claims, and in fact to segregate such material into separate files for the lawyers' eventual review. […] [Similar warnings were given four more times. The court found that, despite the instructions, UBS had deleted relevant e-mails and backup tapes and failed to produce responsive e-mails it had not deleted.] […]

III. Legal Standard

Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably

foreseeable litigation. The determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the trial judge, and is assessed on a case-by-case basis. The authority to sanction litigants for spoliation arises jointly under the Federal Rules of Civil Procedure and the court's inherent powers.

The spoliation of evidence germane to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction. A party seeking an adverse inference instruction (or other sanctions) based on the spoliation of evidence must establish the following three elements: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind" and (3) that the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

[…] In *Zubulake IV*, I summarized a litigant's preservation obligations:

> Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (*e.g.*, those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (*i.e.*, actively used for information retrieval), then such tapes would likely be subject to the litigation hold.

A party's discovery obligations do not end with the implementation of a "litigation hold"—to the contrary, that's only the beginning. […]

Once a "litigation hold" is in place, a party and her counsel must make certain that all sources of potentially relevant information are identified and placed "on hold," to the extent required in *Zubulake IV*. To do this, counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy. It will also involve communicating with the "key players" in the litigation, in order to understand how they stored information. In this case, for example, some UBS employees created separate computer files pertaining to Zubulake, while others printed out relevant e-mails and retained them in hard copy only. Unless counsel interviews each employee, it is impossible to determine whether all potential sources of information have been inspected. […]

To the extent that it may not be feasible for counsel to speak with every key player, given the size of a company or the scope of the lawsuit, counsel must be more creative. […] [I]t is not sufficient to notify all employees of a litigation

hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched. This is not to say that counsel will necessarily succeed in locating all such sources, or that the later discovery of new sources is evidence of a lack of effort. But counsel and client must take some reasonable steps to see that sources of relevant information are located.

[…] The continuing duty to supplement disclosures strongly suggests that parties also have a duty to make sure that discoverable information is not lost. Indeed, the notion of a "duty to preserve" connotes an ongoing obligation. Obviously, if information is lost or destroyed, it has not been preserved. […]

There are thus a number of steps that counsel should take to ensure compliance with the preservation obligation. While these precautions may not be enough (or may be too much) in some cases, they are designed to promote the continued preservation of potentially relevant information in the typical case.

First, counsel must issue a "litigation hold" at the outset of litigation or whenever litigation is reasonably anticipated. The litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees.

Second, counsel should communicate directly with the "key players" in the litigation, *i.e.*, the people identified in a party's initial disclosure and any subsequent supplementation thereto. Because these "key players" are the "employees likely to have relevant information," it is particularly important that the preservation duty be communicated clearly to them. As with the litigation hold, the key players should be periodically reminded that the preservation duty is still in place.

Finally, counsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place. […]

UBS's in-house counsel issued a litigation hold in August 2001 and repeated that instruction several times from September 2001 through September 2002. Outside counsel also spoke with some (but not all) of the key players in August 2001. Nonetheless, certain employees unquestionably deleted e-mails. Although many of the deleted e-mails were recovered from backup tapes, a number of backup tapes—and the e-mails on them—are lost forever. Other employees, notwithstanding counsel's request that they produce their files on Zubulake, did not do so. […]

Counsel failed to communicate the litigation hold order to all key players. They also failed to ascertain each of the key players' document management habits. By the same token, UBS employees—for unknown reasons—ignored many of the instructions that counsel gave. This case represents a failure of communication, and that failure falls on counsel and client alike.

At the end of the day, however, the duty to preserve and produce documents rests on the party. Once that duty is made clear to a party, either by court order or by instructions from counsel, that party is on notice of its obligations and acts at its own peril. Though more diligent action on the part of counsel would have mitigated some of the damage caused by UBS's deletion of e-mails, UBS deleted the e-mails in defiance of explicit instructions not to.

[The court went on to require UBS to restore documents from backup tapes where available and to submit to additional depositions. The court further held that the jury would be given an "adverse inference instruction," which allows the jury to conclude that UBS hid evidence because it would have been unfavorable to UBS.]

Mueller v. Swift

No. 15-cv-1974-WJM-KLM, 2017 WL 3058027 (D. Colo. 2017)

Martínez, J.

In this tort action pending under the Court's diversity jurisdiction, 28 U.S.C. § 1332, Plaintiff pursues claims against all Defendants for tortious interference with his employment contract and with related business expectancies, while Defendant-Counter Claimant Taylor Swift ("Swift") pursues counterclaims for the torts of assault and battery. Now before the Court is Plaintiff's Motion for Sanctions for Plaintiff's Spoliation of Evidence. (ECF No. 139 (Defendants' "Motion").) As explained below, Defendants' Motion is granted in part, to impose a spoliation sanction that is less harsh than the adverse inference requested by Defendants, but which the Court finds is the most appropriate sanction in the circumstances of this case.

I. BACKGROUND AND FINDINGS OF FACT

[…] [T]he additional background set out below is both undisputed and supported by evidence in the record.

Plaintiff worked as an on-air radio personality for a Denver area radio station, KYGO. On June 2, 2013, he attended a backstage "meet and greet" preceding a concert performed by Swift at Denver's Pepsi Center. As detailed in the summary judgment order, Swift alleges that during a staged photo opportunity at the "meet and greet," Plaintiff purposefully and inappropriately touched her buttocks beneath her dress. Plaintiff denies having done so.

Plaintiff's employer, the company that owned KYGO, was informed of Swift's accusation on the evening of June 2, 2013 and on the following day. On June 3, 2013, Plaintiff met with his superiors at KYGO, including Robert Call ("Call") and Hershel Coomer (a/k/a "Eddie Haskell") ("Haskell"). Unbeknownst to Call and Haskell at the time, Plaintiff made an audio recording of their conversation. The following day, June 4, 2013, Plaintiff was terminated from his employment at KYGO by Call. Call explained that one reason for Plaintiff's termination was because Call perceived Plaintiff had "changed his story that it couldn't have occurred, then that it was incidental."

At some point thereafter, well after having first contacted an attorney regarding potential legal action, Plaintiff edited the audio recording of the June 3, 2013 conversation, and then sent only "clips" of the entire audio file to his attorney. In his deposition testimony, Plaintiff offered the following explanation for these actions: "[t]he audio I recorded was close to two hours long. And the audio that I could provide to [Plaintiff's counsel] was a portion of the entire audio" (id.), and "it was so long, that I edited down clips from the recording to provide to [Plaintiff's counsel] to give an idea of what kind of questioning I went … through."

According to his testimony, Plaintiff edited the audio file on his laptop computer, on which he also retained a full copy of the original audio file(s). (*See id.* at 11–12.) However, sometime thereafter, coffee was spilled on the keyboard of Plaintiff's laptop, damaging it. Plaintiff took the laptop to the Apple Store, and was given "a new machine." He did not keep the original hard drive or recover the files from it. Evidently this occurred sometime in 2015. In addition, although Plaintiff kept an external hard drive "to store audio files and documents," and the complete audio recording was saved on this drive, at some point it "stopped working." At his deposition, Plaintiff testified that he "may have kept" this hard drive, but that because it was "useless" he "[didn't] know if I discarded it because it was junk." It has not been produced.

The end result of all this is that the complete audio recording of the June 3, 2013 conversation among Plaintiff, Call, and Haskell has never been produced. So far as the record reveals, Plaintiff is the only person who has ever heard it. Defendants and their lawyers have never heard it, and neither has Plaintiff's own lawyer. As a result, Defendants move for a Court-imposed sanction for spoliation of evidence, and in particular for the Court to give the jury an adverse inference instruction at trial, to direct the jury "that the entirety of the June 3, 2013 audio recording would have been unfavorable to Plaintiff."

II. LEGAL STANDARD

"A spoliation sanction is proper where: '(1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence."' In deciding whether to sanction a party for the spoliation of evidence, courts have considered a variety of factors, but two "generally carry the most weight: (1) the degree of culpability of the party who lost or destroyed the evidence; and (2) the degree of actual prejudice to the other party."

[…]

III. ANALYSIS

A. A Spoliation Sanction is Warranted

The Court concludes that Plaintiff's loss or destruction of the complete recording of the June 3, 2013 conversation constitutes sanctionable spoliation of evidence.

1. Duty to Preserve

Initially, Plaintiff does not dispute that he knew or should have known that litigation was imminent and that he was therefore under a duty to preserve relevant evidence, including the complete audio recording, at the time when he first altered it for his own purposes and then lost or destroyed the unedited file. *See Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

The Court finds that Plaintiff knew or should have known that litigation was imminent. He had consulted with a criminal attorney immediately following the events of June 2, 2013, before being terminated by KYGO. He then consulted with a civil attorney about the allegations in this case, on or very shortly after June 4, 2013, and in contemplation of suing KYGO. Indeed, it is quite likely that the reason Plaintiff secretively recorded his conversation with Call and Haskell was because he knew that some form of adversarial legal action was likely to follow.

Moreover, Plaintiff later edited the audio file in order to send "clips" to his own attorney, when it was abundantly clear that litigation was imminent, because Plaintiff himself was actively considering it. […]

2. Relevance

The Court also readily concludes that the recording of the June 3, 2013 conversation was relevant to numerous disputed facts and issues in this case. For instance, to prevail on his tortious interference claims, Plaintiff must prove that Defendants' communication with KYGO was improper, and that Defendants' conduct caused KYGO to terminate him. The statements made by Plaintiff and by Messrs. Call and Haskell the day following the incident with Swift and the day before KYGO fired him would plainly be relevant to proving or disproving those facts. Moreover, the record reflects that one of the reasons Mr. Call decided to terminate Plaintiff was because he perceived that Plaintiff had "changed his story" during the course his communications with KYGO. (ECF No. 108-8 at 20.) A recording of this conversation could be invaluable to a jury that will be asked to decide, in part, whether they agree with Mr. Call's assessment that Plaintiff has been inconsistent in his descriptions of the events of June 2, 2013.

[…]

3. Prejudice

The Court similarly finds that Defendants were prejudiced by the loss of evidence. At the very least, if the complete recording had been available, it might have saved time and expense in litigation by documenting the June 3, 2013 conversation, allowing for better preparation for depositions and ultimately for trial. Moreover, to the extent there may now be discrepancies in the accounts that Plaintiff and Messrs. Call and Haskill give regarding their June 3, 2013 conversation, the recording would probably have resolved them. […]

4. Culpability

Finally, the Court finds that the degree of culpability warrants a sanction. Although the Court declines to make a finding that Plaintiff acted in "bad faith" in

the sense that he *intended* to destroy the evidence, it also cannot characterize the loss or destruction of evidence in this case as innocent, or as "*mere* negligence." Rather, the spoliation falls higher up on the "continuum of fault." […]

Plaintiff knew full well that litigation was imminent, since he was pursuing it. He knew that he was the only person in possession of the complete audio recording. He made the decision— inexplicably, in the Court's view—to *alter* the original evidence and to present his lawyer with only "clips" hand-picked from the underlying evidence. This reflects that he obviously intended to make use of portions of the recording to advance his own claims. […] Plaintiff could and should have made sure that some means of backing up the files relevant to litigation was in place, but this was not done.

Moreover, when Plaintiff surrendered his laptop for repair or replacement, he knew that it contained relevant evidence. Depending on whether this occurred before or after the loss of his external hard drive (the record is unclear), the laptop contained either the only remaining copy of the complete audio file or one of only two, as Plaintiff also knew or should have known. Despite this, the record does not reflect that he made any effort to retain the hard drive, to have it returned to him after he surrendered the damaged laptop, or to otherwise recover the lost file(s). The same was true when his external hard drive stopped working. Rather than saving it, seeking to have it repaired, or taking steps to preserve the files stored on it, Plaintiff evidently just set the drive aside, and eventually lost it.

[…]

B. Appropriate Sanction

Despite the discussion of Plaintiff's culpability above, the Court rejects Defendants' request to make a finding of bad faith and to give the jury an adverse inference instruction. Having considered various options, and after directing Defendants to brief the issue of alternative sanctions, the Court finds that the following sanction is appropriate: *Notwithstanding any limitations under Federal Rule of Evidence 611(b), Defendants will be permitted to cross-examine Plaintiff in front of the jury regarding the record of his spoliation of evidence, as described above*.

The Court concludes this is the most appropriate sanction for several reasons. *First*, while Plaintiff is culpable, the Court does not find that the nature of that culpability warrants an adverse inference instruction. Although a threshold finding of bad faith is a prerequisite for an adverse inference, the Court does not view bad faith as a binary or "yes/no" issue. "The destruction of potentially relevant evidence obviously occurs along a continuum of fault—ranging from innocence through the degrees of negligence to intentionality." As set forth above, the Court takes a dim view of Plaintiff's acts of spoliation, which Defendants characterize—not entirely unfairly—as defendant "cherry picking what he wanted" from the recording, then "conveniently destroy[ing] the multiple copies." However, the record does not establish—at least not clearly—that Plaintiff was acting with an intent to deprive Defendants of relevant evidence. Absent a more clear showing that Plaintiff's conduct reflected his own

"consciousness of a weak case," an adverse inference instruction is not appropriate. *See* […] Fed. R. Civ. P. 37(e)(2) (as to electronically stored information, adverse inference jury instruction is permissible "only upon [a] finding that the party acted with the intent to deprive another party of the information's use in litigation").

[…]

[A]llowing Defendants to cross examine Plaintiff about his spoliation of evidence has the benefit of allowing the jury to make its own assessment of Plaintiff's degree of culpability and of the actual prejudice to Defendants. The Court has little doubt that if the jury concludes Plaintiff acted with bad faith or an intention to destroy or conceal evidence, they will draw their own adverse inferences, whether the Court instructs it or not. In this case where Plaintiff's credibility is critical to his claims, allowing cross-examination regarding his spoliation of evidence, including the fact that he personally chose and edited the "clips" now available to the jury is therefore quite a heavy sanction. On the other hand, if the jury is persuaded that Plaintiff's actions were indeed innocent, then the impact of the Court's sanction will be far less harsh.

[…] [T]he remedial effects of the Court's sanction will be proportionally scaled to the degree of Plaintiff's culpability and the degree of resulting prejudice. However, the remedial and punitive impact of the Court's sanction will follow from the jury's own findings and credibility determinations, rather than from findings by the Court on the basis of only the written record.

For all these reasons, the Court concludes in the exercise of its discretion that among all the many possible sanctions it might impose, the one set forth above is properly suited to the circumstances of this case, is no more onerous than is necessary to serve its purposes, and best serves the interests of justice.

IV. CONCLUSION

For the reasons set forth above, Defendants' Motion for Sanctions for Plaintiff's Spoliation of Evidence is GRANTED IN PART and DENIED IN PART as described above.

Notes & Questions

1. *Zubulake* discusses the standards for spoliation: when a party has failed to comply with its duties to preserve and turn over responsive and discoverable information when requested. *Mueller* focuses on the consequences of spoliation: the punishment for misbehavior.
2. Note that in *Muller*, the court stopped short of imposing an adverse inference instruction because there was not clear evidence of bad faith behind Mueller's behavior. Instead, the Court allowed Swift's lawyer to cross-examine Mueller about the missing recording at trial. Why do you think the court concluded that was a lesser sanction? Is it possible that it was actually *more* damaging to Mueller's defenses?

6. Avoiding Trial

6.1. Arbitration

Kalinauskas v. Wong

JOHNSTON, M.J.

151 F.R.D. 363 (D. Nev. 1993)

This matter was submitted to the undersigned Magistrate Judge on a Motion for a Protective Order filed by defendant Desert Palace, Inc., doing business as Caesars Palace Hotel & Casino (Caesars). […]

The plaintiff, Ms. Lin T. Kalinauskas (Kalinauskas), a former employee of Caesars, has sued Caesars for sexual discrimination in the instant case. As part of discovery Kalinauskas seeks to depose Donna R. Thomas, a former Caesars employee who filed a sexual harassment suit against Caesars last year. Ms. Thomas's suit settled without trial pursuant to a confidential settlement agreement[,] which the court sealed upon the stipulated agreement of the parties.

This court has examined, in camera, sealed materials relating to Ms. Thomas's case and settlement. The in camera submission included: Stipulation for & Order for Dismissal, Protective Order and Confidentiality Order, Stipulation for Protective Order and Confidentiality Order, and Settlement Agreement. [The Stipulation for a Protective Order provided] that the plaintiff "shall not discuss any aspect of plaintiff's employment at Caesars other than to state the dates of her employment and her job title." Identical language appears in the Protective Order and Confidentiality Order. […]

Discussion

In general, the scope of discovery is very broad. "Parties may obtain discovery regarding *any [unprivileged matter that is relevant to any party's claim or defense*]" Fed. R. Civ. P. 26(b)(1) (emphasis added). The primary goal of the court and discovery is "to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1.

The public interest favors judicial policies which promote the completion of litigation. Public interest also seeks to protect the finality of prior suits and the secrecy of settlements when desired by the settling parties. However, the courts also serve society by providing a public forum for issues of general concern. The case at bar presents a direct conflict between these crucial public and private interests.

To allow full discovery into all aspects of Ms. Thomas's case could discourage similar settlements. Confidential settlements benefit society and the parties involved by resolving disputes relatively quickly, with slight judicial intervention, and presumably result in greater satisfaction to the parties. Sound judicial policy fosters and protects this form of alternative dispute resolution. *See, e.g.*, Fed. R. Evid. 408 which protects compromises and offers to compromise by rendering them inadmissible to prove liability. The secrecy of a settlement agreement and the contractual rights of the parties thereunder deserve court protection.

On the other hand, to prevent any discovery into Ms. Thomas's case based upon the settlement agreement results in disturbing consequences. First, as pointed out by Kalinauskas, preventing the deposition of Ms. Thomas would condone the practice of "buy[ing] the silence of a witness with a settlement agreement." This court harbors little doubt that preventing the dissemination of the underlying facts which prompted Ms. Thomas to file suit is in Caesars's interest, and formed an important part of the agreement to Caesars. Caesars avers that without the confidentiality order the Thomas case would not have settled. Yet despite this freedom to contract, the courts must carefully police the circumstances under which litigants seek to protect their interests while concealing legitimate areas of public concern. This concern grows more pressing as additional individuals are harmed by identical or similar action.

Second, the deposition of Ms. Thomas is likely to lead to relevant evidence. Preventing the deposition of Ms. Thomas or the discovery of documents created in her case could lead to wasteful efforts to generate discovery already in existence. […]

Caesars['s] motion for a protective order preventing the deposition of Ms. Thomas rests entirely upon the confidential settlement agreement. Caesars … maintains that it should be able to rely upon the confidentiality order to protect against [disclosure to] third parties, unless extraordinary circumstances or compelling need justifies some breach of secrecy. […]

[Caesars's] argument that Kalinauskas must show a compelling need to obtain discovery applies to discovery of the specific terms of the settlement agreement (*i.e.*, the amount and conditions of the agreement), not [to] factual information surrounding Thomas's case. Caesars should not be able to conceal basic facts of concern to Kalinauskas in her case, and of legitimate public concern, regarding employment at its place of business.

Accordingly, keeping in mind the liberal nature of discovery, this court will allow the deposition of Ms. Thomas. […] The deposition of Ms. Thomas and any further discovery into the Thomas case must not, however, disclose any substantive terms of the Caesars-Thomas settlement agreement. Naturally, Ms. Thomas may answer questions regarding her employment at Caesars and any knowledge of sexual harassment.

Although the terms of the confidential settlement agreement impose penalties upon Ms. Thomas for discussing her past employment at Caesars, those penalties shall not apply to the disclosure of information for discovery purposes

in furtherance of Kalinauskas's case. Indeed, the settlement agreement itself makes exception for court ordered release of information.

While settlement is an important objective, an overzealous quest for alternative dispute resolution can distort the proper role of the court. Furthermore, settlement agreements which suppress evidence violate the greater public policy. […]

Based on the foregoing […] IT IS HEREBY ORDERED […] that the Defendant's Motion for Protective Order is granted to the extent that during the deposition of Ms. Donna R. Thomas, no information regarding the settlement agreement itself shall come forth [and] that the Defendant's Motion for Protective Order is denied as to all other requests. […]

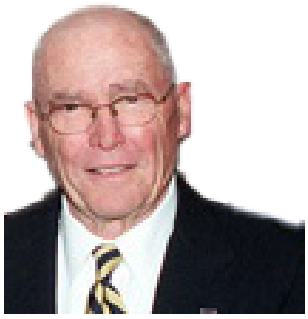
Notes & Questions

1. Why did Kalinauskas want to depose Ms. Thomas?
2. Why didn't Caesars want that to happen?
3. What was Caesars' argument?
4. Why do you think the settlement between Caesars and Ms. Thomas was confidential?
5. What was the Court's holding?

Ferguson v. Countrywide Credit Industries, Inc.

PREGERSON, J.

298 F.3d 778 (9th Cir. 2002)



Misty Ferguson filed a complaint against Countrywide Credit Industries, Inc. and her supervisor, Leo DeLeon, alleging causes of action under federal and state law for sexual harassment, retaliation, and hostile work environment. Countrywide filed a petition for an order compelling arbitration of Ferguson's claims. The district court denied Countrywide's petition on the grounds that Countrywide's arbitration agreement is unenforceable based on the doctrine of unconscionability.

I. Factual and Procedural History

When Ferguson was hired she was required to sign Countrywide's Conditions of Employment, which states in relevant part: "I understand that in order to work at Countrywide I must execute an arbitration agreement."

The district court denied Countrywide's petition to compel arbitration. It ruled that the arbitration agreement is unenforceable because it is unconscionable under *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000).

II. Unconscionability

The FAA compels judicial enforcement of a wide range of written arbitration agreements. Section 2 of the FAA provides, in relevant part, that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In determining the validity of an agreement to arbitrate, federal courts "should apply ordinary state-law principles that govern the formation of contracts." "Thus, generally applicable defenses, such as unconscionability, may be applied to invalidate arbitration agreements without contravening the FAA." California courts may invalidate an arbitration clause under the doctrine of unconscionability. This doctrine, codified by the California Legislature in California Civil Code 1670.5(a), provides:

> if the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

This statute, however, does not define unconscionability. Instead, we look to the California Supreme Court's decision in Armendariz, which provides the definitive pronouncement of California law on unconscionability to be applied to mandatory arbitration agreements, such as the one at issue in this case. In order to render a contract unenforceable under the doctrine of unconscionability, there must be both a procedural and substantive element of unconscionability. These two elements, however, need not both be present in the same degree. Thus, for example, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable.

1. Procedural Unconscionability

Procedural unconscionability concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. A determination of whether a contract is procedurally unconscionable focuses on two factors: oppression and surprise. Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms.

In *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir. 2002), we held that the arbitration agreement at issue satisfied the elements of procedural unconscionability under California law. We found the agreement to be procedurally unconscionable because Circuit City, which possesses considerably more bargaining power than nearly all of its employees or applicants, drafted the contract and uses it as its standard arbitration agreement for all of its new employees. The agreement is a prerequisite to employment, and job applicants are not permitted to modify the agreement's terms—they must take the contract or leave it.

2. Substantive Unconscionability

Substantive unconscionability focuses on the terms of the agreement and whether those terms are so one-sided as to shock the conscience. Just before oral argument was heard in this case, the California Court of Appeal held in another case that Countrywide's arbitration agreement was unconscionable. *See Mercuro v. Superior Court*, 96 Cal. App. 4th 167 (2002).

a. One-Sided Coverage of Arbitration Agreement

Countrywide's arbitration agreement specifically covers claims for breach of express or implied contracts or covenants, tort claims, claims of discrimination or harassment based on race, sex, age, or disability, and claims for violation of any federal, state, or other governmental constitution, statute, ordinance, regulation, or public policy. On the other hand, the arbitration agreement specifically excludes claims for workers' compensation or unemployment compensation benefits, injunctive and/ or other equitable relief for intellectual property violations, unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information. We adopt the California appellate court's holding in Mercuro, that Countrywide's arbitration agreement was unfairly one-sided and, therefore, substantively unconscionable because the agreement "compels arbitration of the claims employees are most likely to bring against Countrywide … [but] exempts from arbitration the claims Countrywide is most likely to bring against its employees."

[…]

b. Arbitration Fees

In *Armendariz*, the California Supreme Court held that:

> when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court. This rule will ensure that employees bringing [discrimination] claims will not be deterred by costs greater than the usual costs incurred during litigation, costs that are essentially imposed on an employee by the employer.

Countrywide's arbitration agreement has a provision that requires the employee to "pay to NAF [National Arbitration Forum] its filing fee up to a maximum of $125.00 when the Claim is filed. The Company shall pay for the first hearing day. All other arbitration costs shall be shared equally by the Company and the Employee." Countrywide argues that this provision is not so one-sided as to "shock the conscience" and, therefore, is enforceable.

However, *Armendariz* holds that a fee provision is unenforceable when the employee bears any expense beyond the usual costs associated with bringing an action in court. NAF imposes multiple fees which would bring the cost of arbitration for Ferguson into the thousands of dollars.

Because the only valid fee provision is one in which an employee is not required to bear any expense beyond what would be required to bring the action in court, we affirm the district court's conclusion that "the original fee provision … appears clearly to violate the Armendariz standard."

c. One-Sided Discovery Provision

Ferguson also argues that the discovery provision in the arbitration agreement is one-sided and, therefore, unconscionable. The discovery provision states that "a deposition of a corporate representative shall be limited to no more than four designated subjects," but does not impose a similar limitation on depositions of employees. Ferguson also notes that the arbitration agreement sets mutual limitations (*e.g.*, no more than three depositions) and mutual advantages (*e.g.*, unlimited expert witnesses) which favor Countrywide because it is in a superior position to gather information regarding its business practices and employees' conduct, and has greater access to funds to pay for expensive expert witnesses.

Ferguson urges this court to affirm the district court's ruling that the discovery provision is unconscionable on the ground that the limitations and mutual advantages on discovery are unfairly one-sided and have no commercial justification other than "maximizing employer advantage," which is an improper basis for such differences under *Armendariz*. Countrywide argues to the contrary that the arbitration agreement provides for ample discovery by employees.

In *Armendariz*, the California Supreme Court held that employees are "at least entitled to discovery sufficient to adequately arbitrate their statutory claims, including access to essential documents and witnesses." Adequate discovery, however, does not mean unfettered discovery. As Armendariz recognized, an arbitration agreement might specify "something less than the full panoply of discovery provided in the California Code of Civil Procedure."

In *Mercuro*, the California Court of Appeals applied the parameters set forth in Armendariz to Countrywide's discovery provisions. It concluded that "without evidence showing how these discovery provisions are applied in practice, we are not prepared to say they would not necessarily prevent Mercuro from vindicating his statutory rights." *Mercuro* relied heavily on the ability of the arbitrator to extend the discovery limits for "good cause." In fact, *Mercuro* ultimately left it up to the arbitrator to balance the need for simplicity in arbitration with the discovery necessary for a party to vindicate her claims. Following the Court in *Mercuro*, we too find that Countrywide's discovery provisions may afford Ferguson adequate discovery to vindicate her claims.

Nevertheless, we recognize an insidious pattern in Countrywide's arbitration agreement. Not only do these discovery provisions appear to favor Countrywide at the expense of its employees, but the entire agreement seems drawn to provide Countrywide with undue advantages should an employment-related dispute arise. Aside from merely availing itself of the cost-saving benefits of arbitration, Countrywide has sought to advantage itself substantively by tilting the playing field.

While many of its arbitration provisions appear equally applicable to both parties, these provisions may work to curtail the employee's ability to substantiate any claim against the employer. We follow *Mercuro* in holding that the discovery provisions alone are not unconscionable, but in the context of an arbitration agreement which unduly favors Countrywide at every turn, we find that their inclusion reaffirms our belief that the arbitration agreement as a whole is substantively unconscionable.

Conclusion

The district court's denial of Countrywide's petition to compel arbitration on the ground that Countrywide's arbitration agreement is unenforceable under the doctrine of unconscionability is AFFIRMED.

Notes & Questions

1. What kind of motion did Countrywide file seeking to force Ferguson to arbitrate her claims? What legal authority did they rely for doing so?
2. What are the two aspects (and their subparts) of the law of unconscionability under California law? Is it enough for either one to be satisfied, or must both be met?
3. Note that *Ferguson* is an outlier case. Other cases considering whether to enforce similar arbitration clauses have come out the other way. *See, e.g.*, *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294 (5th Cir. 2004).

Epic Systems v. Lewis

GORSUCH, J., delivered the opinion of the Court. 138 S. Ct. 1612 (2018)

Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?

As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings. Nor can we agree with the employees' suggestion that the National Labor Relations Act (NLRA) offers a conflicting command. It is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another. And abiding that duty here leads to an unmistakable conclusion. The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum. This Court has never read a right to class actions into the NLRA—and for three quarters of

a century neither did the National Labor Relations Board. Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful.

I

The three cases before us differ in detail but not in substance. Take *Ernst & Young LLP v. Morris*. There Ernst & Young and one of its junior accountants, Stephen Morris, entered into an agreement providing that they would arbitrate any disputes that might arise between them. The agreement stated that the employee could choose the arbitration provider and that the arbitrator could "grant any relief that could be granted by … a court" in the relevant jurisdiction. The agreement also specified individualized arbitration, with claims "pertaining to different [e]mployees [to] be heard in separate proceedings."

After his employment ended, and despite having agreed to arbitrate claims against the firm, Mr. Morris sued Ernst & Young in federal court. He alleged that the firm had misclassified its junior accountants as professional employees and violated the federal Fair Labor Standards Act (FLSA) and California law by paying them salaries without overtime pay. Although the arbitration agreement provided for individualized proceedings, Mr. Morris sought to litigate the federal claim on behalf of a nationwide class under the FLSA's collective action provision, 29 U.S.C. § 216(b). He sought to pursue the state law claim as a class action under Federal Rule of Civil Procedure 23.

Ernst & Young replied with a motion to compel arbitration. The district court granted the request, but the Ninth Circuit reversed this judgment. The Ninth Circuit recognized that the Arbitration Act generally requires courts to enforce arbitration agreements as written. But the court reasoned that the statute's "saving clause," *see* 9 U.S.C. § 2, removes this obligation if an arbitration agreement violates some other federal law. And the court concluded that an agreement requiring individualized arbitration proceedings violates the NLRA by barring employees from engaging in the "concerted activit[y]," of pursuing claims as a class or collective action. […]

Although the Arbitration Act and the NLRA have long coexisted—they date from 1925 and 1935, respectively—the suggestion they might conflict is something quite new. Until a couple of years ago, courts more or less agreed that arbitration agreements like those before us must be enforced according to their terms. […]

II

We begin with the Arbitration Act and the question of its saving clause.

Congress adopted the Arbitration Act in 1925 in response to a perception that courts were unduly hostile to arbitration. No doubt there was much to that perception. Before 1925, English and American common law courts routinely refused to enforce agreements to arbitrate disputes. But in Congress's judgment arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved.

So Congress directed courts to abandon their hostility and instead treat arbitration agreements as "valid, irrevocable, and enforceable." 9 U.S.C. § 2. The Act, this Court has said, establishes "a liberal federal policy favoring arbitration agreements."

Not only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures.

On first blush, these emphatic directions would seem to resolve any argument under the Arbitration Act. The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. And this much the Arbitration Act seems to protect pretty absolutely. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). You might wonder if the balance Congress struck in 1925 between arbitration and litigation should be revisited in light of more contemporary developments. You might even ask if the Act was good policy when enacted. But all the same you might find it difficult to see how to avoid the statute's application.

Still, the employees suggest the Arbitration Act's saving clause creates an exception for cases like theirs. By its terms, the saving clause allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." § 2. That provision applies here, the employees tell us, because the NLRA renders their particular class and collective action waivers illegal. In their view, illegality under the NLRA is a "ground" that "exists at law … for the revocation" of their arbitration agreements, at least to the extent those agreements prohibit class or collective action proceedings.

The problem with this line of argument is fundamental. […]

[The clause] can't [apply] because the saving clause recognizes only defenses that apply to "any" contract. In this way the clause establishes a sort of "equal-treatment" rule for arbitration contracts. The clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.' " *Concepcion*. At the same time, the clause offers no refuge for "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration."

This is where the employees' argument stumbles. They don't suggest that their arbitration agreements were extracted, say, by an act of fraud or duress or in some other unconscionable way that would render any contract unenforceable. Instead, they object to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones. And by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes.

We know this much because of *Concepcion*. There this Court faced a state law defense that prohibited as unconscionable class action waivers in consumer contracts. The Court readily acknowledged that the defense formally applied in both the litigation and the arbitration context. But, the Court held, the defense failed to qualify for protection under the saving clause because it interfered with a fundamental attribute of arbitration all the same. It did so by effectively permitting any party in arbitration to demand classwide proceedings despite the traditionally individualized and informal nature of arbitration. This "fundamental" change to the traditional arbitration process, the Court said, would "sacrific[e] the principal advantage of arbitration—its informality—and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment." […]

Of course, *Concepcion* has its limits. The Court recognized that parties remain free to alter arbitration procedures to suit their tastes, and in recent years some parties have sometimes chosen to arbitrate on a classwide basis. But *Concepcion*'s essential insight remains: courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent. Just as judicial antagonism toward arbitration before the Arbitration Act's enactment "manifested itself in a great variety of devices and formulas declaring arbitration against public policy," Concepcion teaches that we must be alert to new devices and formulas that would achieve much the same result today. And a rule seeking to declare individualized arbitration proceedings off limits is, the Court held, just such a device. […]

Illegality[, as the term is used in the NLRA], like unconscionability, may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable just because it requires bilateral arbitration is a different creature. A defense of that kind, Concepcion tells us, is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability. The law of precedent teaches that like cases should generally be treated alike, and appropriate respect for that principle means the Arbitration Act's saving clause can no more save the defense at issue in these cases than it did the defense at issue in Concepcion. At the end of our encounter with the Arbitration Act, then, it appears just as it did at the beginning: a congressional command requiring us to enforce, not override, the terms of the arbitration agreements before us.

[…]

IV

The dissent sees things a little bit differently. In its view, today's decision ushers us back to the Lochner era when this Court regularly overrode legislative policy judgments. The dissent even suggests we have resurrected the long-dead "yellow dog" contract. But like most apocalyptic warnings, this one proves a false alarm. […]

Our decision does nothing to override Congress's policy judgments. As the dissent recognizes, the legislative policy embodied in the NLRA is aimed at "safe-

guard[ing], first and foremost, workers' rights to join unions and to engage in collective bargaining." Those rights stand every bit as strong today as they did yesterday. And rather than revive "yellow dog" contracts against union organizing that the NLRA outlawed back in 1935, today's decision merely declines to read into the NLRA a novel right to class action procedures that the Board's own general counsel disclaimed as recently as 2010. […]

* * *

The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act. Because we can easily read Congress's statutes to work in harmony, that is where our duty lies. […]

So ordered.

GINSBURG, J., with whom BREYER, J., SOTOMAYOR, J., and KAGAN, J., join, dissenting.

The employees in these cases complain that their employers have underpaid them in violation of the wage and hours prescriptions of the Fair Labor Standards Act of 1938 (FLSA) and analogous state laws. Individually, their claims are small, scarcely of a size warranting the expense of seeking redress alone. But by joining together with others similarly circumstanced, employees can gain effective redress for wage underpayment commonly experienced. To block such concerted action, their employers required them to sign, as a condition of employment, arbitration agreements banning collective judicial and arbitral proceedings of any kind. The question presented: Does the Federal Arbitration Act permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone, never mind the right secured to employees by the National Labor Relations Act (NLRA) "to engage in … concerted activities" for their "mutual aid or protection"? The answer should be a resounding "No."

In the NLRA and its forerunner, the Norris-LaGuardia Act (NLGA), 29 U.S.C. § 101 *et seq.*, Congress acted on an acute awareness: For workers striving to gain from their employers decent terms and conditions of employment, there is strength in numbers. A single employee, Congress understood, is disarmed in dealing with an employer. The Court today subordinates employee-protective labor legislation to the Arbitration Act. In so doing, the Court forgets the labor market imbalance that gave rise to the NLGA and the NLRA, and ignores the destructive consequences of diminishing the right of employees "to band together in confronting an employer." Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order.

To explain why the Court's decision is egregiously wrong, I first refer to the extreme imbalance once prevalent in our Nation's workplaces, and Congress' aim in the NLGA and the NLRA to place employers and employees on a more

equal footing. I then explain why the Arbitration Act, sensibly read, does not shrink the NLRA's protective sphere. […]

The end of the 19th century and beginning of the 20th was a tumultuous era in the history of our Nation's labor relations. Under economic conditions then prevailing, workers often had to accept employment on whatever terms employers dictated. Aiming to secure better pay, shorter workdays, and safer workplaces, workers increasingly sought to band together to make their demands effective. […]

Early legislative efforts to protect workers' rights to band together were unavailing. […]

In the 1930's, legislative efforts to safeguard vulnerable workers found more receptive audiences. As the Great Depression shifted political winds further in favor of worker-protective laws, Congress passed two statutes aimed at protecting employees' associational rights. First, in 1932, Congress passed the NLGA, which regulates the employer-employee relationship indirectly. Section 2 of the Act declares:

> "Whereas … the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, … it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, … and that he shall be free from the interference, restraint, or coercion of employers … in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 102. …

But Congress did so three years later, in 1935, when it enacted the NLRA. Relevant here, § 7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (emphasis added). Section 8(a)(1) safeguards those rights by making it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7]." § 158(a)(1). […]

Despite the NLRA's prohibitions, the employers in the cases now before the Court required their employees to sign contracts stipulating to submission of wage and hours claims to binding arbitration, and to do so only one-by-one. When employees subsequently filed wage and hours claims in federal court and sought to invoke the collective-litigation procedures provided for in the FLSA and Federal Rules of Civil Procedure, the employers moved to compel individual arbitration. The Arbitration Act, in their view, requires courts to enforce their take-it-or-leave-it arbitration agreements as written, including the collective-litigation abstinence demanded therein.

In resisting enforcement of the group-action foreclosures, the employees involved in this litigation do not urge that they must have access to a judicial forum. They argue only that the NLRA prohibits their employers from denying them the right to pursue work-related claims in concert in any forum. If they may be stopped by employer-dictated terms from pursuing collective procedures in court, they maintain, they must at least have access to similar procedures in an arbitral forum. […]

Suits to enforce workplace rights collectively fit comfortably under the umbrella "concerted activities for the purpose of … mutual aid or protection." 29 U.S.C. § 157. "Concerted" means "[p]lanned or accomplished together; combined." American Heritage Dictionary 381 (5th ed. 2011). "Mutual" means "reciprocal." *Id.*, at 1163. When employees meet the requirements for litigation of shared legal claims in joint, collective, and class proceedings, the litigation of their claims is undoubtedly "accomplished together." By joining hands in litigation, workers can spread the costs of litigation and reduce the risk of employer retaliation. […]

In face of the NLRA's text, history, purposes, and longstanding construction, the Court nevertheless concludes that collective proceedings do not fall within the scope of § 7. None of the Court's reasons for diminishing § 7 should carry the day. […]

The inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers. […]

* * *

If these untoward consequences stemmed from legislative choices, I would be obliged to accede to them. But the edict that employees with wage and hours claims may seek relief only one-by-one does not come from Congress. It is the result of take-it-or-leave-it labor contracts harking back to the type called "yellow dog," and of the readiness of this Court to enforce those unbargained-for agreements. The FAA demands no such suppression of the right of workers to take concerted action for their "mutual aid or protection." […]

Notes & Questions

1. *Epic Systems* involves a purported clash between two federal statutes: the Federal Arbitration Act and the National Labor Relations Act. The Court held that the FAA applies unless there is a generally applicable defense (such as unconscionability, the doctrine at issue in *Ferguson*). What did the employees argue was their generally applicable defense?

2. The Court held that the employees defense was contract-specific rather than general. Why?

6.2. Summary Judgment

At the close of discovery, the parties have another chance to dispose of the case without the need for a jury: summary judgment. Rule 56(a) provides that either party may move for summary judgment by showing "that there is no genuine dispute as to any material fact" and therefore that "the movant is entitle to judgment as a matter of law."

In many ways, summary judgment is a later-in-time version of a motion to dismiss for failure to state a claim under Rule 12(b)(6). Both motions ask the court to take the facts as the non-moving party has presented them and then determine whether the case can survive as a legal matter. The key difference between a summary judgment motion and Rule 12(b)(6) motion is that the latter is tested against the allegations in the complaint, while the former is tested against evidence, which must be submitted to the court as part of the briefing on the motion. *See* Rule 56(c).

Like the Rule 12(b)(6) motion, the standards governing Rule 56 have changed more dramatically than the text of the Rule has. The cases that follow trace the development of summary judgment procedure in federal court. As you read them, pay close attention to (1) the evidence adduced by the non-moving party; and (2) the arguments made by the party seeking summary judgment.

Adickes v. S.H. Kress & Co.

398 U.S. 144 (1970)

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioner, Sandra Adickes, a white school teacher from New York, brought this suit in the United States District Court for the Southern District of New York against respondent S. H. Kress & Co. ("Kress") to recover damages under 42 U.S.C. § 1983[1] for an alleged violation of her constitutional rights under the Equal Protection Clause of the Fourteenth Amendment. The suit arises out of Kress' refusal to serve lunch to Miss Adickes at its restaurant facilities in its Hattiesburg, Mississippi, store on August 14, 1964, and Miss Adickes' subsequent arrest upon her departure from the store by the Hattiesburg police on a charge of vagrancy. At the time of both the refusal to serve and the arrest, Miss Adickes was with six young people, all Negroes, who were her students in a Mississippi "Freedom School" where she was teaching that summer. Unlike Miss Adickes, the students were offered service, and were not arrested.

Petitioner's complaint had two counts, each bottomed on § 1983, and each alleging that Kress had deprived her of the right under the Equal Protection Clause of the Fourteenth Amendment not to be discriminated against on the basis of race. […]

The second count of her complaint, alleging that both the refusal of service and her subsequent arrest were the product of a conspiracy between Kress and the

[1] Rev. Stat. § 1979, 42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Hattiesburg police, was dismissed before trial on a motion for summary judgment. The District Court ruled that petitioner had "failed to allege any facts from which a conspiracy might be inferred." This determination was unanimously affirmed by the Court of Appeals.

Miss Adickes, in seeking review here, claims that the District Court erred […] in granting summary judgment on the conspiracy count. [W]e now reverse and remand for further proceedings on each of the two counts.

As explained in Part I, because the respondent failed to show the absence of any disputed material fact, we think the District Court erred in granting summary judgment. […]

I

Briefly stated, the conspiracy count of petitioner's complaint made the following allegations: While serving as a volunteer teacher at a "Freedom School" for Negro children in Hattiesburg, Mississippi, petitioner went with six of her students to the Hattiesburg Public Library at about noon on August 14, 1964. The librarian refused to allow the Negro students to use the library, and asked them to leave. Because they did not leave, the librarian called the Hattiesburg chief of police who told petitioner and her students that the library was closed, and ordered them to leave. From the library, petitioner and the students proceeded to respondent's store where they wished to eat lunch. According to the complaint, after the group sat down to eat, a policeman came into the store "and observed [Miss Adickes] in the company of the Negro students." A waitress then came to the booth where petitioner was sitting, took the orders of the Negro students, but refused to serve petitioner because she was a white person "in the company of Negroes." The complaint goes on to allege that after this refusal of service, petitioner and her students left the Kress store. When the group reached the sidewalk outside the store, "the Officer of the Law who had previously entered [the] store" arrested petitioner on a groundless charge of vagrancy and took her into custody.

On the basis of these underlying facts petitioner alleged that Kress and the Hattiesburg police had conspired (1) "to deprive [her] of her right to enjoy equal treatment and service in a place of public accommodation"; and (2) to cause her arrest "on the false charge of vagrancy."

[…]

SUMMARY JUDGMENT

We now proceed to consider whether the District Court erred in granting summary judgment on the conspiracy count. In granting respondent's motion, the District Court simply stated that there was "no evidence in the complaint or in the affidavits and other papers from which a 'reasonably-minded person' might draw an inference of conspiracy." Our own scrutiny of the factual allegations of petitioner's complaint, as well as the material found in the affidavits and depositions presented by Kress to the District Court, however, convinces us that summary judgment was improper here, for we think respondent failed

to carry its burden of showing the absence of any genuine issue of fact. Before explaining why this is so, it is useful to state the factual arguments, made by the parties concerning summary judgment, and the reasoning of the courts below.

In moving for summary judgment, Kress argued that "uncontested facts" established that no conspiracy existed between any Kress employee and the police. To support this assertion, Kress pointed first to the statements in the deposition of the store manager (Mr. Powell) that (a) he had not communicated with the police, and that (b) he had, by a prearranged tacit signal, ordered the food counter supervisor to see that Miss Adickes was refused service only because he was fearful of a riot in the store by customers angered at seeing a "mixed group" of whites and blacks eating together. Kress also relied on affidavits from the Hattiesburg chief of police, and the two arresting officers, to the effect that store manager Powell had not requested that petitioner be arrested. Finally, Kress pointed to the statements in petitioner's own deposition that she had no knowledge of any communication between any Kress employee and any member of the Hattiesburg police, and was relying on circumstantial evidence to support her contention that there was an arrangement between Kress and the police.

Petitioner, in opposing summary judgment, pointed out that respondent had failed in its moving papers to dispute the allegation in petitioner's complaint, a statement at her deposition, and an unsworn statement by a Kress employee, all to the effect that there was a policeman in the store at the time of the refusal to serve her, and that this was the policeman who subsequently arrested her. Petitioner argued that although she had no knowledge of an agreement between Kress and the police, the sequence of events created a substantial enough possibility of a conspiracy to allow her to proceed to trial, especially given the fact that the non-circumstantial evidence of the conspiracy could only come from adverse witnesses. Further, she submitted an affidavit specifically disputing the manager's assertion that the situation in the store at the time of the refusal was "explosive," thus creating an issue of fact as to what his motives might have been in ordering the refusal of service.

We think that on the basis of this record, it was error to grant summary judgment. As the moving party, respondent had the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party. Respondent here did not carry its burden because of its failure to foreclose the possibility that there was a policeman in the Kress store while petitioner was awaiting service, and that this policeman reached an understanding with some Kress employee that petitioner not be served.

It is true that Mr. Powell, the store manager, claimed in his deposition that he had not seen or communicated with a policeman prior to his tacit signal to Miss Baggett, the supervisor of the food counter. But respondent did not submit any affidavits from Miss Baggett, or from Miss Freeman, the waitress who actually refused petitioner service, either of whom might well have seen and communicated with a policeman in the store. Further, we find it particularly noteworthy

that the two officers involved in the arrest each failed in his affidavit to foreclose the possibility (1) that he was in the store while petitioner was there; and (2) that, upon seeing petitioner with Negroes, he communicated his disapproval to a Kress employee, thereby influencing the decision not to serve petitioner.

Given these unexplained gaps in the materials submitted by respondent, we conclude that respondent failed to fulfill its initial burden of demonstrating what is a critical element in this aspect of the case—that there was no policeman in the store. If a policeman were present, we think it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and a Kress employee had a "meeting of the minds" and thus reached an understanding that petitioner should be refused service. Because "[o]n summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion," we think respondent's failure to show there was no policeman in the store requires reversal.

Pointing to Rule 56(e), as amended in 1963,[18] respondent argues that it was incumbent on petitioner to come forward with an affidavit properly asserting the presence of the policeman in the store, if she were to rely on that fact to avoid summary judgment. Respondent notes in this regard that none of the materials upon which petitioner relied met the requirements of Rule 56(e).

This argument does not withstand scrutiny, however, for both the commentary on and background of the 1963 amendment conclusively show that it was not intended to modify the burden of the moving party under Rule 56([a]) to show initially the absence of a genuine issue concerning any material fact.[20] The Advisory Committee note on the amendment states that the changes were not designed to "affect the ordinary standards applicable to the summary judgment." And, in a comment directed specifically to a contention like respondent's the Committee stated that "[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented." Because respondent did not meet its initial burden of establishing the absence of a policeman in the store, petitioner here was not required to come forward with suitable opposing affidavits.

If respondent had met its initial burden by, for example, submitting affidavits from the policemen denying their presence in the store at the time in question, Rule 56(e) would then have required petitioner to have done more than simply rely on the contrary allegation in her complaint. To have avoided conceding this fact for purposes of summary judgment, petitioner would have had to come forward with either (1) the affidavit of someone who saw the policeman in the store or (2) an affidavit under Rule 56([d]) explaining why at that time it was impractical to do so. Even though not essential here to defeat respondent's motion, the submission of such an affidavit would have been the preferable course for petitioner's counsel to have followed. As one commentator has said:

[18] The amendment added the following to Rule 56(e):

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

[Ed. note: the 2010 amendments moved the substance of this part of Rule 56(e) to Rule 56(c)(1).]

[20] The purpose of the 1963 amendment was to overturn a line of cases, primarily in the Third Circuit, that had held that a party opposing summary judgment could successfully create a dispute as to a material fact asserted in an affidavit by the moving party simply by relying on a contrary allegation in a well-pleaded complaint. *E.g.*, *Frederick Hart & Co. v. Recordgraph Corp.*, 169 F.2d 580 ([3d Cir.]1948); *United States ex rel. Kolton v. Halpern*, 260 F.2d 590 ([3d Cir.] 1958). *See* Advisory Committee Note on 1963 Amendment to subdivision (e) of Rule 56.

> "It has always been perilous for the opposing party neither to proffer any countering evidentiary materials nor file a 56([d]) affidavit. And the peril rightly continues [after the amendment to Rule 56(e)]. Yet the party moving for summary judgment has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden then he is not entitled to judgment. No defense to an insufficient showing is required."

6 J. Moore, Federal Practice ¶ 56.22 [2], pp. 2824–2825 (2d ed. 1966).

[…]

The judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the decision of this case.

MR. JUSTICE BLACK, concurring in the judgment.

The petitioner, Sandra Adickes, brought suit against the respondent, S. H. Kress & Co., to recover damages for alleged violations of 42 U.S.C. § 1983. In one count of her complaint she alleged that a police officer of the City of Hattiesburg, Mississippi, had conspired with employees of Kress to deprive her of rights secured by the Constitution and that this joint action of a state official and private individuals was sufficient to constitute a violation of § 1983. […] The trial judge granted a motion for summary judgment in favor of Kress on the conspiracy allegation […]. [That decision] rested on [the] conclusion[] that there were no issues of fact supported by sufficient evidence to require a jury trial. I think the trial court and the Court of Appeals which affirmed were wrong in allowing summary judgment on the conspiracy allegation. […] In my judgment, on this record, petitioner should have been permitted to have the jury consider […] her claims.

Summary judgments may be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact … ." Fed. Rule Civ. Proc. 56([a]). Petitioner in this case alleged that she went into Kress in the company of Negroes and that the waitress refused to serve her, stating "[w]e have to serve the colored, but we are not going to serve the whites that come in with them." Petitioner then alleged that she left the store with her friends and as soon as she stepped outside a policeman arrested her and charged her with vagrancy. On the basis of these facts she argued that there was a conspiracy between the store and the officer to deprive her of federally protected rights. The store filed affidavits denying any such conspiracy and the trial court granted the motion for summary judgment, concluding that petitioner had not alleged any basic facts sufficient to support a finding of conspiracy.

The existence or nonexistence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide. In this case petitioner may have had to prove her case by impeaching the store's witnesses and appealing to

the jury to disbelieve all that they said was true in the affidavits. The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases. The advantages of trial before a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment. "It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.' "

Notes & Questions

1. What was S.H. Kress's argument for why there was no genuine dispute as to any material fact? Did Kress rely on its own evidence or legal argument?
2. What evidence did Adickes present to resist summary judgment?
3. Did the Court find that there was an agreement between the police and the store employees? If not, why did the Court hold that summary judgment was not appropriate?
4. With summary judgment motions, as with all motions, the party filing the motion has the burden of persuasion. If the moving party can't convince the court to grant summary judgment, it will lose. But there is another kind of burden: a burden of production. And unlike the burden of persuasion, the burden of production can shift from the moving party to the nonmoving party. It does so when the moving party has made a *prima facie* showing that there is no genuine dispute as to any material fact. At that point, the burden of production shifts to the non-moving party, who then must come forward with evidence of her own showing that there is, in material fact, a genuine dispute. The next case, which stands in significant tension with *Adickes*, explores what Rule 56 demands of a party seeking summary judgment before the burden of production will shift.

Celotex Corp. v. Catrett

JUSTICE REHNQUIST delivered the opinion of the Court. 477 U.S. 317 (1986)

[…] Respondent commenced this lawsuit in September 1980, alleging that the death in 1979 of her husband, Louis H. Catrett, resulted from his exposure to products containing asbestos manufactured or distributed by 15 named corporations. Respondent's complaint sounded in negligence, breach of warranty, and strict liability. […] Petitioner's motion [for summary judgment] […] argued that summary judgment was proper because respondent had "failed to produce evidence that any [Celotex] product … was the proximate cause of the

injuries alleged […]." In particular, petitioner noted that respondent had failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to petitioner's asbestos products. In response to petitioner's summary judgment motion, respondent then produced three documents which she claimed "demonstrate that there is a genuine material factual dispute" as to whether the decedent had ever been exposed to petitioner's asbestos products. The three documents included a transcript of a deposition of the decedent, a letter from an official of one of the decedent's former employers whom petitioner planned to call as a trial witness, and a letter from an insurance company to respondent's attorney, all tending to establish that the decedent had been exposed to petitioner's asbestos products in Chicago during 1970–1971. Petitioner, in turn, argued that the three documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion.

[…] [T]he District Court granted […] [the] motion because "there [was] no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period." [The court of appeals reversed.] According to the majority, Rule 56(e) of the Federal Rules of Civil Procedure, and this Court's decision in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970), establish that "the party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." The majority therefore declined to consider petitioner's argument that none of the evidence produced by respondent in opposition to the motion for summary judgment would have been admissible at trial. […]

We think that the position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56([a]) of the Federal Rules of Civil Procedure. […] In our view, the plain language of Rule 56([a]) mandates the entry of summary judgment, after adequate time for discovery […] against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[The] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) … ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of ["particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations … admissions, interrogatory answers [quoting Rule 56(c)(1)]"] which it believes demonstrate the absence of a genuine issue

* [Quoting the text of rule 56(c) at the time. –*Ed.*]

of material [dispute]. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, *if any*"* (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide that claimants and defendants, respectively, may move for summary judgment "*with or without supporting affidavits*" (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.

[…]

We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves […].

The Court of Appeals in this case felt itself constrained, however, by language in our decision in *Adickes*. There we held that summary judgment had been improperly entered in favor of the defendant restaurant in an action brought under 42 U.S.C. § 1983. In the course of its opinion, the *Adickes* Court said that "both the commentary on and the background of the 1963 amendment conclusively show that it was not intended to modify the burden of the moving party … to show initially the absence of a genuine issue concerning any material fact." We think that this statement is accurate in a literal sense […]. But we do not think the *Adickes* language quoted above should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by "showing"—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.

[…]

Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte,* so long as the losing party was on notice that she had to come forward with all of her evidence. It would surely defy common sense to hold that the District Court could have entered summary judgment *sua sponte* in favor of petitioner in the

instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it.

Respondent commenced this action in September 1980, and petitioner's motion was filed in September 1981. The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

In this Court, respondent's brief and oral argument have been devoted as much to the proposition that an adequate showing of exposure to petitioner's asbestos products was made as to the proposition that no such showing should have been required. But the Court of Appeals declined to address either […]. We think the Court of Appeals with its superior knowledge of local law is better suited than we are to make these determinations in the first instance.

[…] Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed. Rule Civ. Proc. 1. Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, concurring.

[I agree with the Court's holding, but write separately to emphasize that] the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.

[…] Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex['s] somehow showing that the named witness' possible testimony raises no genuine issue of material fact. It asserts, however, that respondent has failed on request

to produce any basis for her case. Respondent, on the other hand, does not contend that she was not obligated to reveal her witnesses and evidence but insists that she has revealed enough to defeat the motion for summary judgment. Because the Court of Appeals found it unnecessary to address this aspect of the case, I agree that the case should be remanded for further proceedings.

JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and JUSTICE BLACKMUN join, dissenting.

[…]

Notes & Questions

1. What was Celotex's argument for why there was no genuine dispute as to any material fact? Did Celotex rely on its own evidence or legal argument?
2. What evidence did Catrett present to resist summary judgment? What did the Court say was wrong with that evidence? Why wasn't it enough to defeat summary judgment?
3. *Celotex* was one of a trilogy of summary judgment cases decided by the Supreme Court in 1986. Each is important.
    - *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), is to summary judgment as *Bell Atlantic Corp. v. Twombly* is to the motion to dismiss for failure to state claim. Both cases held, in their respective procedural postures, that only a *plausible* showing of conspiracy will be enough to survive dismissal. In *Matsushita*, the plaintiffs offered circumstantial evidence of a conspiracy, which the court rejected because the same evidence was consistent with parallel conduct, which is lawful.
    - *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), clarified that courts ruling on a motion for summary judgment must apply the standard of proof that would apply at trial. The claims in *Anderson* sounded in libel, which carries a heighted burden of proof on the plaintiff: clear and convincing evidence. The Court held that a plaintiff held to such a standard of proof must satisfy it to win summary judgment.

Tolan v. Cotton

PER CURIAM. 550 U.S. 372 (2007)

During the early morning hours of New Year's Eve, 2008, police sergeant Jeffrey Cotton fired three bullets at Robert Tolan; one of those bullets hit its target and punctured Tolan's right lung. At the time of the shooting, Tolan was unarmed on his parents' front porch about 15 to 20 feet away from Cotton. Tolan sued,

alleging that Cotton had exercised excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Cotton. In articulating the factual context of the case, the Fifth Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). For that reason, we vacate its decision and remand the case for further proceedings consistent with this opinion.

I

A

The following facts, which we view in the light most favorable to Tolan, are taken from the record evidence and the opinions below. At around 2:00 on the morning of December 31, 2008, John Edwards, a police officer, was on patrol in Bellaire, Texas, when he noticed a black Nissan sport utility vehicle turning quickly onto a residential 580street. The officer watched the vehicle park on the side of the street in front of a house. Two men exited: Tolan and his cousin, Anthony Cooper.

Edwards attempted to enter the license plate number of the vehicle into a computer in his squad car. But he keyed an incorrect character; instead of entering plate number 696BGK, he entered 695BGK. That incorrect number matched a stolen vehicle of the same color and make. This match caused the squad car's computer to send an automatic message to other police units, informing them that Edwards had found a stolen vehicle.

Edwards exited his cruiser, drew his service pistol and ordered Tolan and Cooper to the ground. He accused Tolan and Cooper of having stolen the car. Cooper responded, "That's not true." And Tolan explained, "That's my car." Tolan then complied with the officer's demand to lie face-down on the home's front porch.

As it turned out, Tolan and Cooper were at the home where Tolan lived with his parents. Hearing the commotion, Tolan's parents exited the front door in their pajamas. In an attempt to keep the misunderstanding from escalating into something more, Tolan's father instructed Cooper to lie down, and instructed Tolan and Cooper to say nothing. Tolan and Cooper then remained face-down.

Edwards told Tolan's parents that he believed Tolan and Cooper had stolen the vehicle. In response, Tolan's father identified Tolan as his son, and Tolan's mother explained that the vehicle belonged to the family and that no crime had been committed. Tolan's father explained, with his hands in the air, "[T]his is my nephew. This is my son. We live here. This is my house." Tolan's mother similarly offered, "[S]ir this is a big mistake. This car is not stolen. … That's our car."

While Tolan and Cooper continued to lie on the ground in silence, Edwards radioed for assistance. Shortly thereafter, Sergeant Jeffrey Cotton arrived on the scene and drew his pistol. Edwards told Cotton that Cooper and Tolan had

exited a stolen vehicle. Tolan's mother reiterated that she and her husband owned both the car Tolan had been driving and the home where these events were unfolding. Cotton then ordered her to stand against the family's garage door. In response to Cotton's order, Tolan's mother asked, "[A]re you kidding me? We've lived her[e] 15 years. We've never had anything like this happen before."

The parties disagree as to what happened next. Tolan's mother and Cooper testified during Cotton's criminal trial that Cotton grabbed her arm and slammed her against the garage door with such force that she fell to the ground. Tolan similarly testified that Cotton pushed his mother against the garage door. In addition, Tolan offered testimony from his mother and photographic evidence to demonstrate that Cotton used enough force to leave bruises on her arms and back that lasted for days. By contrast, Cotton testified in his deposition that when he was escorting the mother to the garage, she flipped her arm up and told him to get his hands off her. He also testified that he did not know whether he left bruises but believed that he had not.

The parties also dispute the manner in which Tolan responded. Tolan testified in his deposition and during the criminal trial that upon seeing his mother being pushed, he rose to his knees. Edwards and Cotton testified that Tolan rose to his feet.

Both parties agree that Tolan then exclaimed, from roughly 15 to 20 feet away, "[G]et your fucking hands off my mom." The parties also agree that Cotton then drew 581his pistol and fired three shots at Tolan. Tolan and his mother testified that these shots came with no verbal warning. One of the bullets entered Tolan's chest, collapsing his right lung and piercing his liver. While Tolan survived, he suffered a life-altering injury that disrupted his budding professional baseball career and causes him to experience pain on a daily basis.

B

In May 2009, Cooper, Tolan, and Tolan's parents filed this suit in the Southern District of Texas, alleging claims under Rev. Stat. § 1979, 42 U.S.C. § 1983. Tolan claimed, among other things, that Cotton had used excessive force against him in violation of the Fourth Amendment. After discovery, Cotton moved for summary judgment.

The District Court granted summary judgment to Cotton. […] The Fifth Circuit affirmed […]. […]

In reaching this conclusion, the Fifth Circuit began by noting that at the time Cotton shot Tolan, "it was … clearly established that an officer had the right to use deadly force if that officer harbored an objective and reasonable belief that a suspect presented an 'immediate threat to [his] safety.' " The Court of Appeals reasoned that Tolan failed to overcome th[at] bar because "an objectively-reasonable officer in Sergeant Cotton's position could have … believed" that Tolan "presented an 'immediate threat to the safety of the officers.' " In support of this conclusion, the court relied on the following facts: the front porch had been "dimly-lit"; Tolan's mother had "refus[ed] orders to remain quiet

and calm"; and Tolan's words had amounted to a "verba[l] threa[t]." Most critically, the court also relied on the purported fact that Tolan was "moving to intervene in" Cotton's handling of his mother, and that Cotton therefore could reasonably have feared for his life. Accordingly, the court held, Cotton did not violate clearly established law in shooting Tolan. […]

II

[…]

B

In holding that Cotton's actions did not violate clearly established law, the Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case. By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly "weigh[ed] the evidence" and resolved disputed issues in favor of the moving party, *Anderson*, 477 U.S., at 249.

First, the court relied on its view that at the time of the shooting, the Tolans' front porch was "dimly-lit." The court appears to have drawn this assessment from Cotton's statements in a deposition that when he fired at Tolan, the porch was " 'fairly dark,' " and lit by a gas lamp that was " 'decorative.' " In his own deposition, however, Tolan's father was asked whether the gas lamp was in fact "more decorative than illuminating." He said that it was not. Moreover, Tolan stated in his deposition that two floodlights shone on the driveway during the incident, and Cotton acknowledged that there were two motion-activated lights in front of the house. And Tolan confirmed that at the time of the shooting, he was "not in darkness."

Second, the Fifth Circuit stated that Tolan's mother "refus[ed] orders to remain quiet and calm," thereby "compound[ing]" Cotton's belief that Tolan "presented an immediate threat to the safety of the officers." But here, too, the court did not credit directly contradictory evidence. Although the parties agree that Tolan's mother repeatedly informed officers that Tolan was her son, that she lived in the home in front of which he had parked, and that the vehicle he had been driving belonged to her and her husband, there is a dispute as to how calmly she provided this information. Cotton stated during his deposition that Tolan's mother was "very agitated" when she spoke to the officers. By contrast, Tolan's mother testified at Cotton's criminal trial that she was neither "aggravated" nor "agitated."

Third, the Court concluded that Tolan was "shouting," and "verbally threatening" the officer, in the moments before the shooting. The court noted, and the parties agree, that while Cotton was grabbing the arm of his mother, Tolan told Cotton, "[G]et your fucking hands off my mom." But Tolan testified that he "was not screaming." And a jury could reasonably infer that his words, in context, did not amount to a statement of intent to inflict harm. Tolan's mother testified in Cotton's criminal trial that he slammed her against a garage door with enough force to cause bruising that lasted for days. A jury could well have

concluded that a reasonable officer would have heard Tolan's words not as a threat, but as a son's plea not to continue any assault of his mother.

Fourth, the Fifth Circuit inferred that at the time of the shooting, Tolan was "moving to intervene in Sergeant Cotton's" interaction with his mother. The court appears to have credited Edwards' account that at the time of the shooting, Tolan was on both feet "[i]n a crouch" or a "charging position" looking as if he was going to move forward. Tolan testified at trial, however, that he was on his knees when Cotton shot him, a fact corroborated by his mother. Tolan also testified in his deposition that he "wasn't going anywhere," and emphasized that he did not "jump up."

Considered together, these facts lead to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion. And while "this Court is not equipped to correct every perceived error coming from the lower federal courts," we intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents.

The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the non-moving party.

Applying that principle here, the court should have acknowledged and credited Tolan's evidence with regard to the lighting, his mother's demeanor, whether he shouted words that were an overt threat, and his positioning during the shooting. […]

The judgment of the United States Court of Appeals for the Fifth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

Justice ALITO, with whom Justice SCALIA joins, concurring in the judgment.

[Omitted.]

Notes & Questions

1. According to the Court, what was the problem with the Fifth Circuit's analysis? Which evidence did the Fifth Circuit improperly consider?
2. The *Tolan* case illustrates how fact-bound summary judgment motions can be. Nearly all of the testimony at issue in the case was elicited during depositions that were taken during the discovery process. Consider how

numerous and detailed the questions must have been in order to draw out the key testimony.

Bias v. Advantage Int'l, Inc.

905 F.2d 1558 (D.C. Cir. 1990)

SENTELLE, Circuit Judge:

This case arises out of the tragic death from cocaine intoxication of University of Maryland basketball star Leonard K. Bias ("Bias"). James Bias, as Personal Representative of the Estate of Leonard K. Bias, deceased ("the Estate"), appeals an order of the District Court for the District of Columbia which granted summary judgment to defendants Advantage International, Inc. ("Advantage") and A. Lee Fentress […]. […] For the reasons which follow, we affirm […]. […]

I. Background

On April 7, 1986, after the close of his college basketball career, Bias entered into a representation agreement with Advantage whereby Advantage agreed to advise and represent Bias in his affairs. Fentress was the particular Advantage representative servicing the Bias account. On June 17 of that year Bias was picked by the Boston Celtics in the first round of the National Basketball Association draft. On the morning of 584June 19, 1986, Bias died of cocaine intoxication. The Estate sued Advantage and Fentress for […] injuries allegedly arising out of the representation arrangement between Bias and the defendants.

[T]he Estate alleges that, prior to Bias's death, Bias and his parents directed Fentress to obtain a one-million dollar life insurance policy on Bias's life, that Fentress represented to Bias and Bias's parents that he had secured such a policy, and that in reliance on Fentress's assurances, Bias's parents did not independently seek to buy an insurance policy on Bias's life. […] [D]efendants […] did not secure any life insurance coverage for Bias prior to his death.

[…]

The District Court awarded the defendants summary judgment […]. With respect to the [life insurance] claim, the District Court held, in effect, that the Estate did not suffer any damage from the defendants' alleged failure to obtain life insurance for Bias because, even if the defendants had tried to obtain a one-million dollar policy on Bias's life, they would not have been able to do so. The District Court based this conclusion on the facts, about which it found no genuine issue, that Bias was a cocaine user and that no insurer in 1986 would have issued a one-million dollar life insurance policy, or "jumbo" policy, to a cocaine user unless the applicant made a misrepresentation regarding the applicant's use of drugs, thereby rendering the insurance policy void.

[…]

The Estate appeals […] the District Court's conclusions, arguing that there is a genuine issue as to Bias's insurability […].

II. Summary Judgment Standard

[…] The Supreme Court has stated that the moving party always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*. The Supreme Court also explained that summary judgment is appropriate, no matter which party is the moving party, where a party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Thus, the moving party must explain its reasons for concluding that the record does not reveal any genuine issues of material fact, and must make a showing supporting its claims insofar as those claims involve issues on which it will bear the burden at trial.

Once the moving party has carried its burden, the responsibility then shifts to the nonmoving party to show that there is, in fact, a genuine issue of material fact. The Supreme Court has directed that the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). The nonmoving party "must come forward with 'specific facts showing that there is a *genuine issue for trial*.' " (emphasis in original). In evaluating the nonmovant's proffer, a court must of course draw from the evidence all justifiable inferences in favor of the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

III. The Insurance Issue

The District Court's determination that there was no genuine issue involving Bias's insurability rests on two subsidiary conclusions: First, the District Court concluded that there was no genuine issue as to the fact that Bias was a drug user. Second, the District Court held that there was no dispute about the fact that as a drug user, Bias could not have obtained a jumbo life insurance policy. We can only affirm the District Court's award of summary judgment to the defendants on the insurance issue if both of these conclusions were correct.

A. Bias's Prior Drug Use

The defendants in this case offered the eyewitness testimony of two former teammates of Bias, Terry Long and David Gregg, in order to show that Bias was a cocaine user during the period prior to his death. Long and Gregg both described numerous occasions when they saw Bias ingest cocaine, and Long testified that he was introduced to cocaine by Bias and that Bias sometimes supplied others with cocaine.

Although on appeal the Estate attempts to discredit the testimony of Long and Gregg, the Estate did not seek to impeach the testimony of these witnesses before the District Court, and the Estate made no effort to depose these witnesses. Instead, the Estate offered affidavits from each of Bias's parents stating that Bias was not a drug user; the deposition testimony of Bias's basketball coach, Charles "Lefty" Driesell, who testified that he knew Bias well for four years and never knew Bias to be a user of drugs at any time prior to his death; and the results of several drug tests administered to Bias during the four years prior to his death which may have shown that, on the occasions when the tests were

administered, there were no traces in Bias's system of the drugs for which he was tested.

Because the Estate's generalized evidence that Bias was not a drug user did not contradict the more specific testimony of teammates who knew Bias well and had seen him use cocaine on particular occasions, the District Court determined that there was no genuine issue as to the fact that Bias was a drug user. We agree.

There is no question that the defendants satisfied their initial burden on the issue of Bias's drug use. The testimony of Long and Gregg clearly tends to show that Bias was a cocaine user. We also agree with the District Court that the Estate did not rebut the defendants' showing. The testimony of Bias's parents to the effect that they knew Bias well and did not know him to be a drug user does not rebut the Long and Gregg testimony about Bias's drug use on particular occasions. The District Court properly held that rebuttal testimony either must come from persons familiar with the particular events to which the defendants' witnesses testified or must otherwise cast more than metaphysical doubt on the credibility of that testimony. Bias's parents and coach did not have personal knowledge of Bias's activities at the sorts of parties and gatherings about which Long and Gregg testified. The drug test results offered by the Estate may show that Bias had no cocaine in his system on the dates when the tests were administered, but, as the District Court correctly noted, these tests speak only to Bias's abstention during the periods preceding the tests. The tests do not rebut the Long and Gregg testimony that on a number of occasions Bias ingested cocaine in their presence.

The Estate could have deposed Long and Gregg, or otherwise attempted to impeach their testimony. The Estate also could have offered the testimony of other friends or teammates of Bias who were present at some of the gatherings described by Long and Gregg, who went out with Bias frequently, or who were otherwise familiar with his social habits. The Estate did none of these things. The Estate is not entitled to reach the jury merely on the supposition that the jury might not believe the defendants' witnesses. We thus agree with the District Court that there was no genuine issue of fact concerning Bias's status as a cocaine user.

B. The Availability of a Jumbo Policy in Light of Bias's Prior Drug Use

The defendants offered evidence that *every* insurance company inquires about the prior drug use of an applicant for a jumbo policy at *some point* in the application process […].

[…]

The Estate's evidence that some insurance companies existed in 1986 which did not inquire about prior drug use at certain particular stages in the application process does not undermine the defendant's claim that at *some* point in the process *every* insurance company did inquire about drug use, particularly where a jumbo policy was involved. The Estate failed to name a single particular company or provide other evidence that a single company existed which

would have issued a jumbo policy in 1986 without inquiring about the applicant's drug use. Because the Estate has failed to do more than show that there is "some metaphysical doubt as to the material facts," *Matsushita Elec.*, the District Court properly concluded that there was no genuine issue of material fact as to the insurability of a drug user.

[…]

In order to withstand a summary judgment motion once the moving party has made a prima facie showing to support its claims, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The Estate has failed to come forward with such facts in this case, relying instead on bare arguments and allegations or on evidence which does not actually create a genuine issue for trial. For this reason, we affirm the District Court's award of summary judgment to the defendants in this case.

Notes & Questions

1. Which element of the Biases' case did Advantage target with its summary judgment motion?
2. Why did the court say that the Biases' evidence was not enough to create a genuine dispute as to a material fact? What evidence might have helped the Biases' argument? How could they have gotten that evidence?

Scott v. Harris

Justice Scalia delivered the opinion of the Court.

550 U.S. 372 (2007)

We consider whether a law enforcement official can, consistent with the Fourth Amendment, attempt to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist's car from behind. Put another way: Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?

I

In March 2001, a Georgia county deputy clocked respondent's vehicle traveling at 73 miles per hour on a road with a 55-mile-per-hour speed limit. The deputy activated his blue flashing lights indicating that respondent should pull over. Instead, respondent sped away, initiating a chase down what is in most portions a two-lane road, at speeds exceeding 85 miles per hour. The deputy radioed his dispatch to report that he was pursuing a fleeing vehicle, and broadcast its license plate number. Petitioner, Deputy Timothy Scott, heard the radio communication and joined the pursuit along with other officers. In the midst of the chase, respondent pulled into the parking lot of a shopping center and was

nearly boxed in by the various police vehicles. Respondent evaded the trap by making a sharp turn, colliding with Scott's police car, exiting the parking lot, and speeding off once again down a two-lane highway.

Following respondent's shopping center maneuvering, which resulted in slight damage to Scott's police car, Scott took over as the lead pursuit vehicle. Six minutes and nearly 10 miles after the chase had begun, Scott decided to attempt to terminate the episode by employing a "Precision Intervention Technique ('PIT') maneuver, which causes the fleeing vehicle to spin to a stop." Having radioed his supervisor for permission, Scott was told to " '[g]o ahead and take him out.' " Instead, Scott applied his push bumper to the rear of respondent's vehicle. As a result, respondent lost control of his vehicle, which left the roadway, ran down an embankment, overturned, and crashed. Respondent was badly injured and was rendered a quadriplegic.

Respondent filed suit against Deputy Scott and others under Rev. Stat. § 1979, 42 U.S.C. § 1983, alleging, *inter alia*, a violation of his federal constitutional rights, viz. use of excessive force resulting in an unreasonable seizure under the Fourth Amendment. In response, Scott filed a motion for summary judgment based on an assertion of qualified immunity. The District Court denied the motion, finding that "there are material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury." On interlocutory appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's decision to allow respondent's Fourth Amendment claim against Scott to proceed to trial. Taking respondent's view of the facts as given, the Court of Appeals concluded that Scott's actions could constitute "deadly force" under *Tennessee v. Garner*, and that the use of such force in this context "would violate [respondent's] constitutional right to be free from excessive force during a seizure. Accordingly, a reasonable jury could find that Scott violated [respondent's] Fourth Amendment rights." The Court of Appeals further concluded that "the law as it existed [at the time of the incident], was sufficiently clear to give reasonable law enforcement officers 'fair notice' that ramming a vehicle under these circumstances was unlawful." The Court of Appeals thus concluded that Scott was not entitled to qualified immunity. We granted certiorari and now reverse.

[…]

III

A

The first step in assessing the constitutionality of Scott's actions is to determine the relevant facts. As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury, and respondent's version of events (unsurprisingly) differs substantially from Scott's version. When things are in such a posture, courts are required to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion." In qualified immunity cases, this usually means adopting (as the Court of Appeals did here) the plaintiff's version of the facts.

[5] Justice Stevens suggests that our reaction to the videotape is somehow idiosyncratic, and seems to believe we are misrepresenting its contents. *See* post, at 392 (dissenting opinion) ("In sum, the factual statements by the Court of Appeals quoted by the Court … were entirely accurate"). We are happy to allow the videotape to speak for itself See Record 36, Exh. A, available at http://www.supremecourtus.gov/

There is, however, an added wrinkle in this case: existence in the record of a videotape capturing the events in question. There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened. The videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals.[5] For example, the Court of Appeals adopted respondent's assertions that, during the chase, "there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [respondent] remained in control of his vehicle." Indeed, reading the lower court's opinion, one gets the impression that respondent, rather than fleeing from police, was attempting to pass his driving test:

> [T]aking the facts from the non-movant's viewpoint, [respondent] remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed [respondent], the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.

The videotape tells quite a different story. There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts. Fed. Rule Civ. Proc. 56([a]). As we have emphasized, "[w]hen the moving party has carried its burden under Rule 56([a]), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts… . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.* "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.* When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.

B

Judging the matter on that basis, we think it is quite clear that Deputy Scott did not violate the Fourth Amendment. […]

* * *

The car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise. Scott's attempt to terminate the chase by forcing respondent off the road was reasonable, and Scott is entitled to summary judgment. The Court of Appeals' judgment to the contrary is reversed.

It is so ordered.

Justice Stevens, dissenting.

[…]

Relying on a *de novo* review of a videotape of a portion of a nighttime chase on a lightly traveled road in Georgia where no pedestrians or other "bystanders" were present, buttressed by uninformed speculation about the possible consequences of discontinuing the chase, eight of the jurors on this Court reach a verdict that differs from the views of the judges on both the District Court and the Court of Appeals who are surely more familiar with the hazards of driving on Georgia roads than we are. The Court's justification for this unprecedented departure from our well-settled standard of review of factual determinations made by a district court and affirmed by a court of appeals is based on its mistaken view that the Court of Appeals' description of the facts was "blatantly contradicted by the record" and that respondent's version of the events was "so utterly discredited by the record that no reasonable jury could have believed him."

Rather than supporting the conclusion that what we see on the video "resembles a Hollywood-style car chase of the most frightening sort,"[1] the tape actually confirms, rather than contradicts, the lower courts' appraisal of the factual questions at issue. More importantly, it surely does not provide a principled basis for depriving the respondent of his right to have a jury evaluate the question whether the police officers' decision to use deadly force to bring the chase to an end was reasonable.

[…]

My colleagues on the jury saw respondent "swerve around more than a dozen other cars," and "force cars traveling in both directions to their respective shoulders," but they apparently discounted the possibility that those cars were already out of the pursuit's path as a result of hearing the sirens. Even if that

[1] I can only conclude that my colleagues were unduly frightened by two or three images on the tape that looked like bursts of lightning or explosions, but were in fact merely the headlights of vehicles zooming by in the opposite lane. Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways—when split-second judgments about the risk of passing a slowpoke in the face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately.

were not so, passing a slower vehicle on a two-lane road always involves some degree of swerving and is not especially dangerous if there are no cars coming from the opposite direction. At no point during the chase did respondent pull into the opposite lane other than to pass a car in front of him; he did the latter no more than five times and, on most of those occasions, used his turn signal. On none of these occasions was there a car traveling in the opposite direction. In fact, at one point, when respondent found himself behind a car in his own lane and there were cars traveling in the other direction, he slowed and waited for the cars traveling in the other direction to pass before overtaking the car in front of him while using his turn signal to do so. This is hardly the stuff of Hollywood. To the contrary, the video does not reveal any incidents that could even be remotely characterized as "close calls."

[…]

Whether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury. Here, the Court has usurped the jury's factfinding function and, in doing so, implicitly labeled the four other judges to review the case unreasonable. It chastises the Court of Appeals for failing to "vie[w] the facts in the light depicted by the videotape" and implies that no reasonable person could view the videotape and come to the conclusion that deadly force was unjustified. However, the three judges on the Court of Appeals panel apparently did view the videotapes entered into evidence and described a very different version of events:

> At the time of the ramming, apart from speeding and running two red lights, Harris was driving in a non-aggressive fashion (*i.e.*, without trying to ram or run into the officers). Moreover, … Scott's path on the open highway was largely clear. The videos introduced into evidence show little to no vehicular (or pedestrian) traffic, allegedly because of the late hour and the police blockade of the nearby intersections. Finally, Scott issued absolutely no warning (*e.g.*, over the loudspeaker or otherwise) prior to using deadly force.

If two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events. […]

In my judgment, jurors in Georgia should be allowed to evaluate the reasonableness of the decision to ram respondent's speeding vehicle in a manner that created an obvious risk of death and has in fact made him a quadriplegic at the age of 19.

I respectfully dissent.

Notes & Questions

1. The typical rule on summary judgment is that the court must take the non-moving party's evidence as true and make all reasonable inferences therefrom in the non-moving party's favor. How does *Scott v. Harris* change that rule? On what basis does it do so?

2. Justice Stevens was the lone dissenter. What do you think he meant by referring to the majority as "[m]y colleagues on the jury"? His dissent notes that all three judges on the Court of Appeals agreed with him about what the video depicted. If so, couldn't a reasonable jury do so as well? For some eye-opening reasons to think the answer is yes, see Dan M. Kahan, David A. Hoffman, & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 Harv. L. Rev. 837, 866 (2009) (finding that 26% of people who viewed the video recording thought deadly force was not justified in the case).

3. Is the holding in *Scott v. Harris* unique to video evidence? Would it apply to other kinds of audiovisual evidence? In other words, what kind of evidence is enough to "blatantly contradict[]" evidence to the contrary?

7. Trial & Appeal

[To come.]

8. Respect for Judgments

8.1. Claim Preclusion

When a case is over and appeals are exhausted, the result is a judgment. A judgment is an order from a court stating who won and who lost. Unlike untested claims, judgments have the force of law. A victorious party can enforce a judgment against a losing party to take property, garnish wages, or force compliance on pain of contempt. Judgments don't just benefit victorious plaintiffs, though; they also protect victorious defendants from having to fend off an identical lawsuit all over again.

Doctrines of former adjudication protect the finality of judgments by preventing parties from relitigating claims or issues that have already been adjudicated. We will study two such doctrines in some depth: claim preclusion (formerly known as *res judicata*) and issue preclusion (formerly known as collateral estoppel). It is critical that you pay attention to the similarities and differences between these two doctrines. It is also important to beware that the rules of claim and issue preclusion have changed over time; the general trend is to give greater preclusive effect than has been true in the past.

We begin with claim preclusion, which bars relitigation of claims between the same parties. In recent decades, claim preclusion grew to bar claims that *could have been* but *were not* brought in a prior suit. The next case shows some of the scars of that change.

Frier v. City of Vandalia, Ill.

EASTERBROOK, J.

770 F.2d 699 (7th Cir. 1985)

The City of Vandalia is fairly small (the population is less than 2,500), and apparently its police have maintained informal ways. When Charles Frier parked one of his cars in a narrow street, which forced others to drive on someone else's lawn to get around Frier's car, the police left two notes at Frier's house asking him to move the car. That did not work, so an officer called a local garage, which towed the car back to the garage. The officer left a note, addressed to "Charlie," telling him where he could find the car. The officer did not issue a citation for illegal parking, however; he later testified that he wanted to make it easier for Frier to retrieve the car.

Frier balked at paying the $10 fee the garage wanted. He also balked at keeping his cars out of the street. The police had garages tow four of them in 1983—a 1963 Ford Falcon, a 1970 Plymouth Duster, a 1971 Opal GT, and a 1971 Dodge van. Instead of paying the garages, Frier filed suits in the courts of Illinois seeking replevin. Each suit named as defendants the City of Vandalia and the garage that had towed the car.

One of the suits (which sought to replevy two cars) was dismissed voluntarily when Frier got his cars back. We do not know whether he paid for the tows and the subsequent daily storage fees or whether the garage thought it cheaper to surrender the cars than to defend the suit. The other two cases were consolidated and litigated. The police testified to the circumstances under which they had called for the tows. The court concluded that the police properly took the cars into the City's possession to remove obstructions to the alley, and it declined to issue the writ of replevin because the City had the right to remove the cars from the street. Frier then retrieved another car;[1] so far as we can tell, a garage still has the 1970 Plymouth Duster.

[1] One garage told Frier he could come and get his car any time he wanted, without paying a fee.

After losing in state court, Frier turned to federal court. His [federal] complaint maintained that the City had not offered him a hearing either before or after it took the cars and that it is the "official policy" of the City not to do so. The complaint invoked the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983, and it sought equitable relief in addition to $100,000 in compensatory and $100,000 in punitive damages. The district court, after reviewing the transcript of the replevin action, dismissed the complaint for failure to state a claim on which relief may be granted. (Because the judge considered the transcript he should have treated the motion to dismiss as one for summary judgment. We analyze the decision as if he had done so.) The court found that Frier had notice of each tow and knew how to get his cars back. Frier also had a full hearing in the replevin action on the propriety of the tows. Although the judicial hearing came approximately one month after the tows, the court thought the delay permissible.

A month is a long wait for a hearing when the subject is an automobile. The automobile is "property" within the meaning of the Due Process Clause, and the City therefore must furnish appropriate process. *Sutton v. City of Milwaukee*, 672 F.2d 644 (7th Cir. 1982), holds that a hearing is not necessary before the police tow a car but suggests that one must be furnished promptly after the tow. Sutton also suggests, in line with many other cases, that the City must establish the process and tender an opportunity for a hearing; it may not sit back and wait for the aggrieved person to file a suit.

The City, for its part, maintains that a few isolated tows without hearings are not the "policy" of the City and may not be imputed to it, and that anyway a month's delay in holding a hearing about seized property is permissible. […]

A court ought not resolve a constitution[al] dispute unless that is absolutely necessary. Here it is not. Frier had his day in court in the replevin action. The City has argued that this precludes further suits. (The City raised this argument in the motion to dismiss, which is irregular but not fatally so. *See* Fed. R. Civ.

P. 8(c).) The district court bypassed this argument because, it believed, Frier could not have asserted his constitutional arguments in a replevin action. This is only partially correct.

Frier could not have obtained punitive damages or declaratory relief in a suit limited to replevin. But he was free to join one count seeking such relief with another seeking replevin. *See Welch v. Brunswick Corp.*, 10 Ill. App. 3d 693 (1st Dist. 1973), *rev'd in part on other grounds*, 57 Ill. 2d 461 (1974); *Hanaman v. Davis*, 20 Ill. App. 2d 111 (2d Dist. 1959), both of which allow one count seeking replevin to be joined with another count seeking different relief. As we show below, the law of Illinois, which under 28 U.S.C. § 1738 governs the preclusive effect to be given to the judgment in the replevin actions, would bar this suit. The City therefore is entitled to prevail on the ground of claim preclusion, although the district court did not decide the case on that ground.

Illinois recognizes the principles of claim preclusion (also called res judicata or estoppel by judgment). *Jones v. City of Alton*, 757 F.2d 878, 884–85 (7th Cir. 1985) (summarizing the law of preclusion in Illinois). One suit precludes a second "where the parties and the cause of action are identical." "Causes of action are identical where the evidence necessary to sustain a second verdict would sustain the first, *i.e.*, where the causes of action are based upon a common core of operative facts." Two suits may entail the same "cause of action" even though they present different legal theories, and the first suit "operates as an absolute bar to a subsequent action … 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' " […]

The City was a defendant in each replevin action. Frier could have urged constitutional grounds as reasons for replevin. He also could have joined a constitutional claim seeking punitive damages and declaratory relief to his demand for replevin, and therefore he had a full and fair opportunity to litigate […] . The actions also involve both the same "common core of operative facts" and the same transactions. Frier argues that the City towed his cars wrongfully. Each complaint seeking replevin asserted [that] Frier owned each car and that it had not been "seized under lawful process"—in other words, that there had been no citation and no hearing at which anyone had found that the cars were illegally parked. The replevin statute requires a plaintiff to show that the property was taken without "lawful process." Ill. Rev. Stat., ch. 110, § 19-104. "Process," even in its technical sense, initiates or follows a hearing. Had there been process and a hearing at which a magistrate found the cars to have been illegally parked, Frier would have had no claim for replevin no matter how strongly he contested the substantive issue. The "operative facts" in the replevin and § 1983 actions therefore are the same. Frier urges that he owned the car (the property interest) and that the City did not offer him a hearing to adjudicate the legality of his parking (the absence of due process).

The replevin actions diverged from the path of this § 1983 suit only because the state judge adjudicated on the merits the propriety of the seizures. Having found the seizures proper, the judge had no occasion to determine whether the

City should have offered Frier an earlier hearing. But this divergence does not mean that the two legal theories require a different "core of operative facts." […]

To the extent there is any doubt about this, we look […] to the purpose of doctrines of preclusion. Claim preclusion is designed to impel "parties to consolidate all closely related matters into one suit." This prevents the oppression of defendants by multiple cases, which may be easy to file and costly to defend. There is no assurance that a second or third case will be decided more accurately than the first and so there is no good reason to incur the costs of litigation more than once. When the facts and issues of all theories of liability are closely related, one case is enough. Here the replevin theory contained the elements that make up a due process theory, and we are therefore confident that the courts of Illinois would treat both theories as one "cause of action." The final question is whether it makes a difference that only two of the replevin actions went to judgment, while here Frier challenges the towing of four cars. Under Illinois law the answer is no. The defendant may invoke claim preclusion when the plaintiff litigated in the first suit a subset of all available disputes between the parties. *See Baird & Warner, Inc. v. Addison Industrial Park, Inc.*, 70 Ill. App. 3d 59 (1st Dist. 1979), which holds that a suit on three of six disputed parcels of land precludes a subsequent suit on all six. We doubt that Illinois would see difference between three lots out of six and two cars out of four.

If Frier had filed the current suit in state court, he would have lost under the doctrine of claim preclusion. Under 28 U.S.C. § 1738 he therefore loses in federal court as well.

AFFIRMED.

SWYGERT, Senior Circuit Judge, concurring in the result.

In my view, the majority has simply applied the wrong analysis to the problem at hand. Rather than trying to squeeze a res judicata solution into a mold that does not fit, I would review the facts to determine whether Frier's procedural due process claims could withstand a summary judgment motion. Because I believe the City was entitled to summary judgment, I concur in the result.

I

In determining whether the disposition of a claim in State court precludes a subsequent suit on the same claim in federal court, the federal court must apply the State's law of res judicata. Because Illinois continues to adhere to the narrow, traditional view of claim preclusion, as opposed to the broader approach codified in the Restatement (Second) of Judgments §§ 24, 25 (1982), I would hold that Frier's substantive traffic law claim does not preclude this subsequent procedural due process claim. Under the more modern view of the new Restatement, all claims arising from a single "transaction"—broadly defined to include matters related in time, space, origin, and motivation—must be litigated in a single, initial lawsuit, or be barred from being raised in subsequent litigation. There was only one transaction in the case at bar: the seizure

of Frier's cars. Accordingly, Frier should have raised both his substantive and procedural objections to the seizure in one initial lawsuit.

Illinois, however, has not adopted the view of the new Restatement.[1] Rather, as the majority recognizes, the Illinois courts focus on the similarities between the causes of action alleged in both suits, not on whether there is a common factual transaction. One suit precludes a second "where the parties and the cause of action are identical." *Redfern v. Sullivan*, 111 Ill. App. 3d 372, 444 N.E.2d 205, 208 (1983). "Causes of action are identical where the evidence necessary to sustain a second verdict would sustain the first, *i.e.*, where the causes of action are based upon a common core of operative facts." *Id.* […]

[1] No Illinois court has ever cited the new Restatement. The first Restatement, which follows the traditional "cause of action" approach, see Restatement of Judgments § 61 (1942), has been cited several times.

In sum, the common set of facts that must be shown to invoke Illinois' doctrine of claim preclusion is defined as those facts necessary to sustain the cause of action, not as those facts that could be conveniently litigated in one lawsuit. This focus on the elements of the causes of action and the proofs at trial—rather than on the policy advantages of trying both actions in one suit—dooms any attempt to invoke claim preclusion in the case at bar. To be sure, both actions arise from the same seizure of the same cars. Yet, both the theory of recovery and focus of factual inquiry are dramatically different in each case. Frier's replevin claim was substantive in nature; to replevy property, the claimant must show his superior possessory rights. Frier's possessory rights turned on the legality of his parking. Because the trial court found that "the officer reasonably believed and had a right to believe that … [Frier's] vehicle obstructed the free use and passage way of that street at that time," it concluded that, therefore, Frier did not enjoy the "superior right to possession of the property" necessary to sustain a replevin action.

Frier's procedural due process claim requires an entirely different factual showing. The legality or reasonableness of the seizure is irrelevant. Because of the "risk of error inherent in the truth-finding process," an individual is entitled to certain procedural safeguards regardless of whether the deprivation of property was substantively justified. The focus of the inquiry, then, is the adequacy of procedures attending the seizure, not the seizure itself.

The majority urges that Frier could have joined a separate constitutional claim to his replevin action. This precise argument was rejected in *Fountas*, 455 N.E.2d at 204. […] Illinois law focuses on the similarities and differences between the various causes of action. That two wholly different causes of action arising out of the same transaction could be joined together as one convenient trial unit is irrelevant for the purposes of Illinois law, though this would be dispositive under the new Restatement.

II

It was established at Frier's replevin trial that the City police caused various service station owners to tow four of Frier's cars and, in lieu of a traffic citation, left written notice of the reason for the towing and the whereabouts of the cars. Frier eventually recovered two of his cars. Thus, the replevin action, and this action, concern only two of the cars. Frier could have recovered one of those cars immediately by paying a $10.00 towing fee to the owner of the service

station that towed the car. However, Frier was informed that any further delay in reclaiming the car would result in a $2.50 per day storage charge. Frier was free to reclaim the other car without paying any fee. I would hold that, on the basis of these uncontested facts, the City was entitled to summary judgment against Frier's procedural due process claim. […]

I would hold, then, that notice of towing, the availability of an expedited State tort suit that can make the petitioner whole, and the ability to reclaim the towed cars immediately at a cost of $10.00 together constitute adequate postdeprivation process as long as the $10.00 fee does not present a financial hardship. This holding would not necessarily conflict with recent decisions of other courts requiring more immediate and elaborate postdeprivation process. More elaborate process may well be required in those cases because the towing practices of the various municipalities were more burdensome on the respective petitioners: Immediate reclamation required significantly more than $10.00 and the litigants had standing to represent indigents who could afford no fee. We need not reach such troublesome issues in the case at bar.

I would find, as a matter of law, no procedural due process violation under these facts. Accordingly, I concur with the majority's decision to affirm the judgment below.

Notes & Questions

1. With claim and issue preclusion, it is useful to separate out the two lawsuits at issue (and there will always be at least two if preclusion is involved).
    - What was Frier's first lawsuit? Where was it filed? Who were the defendant(s)? What were Frier's claims? Out of which facts did it arise? What elements did Frier have to prove in order to prevail?
    - What was Frier's second lawsuit? Where was it filed? Who were the defendant(s)? What were Frier's claims? Out of which facts did it arise? What elements did Frier have to prove in order to prevail?
2. Judges Easterbrook and Swygert reach the same result (Frier loses) via different paths. What do they disagree about? And what body of law do they review to reach their answers?

Taylor v. Sturgell

553 U.S. 880 (2008)

GINSBURG, J., delivered the opinion of the Court.

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) [reprinted *infra*]. Several

exceptions, recognized in this Court's decisions, temper this basic rule. In a class action, for example, a person not named as a party may be bound by a judgment on the merits of the action, if she was adequately represented by a party who actively participated in the litigation. In this case, we consider for the first time whether there is a "virtual representation" exception to the general rule against precluding nonparties. Adopted by a number of courts, including the courts below in the case now before us, the exception so styled is broader than any we have so far approved. […]

We disapprove the doctrine of preclusion by "virtual representation," and hold, based on the record as it now stands, that the judgment against Herrick does not bar Taylor from maintaining this suit.

I

The Freedom of Information Act (FOIA) accords "any person" a right to request any records held by a federal agency. 5 U.S.C. § 552(a)(3)(A) (2006 ed.). No reason need be given for a FOIA request, and unless the requested materials fall within one of the Act's enumerated exemptions, *see* § 552(a)(3)(E), (b), the agency must "make the records promptly available" to the requester, § 552(a)(3)(A). If an agency refuses to furnish the requested records, the requester may file suit in federal court and obtain an injunction "order[ing] the production of any agency records improperly withheld." § 552(a)(4)(B).

The courts below held the instant FOIA suit barred by the judgment in earlier litigation seeking the same records. Because the lower courts' decisions turned on the connection between the two lawsuits, we begin with a full account of each action.

A

The first suit was filed by Greg Herrick, an antique aircraft enthusiast and the owner of an F-45 airplane, a vintage model manufactured by the Fairchild Engine and Airplane Corporation (FEAC) in the 1930's. In 1997, seeking information that would help him restore his plane to its original condition, Herrick filed a FOIA request asking the Federal Aviation Administration (FAA) for copies of any technical documents about the F-45 contained in the agency's records.

To gain a certificate authorizing the manufacture and sale of the F-45, FEAC had submitted to the FAA's predecessor, the Civil Aeronautics Authority, detailed specifications and other technical data about the plane. Hundreds of pages of documents produced by FEAC in the certification process remain in the FAA's records. The FAA denied Herrick's request, however, upon finding that the documents he sought are subject to FOIA's exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential," 5 U.S.C. § 552(b)(4) (2006 ed.). […]

[When Herrick filed suit,] the District Court granted summary judgment to the FAA [rejecting Herrick's argument that a 1955 letter from Fairchild to a government agency had waived any protection.] [T]he Tenth Circuit […] affirmed. […]

B

Less than a month later, on August 22, petitioner Brent Taylor—a friend of Herrick's and an antique aircraft enthusiast in his own right—submitted a FOIA request seeking the same documents Herrick had unsuccessfully sued to obtain. When the FAA failed to respond, Taylor filed a complaint in the U.S. District Court for the District of Columbia. Like Herrick, Taylor argued that FEAC's 1955 letter had stripped the records of their trade-secret status. But Taylor also sought to litigate […] two issues concerning recapture of protected status that Herrick had failed to raise in his appeal to the Tenth Circuit.

After Fairchild intervened as a defendant, the District Court in D.C. concluded that Taylor's suit was barred by claim preclusion; accordingly, it granted summary judgment to Fairchild and the FAA. […]

The record before the District Court in Taylor's suit revealed the following facts about the relationship between Taylor and Herrick: Taylor is the president of the Antique Aircraft Association, an organization to which Herrick belongs; the two men are "close associate[s]"; Herrick asked Taylor to help restore Herrick's F-45, though they had no contract or agreement for Taylor's participation in the restoration; Taylor was represented by the lawyer who represented Herrick in the earlier litigation; and Herrick apparently gave Taylor documents that Herrick had obtained from the FAA during discovery in his suit. […]

Applying this test to the record in Taylor's case, the D.C. Circuit found both of the necessary conditions for virtual representation well met. […]

II

[…] Taylor's case presents an issue of first impression in this sense: Until now, we have never addressed the doctrine of "virtual representation" adopted (in varying forms) by several Circuits and relied upon by the courts below. Our inquiry, however, is guided by well-established precedent regarding the propriety of nonparty preclusion. We review that precedent before taking up directly the issue of virtual representation.

A

The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as "res judicata." […] By "preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate," these two doctrines protect against "the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions."

A person who was not a party to a suit generally has not had a "full and fair opportunity to litigate" the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the "deep-rooted historic tradition that everyone should have his own day in court." Indicating the strength of that tradition, we have often repeated the general rule that "one is not bound by a judgment in personam in a litigation in which he is

not designated as a party or to which he has not been made a party by service of process." *Hansberry*; *Martin v. Wilks*, 490 U.S. 755, 761 (1989).

B

Though hardly in doubt, the rule against nonparty preclusion is subject to exceptions. For present purposes, the recognized exceptions can be grouped into six categories.[6] [(1) agreement by the parties to be bound by a prior action; (2) preexisting substantive legal relationships (such as preceding and succeeding owners of property); (3) adequate representation by someone with the same interests who was a party (such as trustees, guardians, and other fiduciaries); (4) a party assuming control over prior litigation; (5) a party who loses an individual suit then sues again, this time as the representative of a class; and (6) special statutory schemes such as bankruptcy and probate proceedings, provided those proceedings comport with due process.]

[6] […] The list that follows is meant only to provide a framework for our consideration of virtual representation, not to establish a definitive taxonomy.

III

Reaching beyond these six established categories, some lower courts have recognized a "virtual representation" exception to the rule against nonparty preclusion. Decisions of these courts, however, have been far from consistent. […]

The D.C. Circuit, the FAA, and Fairchild have presented three arguments in support of an expansive doctrine of virtual representation. We find none of them persuasive.

A

The D.C. Circuit purported to ground its virtual representation doctrine in this Court's decisions stating that, in some circumstances, a person may be bound by a judgment if she was adequately represented by a party to the proceeding yielding that judgment. But the D.C. Circuit's definition of "adequate representation" strayed from the meaning our decisions have attributed to that term. […]

The D.C. Circuit misapprehended *Richards*. […] [O]ur holding [in *Richards*] that the Alabama Supreme Court's application of res judicata to nonparties violated due process turned on the lack of either special procedures to protect the nonparties' interests or an understanding by the concerned parties that the first suit was brought in a representative capacity. […]

B

Fairchild and the FAA do not argue that the D.C. Circuit's virtual representation doctrine fits within any of the recognized grounds for nonparty preclusion. Rather, they ask us to abandon the attempt to delineate discrete grounds and clear rules altogether. Preclusion is in order, they contend, whenever "the relationship between a party and a non-party is 'close enough' to bring the second litigant within the judgment." Courts should make the "close enough" determination, they urge, through a "heavily fact-driven" and "equitable" inquiry. […]

We reject this argument for three reasons. First, our decisions emphasize the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party. […]

Our second reason for rejecting a broad doctrine of virtual representation rests on the limitations attending nonparty preclusion based on adequate representation. A party's representation of a nonparty is "adequate" for preclusion purposes only if, at a minimum: (1) the interests of the nonparty and her representative are aligned; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty. In addition, adequate representation sometimes requires (3) notice of the original suit to the persons alleged to have been represented. In the class-action context, these limitations are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23.

An expansive doctrine of virtual representation, however, would "recogniz[e], in effect, a common-law kind of class action." That is, virtual representation would authorize preclusion based on identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections prescribed in *Hansberry*, *Richards*, and Rule 23. These protections, grounded in due process, could be circumvented were we to approve a virtual representation doctrine that allowed courts to "create de facto class actions at will."

Third, a diffuse balancing approach to nonparty preclusion would likely create more headaches than it relieves. Most obviously, it could significantly complicate the task of district courts faced in the first instance with preclusion questions. An all-things-considered balancing approach might spark wide-ranging, time-consuming, and expensive discovery tracking factors potentially relevant under seven- or five-prong tests. […]

C

Finally […] the FAA maintains that nonparty preclusion should apply more broadly in "public-law" litigation than in "private-law" controversies. To support this position, the FAA offers two arguments. First, the FAA urges, our decision in *Richards* acknowledges that, in certain cases, the plaintiff has a reduced interest in controlling the litigation "because of the public nature of the right at issue." […]

[W]e said in *Richards* only that, for the type of public-law claims there envisioned, [state and federal legislatures] are free to adopt procedures limiting repetitive litigation [involving public rights]. […] It hardly follows, however, that this Court should proscribe or confine successive FOIA suits by different requesters. Indeed, Congress' provision for FOIA suits with no statutory constraint on successive actions counsels against judicial imposition of constraints through extraordinary application of the common law of preclusion.

The FAA next argues that "the threat of vexatious litigation is heightened" in public-law cases because "the number of plaintiffs with standing is potentially limitless." […]

But we are not convinced that this risk justifies departure from the usual rules governing nonparty preclusion. First, stare decisis will allow courts swiftly to dispose of repetitive suits brought in the same circuit. Second, even when stare decisis is not dispositive, "the human tendency not to waste money will deter the bringing of suits based on claims or issues that have already been adversely determined against others." This intuition seems to be borne out by experience: The FAA has not called our attention to any instances of abusive FOIA suits in the Circuits that reject the virtual-representation theory respondents advocate here.

IV

For the foregoing reasons, we disapprove the theory of virtual representation on which the decision below rested. The preclusive effects of a judgment in a federal-question case decided by a federal court should instead be determined according to the established grounds for nonparty preclusion described in this opinion. […]

We now turn back to Taylor's action to determine whether his suit is such a case, or whether the result reached by the courts below can be justified on one of the recognized grounds for nonparty preclusion.

A

It is uncontested that four of the six grounds for nonparty preclusion have no application here. […]

That leaves only the fifth category: preclusion because a nonparty to an earlier litigation has brought suit as a representative or agent of a party who is bound by the prior adjudication. Taylor is not Herrick's legal representative and he has not purported to sue in a representative capacity. He concedes, however, that preclusion would be appropriate if respondents could demonstrate that he is acting as Herrick's "undisclosed agen[t]." […]

We therefore remand to give the courts below an opportunity to determine whether Taylor, in pursuing the instant FOIA suit, is acting as Herrick's agent. Taylor concedes that such a remand is appropriate. […]

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the District of Columbia Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Notes & Questions

1. *Taylor v. Sturgell* illustrates the rigidity of the requirement of mutuality for claim preclusion to attach. The reason why Taylor's claims were barred—even though they were essentially identical to Herrick's, even

though Herrick and Taylor were members of the same hobbyist group, and even though Herrick and Taylor were represented by the same lawyer—is because Taylor is a different person from Herrick. And, as the Court notes, Taylor was entitled to his day in court.

2. What tradeoffs does our civil justice system make by insisting on a strict rule of mutuality in the context of claim preclusion?

8.2. Issue Preclusion

When it applies, claim preclusion bars relitigation of entire claims—causes of action arising out of a common set of facts. Issue preclusion is different: it bars relitigation of *issues*: facts or legal determinations, even if they are only one small part of claim, and even if the prior suit was only somewhat related to the present one. But issue preclusion only applies to issues that were actually litigated and actually decided (recall that claim preclusion often applies to claims that could have been, but in fact were not, brought in a prior suit).

In this way, issue preclusion is both broader (applies to more than just claims) and narrower (only applies to issues that were actually litigated and decided) than claim preclusion. There is one other distinction that has grown in importance in recent decades: issue preclusion does not always demand mutuality of parties to apply. In other words, sometimes a third party can use the doctrine of issue preclusion to bind their adversary, even if that third party was not part of the earlier suit.

As the next case illustrates well, often the doctrines of claim and issue preclusion will overlap, or arguably overlap. That is why it is so important to keep the two doctrines straight in you mind.

Illinois Central Gulf Railroad v. Parks

181 Ind. App. 141, 390 N.E.2d 1078 (1979)

LYBROOK, J.

Bertha and Jessie were injured on March 2, 1975, when the automobile which Jessie was driving and in which Bertha was a passenger collided with a train operated by Illinois Central Gulf. [Two lawsuits then followed. In the first, Bertha and Jessie sued Illinois Central Gulf; Bertha sought compensation for her injuries, and Jessie sought damages for loss of Bertha's services and consortium. In the second, Jessie sued Illinois Central Gulf for his own injuries.]

[In the first suit, the jury awarded Bertha a $30,000 judgment on her claim but returned a verdict against Jessie on his claim. The jury did not explain its reasoning for entering a verdict in the railroad's favor as to Jessie's claim.]

[In the second suit, Illinois Central Gulf moved for summary judgment, arguing that Jessie's claims were barred by claim preclusion because he could have

brought them in the first suit and by issue preclusion because the trial in the first action had established that he had been contributorily negligent, which is why the jury entered a verdict against him. The trial court disagreed and held Jessie's claims not barred. Illinois Central Gulf filed the instant interlocutory appeal.]

[…] Illinois Central Gulf's first allegation of error is an attempt to apply [claim preclusion] in the case at bar, but the railroad concedes its own argument by admitting that Jessie's cause of action for loss of services and consortium as a derivative of Bertha's personal injuries is a distinct cause of action from Jessie's claim for damages for his own personal injuries.

[Claim preclusion] precludes the relitigation of a cause of action finally determined between the parties, and decrees that a judgment rendered is a complete bar to any subsequent action on the same claim or cause of action. Jessie's cause of action in the case at bar is a different cause of action from the one he litigated in the companion case; therefore, [claim preclusion] does not apply.

[Issue preclusion], however, does apply. [T]he causes of action are not the same but, if the case at bar were to go to trial on all the issues raised in the pleadings and answer, some facts or questions determined and adjudicated in the companion case would again be put in issue in this subsequent action between the same parties.

To protect the integrity of the prior judgment by precluding the possibility of opposite results by two different juries on the same set of facts, the doctrine of [issue preclusion] allows the judgment in the prior action to operate as an estoppel as to those facts or questions actually litigated and determined in the prior action. The problem at hand, then, is to determine what facts or questions were actually litigated and determined in the companion case.

We agree with three concessions made by Illinois Central Gulf as to the effect of the verdict in the prior case: (1) that the verdict in favor of Bertha established, among other things, that the railroad was negligent and that its negligence was a proximate cause of the accident and Bertha's injuries; (2) that, inasmuch as Jessie's action for loss of services and consortium was derivative, if Jessie sustained any such loss it was proximately caused by the railroad's negligence; and (3) that, in order for the jury to have returned a verdict against Jessie, it had to have decided that he either sustained no damages or that his own negligence was a proximate cause of his damages.

This third proposition places upon the railroad the heavy burden outlined in [*Flora v. Indiana Service Co.*, 222 Ind. App. 253, 256–57 (1944)]:

> "[W]here a judgment may have been based upon either or any of two or more distinct facts, a party desiring to plead the judgment as an estoppel by verdict or finding upon the particular fact involved in a subsequent suit must show that it went upon that fact, or else the question will be open to a new contention. The estoppel of a judgment is only presumptively conclusive, when it appears that the judgment could not have been rendered without deciding the

> particular matter brought in question. It is necessary to look to the complete record to ascertain what was the question in issue."

The railroad argues that, because Jessie's evidence as to his loss of services and consortium was uncontroverted, the jury's verdict had to be based upon a finding of contributory negligence. Illinois Central Gulf made this same argument in the companion case in relation to a related issue and Jessie countered, as he does here, with his contention that, although the evidence was uncontroverted, it was minimal and, thus, could have caused the jury to find no compensable damages. We reviewed the complete record in the companion case and held that the jury verdict against Jessie in that cause could mean that he had failed his burden of proving compensable damages. […]

We hold that Illinois Central Gulf has failed its burden of showing that the judgment against Jessie in the prior action could not have been rendered without deciding that Jessie was contributorily negligent in the accident which precipitated the two lawsuits. Consequently, the trial court was correct in granting partial summary judgment estopping the railroad from denying its negligence and in limiting the issues at trial to whether Jessie was contributorily negligent, whether any such contributory negligence was a proximate cause of the accident, and whether Jessie sustained personal injuries and compensable damages. […]

Notes & Questions

1. *Parks* focuses on one important requirement of issue preclusion: the issue in question must have been *actually litigated* and *necessary to the judgment* in the prior case.
2. What issue did the railroad seek to bind Jessie with in his second suit? Why did the court conclude that it was not necessarily decided in the prior suit?
3. Why do you think the doctrine of claim preclusion didn't bar Jessie's second suit? (Hint: recall Judge Swygert's concurrence in *Frier* to draw a useful inference about Indiana law at the time *Parks* was decided.)

Parklane Hosiery Co. v. Shore

439 U.S. 322 (1979)

STEWART, J., delivered the opinion of the Court.

This case presents the question whether a party who has had issues of fact adjudicated adversely to it in an equitable action may be collaterally estopped from relitigating the same issues before a jury in a subsequent legal action brought against it by a new party.

The respondent brought this stockholder's class action against the petitioners in a Federal District Court. The complaint alleged that the petitioners, Parklane

Hosiery Co., Inc. (Parklane), and 13 of its officers, directors, and stockholders, had issued a materially false and misleading proxy statement in connection with a merger. The proxy statement, according to the complaint, had violated §§ 14(a), 10(b), and 20(a) of the Securities Exchange Act of 1934, as well as various rules and regulations promulgated by the Securities and Exchange Commission (SEC). The complaint sought damages, rescission of the merger, and recovery of costs.

Before this action came to trial, the SEC filed suit against the same defendants in the Federal District Court, alleging that the proxy statement that had been issued by Parklane was materially false and misleading in essentially the same respects as those that had been alleged in the respondent's complaint. Injunctive relief was requested. After a four-day trial, the District Court found that the proxy statement was materially false and misleading in the respects alleged, and entered a declaratory judgment to that effect. The Court of Appeals for the Second Circuit affirmed this judgment.

The respondent in the present case then moved for partial summary judgment against the petitioners, asserting that the petitioners were collaterally estopped from litigating the issues that had been resolved against them in the action brought by the SEC.[2] The District Court denied the motion on the ground that such an application of collateral estoppel would deny the petitioners their Seventh Amendment right to a jury trial. The Court of Appeals for the Second Circuit reversed, holding that a party who has had issues of fact determined against him after a full and fair opportunity to litigate in a nonjury trial is collaterally estopped from obtaining a subsequent jury trial of these same issues of fact. The appellate court concluded that "the Seventh Amendment preserves the right to jury trial only with respect to issues of fact, [and] once those issues have been fully and fairly adjudicated in a prior proceeding, nothing remains for trial, either with or without a jury." Because of an intercircuit conflict, we granted certiorari.

[2] A private plaintiff in an action under the proxy rules is not entitled to relief simply by demonstrating that the proxy solicitation was materially false and misleading. The plaintiff must also show that he was injured and prove damages. Since the SEC action was limited to a determination of whether the proxy statement contained materially false and misleading information, the respondent conceded that he would still have to prove these other elements of his prima facie case in the private action. The petitioners' right to a jury trial on those remaining issues is not contested.

I

The threshold question to be considered is whether quite apart from the right to a jury trial under the Seventh Amendment, the petitioners can be precluded from litigating facts resolved adversely to them in a prior equitable proceeding with another party under the general law of collateral estoppel. Specifically, we must determine whether a litigant who was not a party to a prior judgment may nevertheless use that judgment "offensively" to prevent a defendant from relitigating issues resolved in the earlier proceeding.[4]

[4] In this context, offensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant.

A

Collateral estoppel, like the related doctrine of res judicata,[5] has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation. Until relatively recently, however, the scope of collateral estoppel was limited by the doctrine of mutuality of parties. Under this mutuality doctrine, neither party could use a prior judgment as an estoppel against the other unless both parties were bound by the judgment. Based on

[5] Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. 1B J. Moore, Federal Practice ¶ 0.405 [1], pp. 622–624 (2d ed. 1974).

the premise that it is somehow unfair to allow a party to use a prior judgment when he himself would not be so bound,[7] the mutuality requirement provided a party who had litigated and lost in a previous action an opportunity to relitigate identical issues with new parties.

[7] It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never has an opportunity to be heard.

By failing to recognize the obvious difference in position between a party who has never litigated an issue and one who has fully litigated and lost, the mutuality requirement was criticized almost from its inception. Recognizing the validity of this criticism, the Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, abandoned the mutuality requirement. […] The "broader question" before the Court, however, was "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." […]

B

The *Blonder-Tongue* case involved defensive use of collateral estoppel—a plaintiff was estopped from asserting a claim that the plaintiff had previously litigated and lost against another defendant. The present case, by contrast, involves offensive use of collateral estoppel—a plaintiff is seeking to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff. In both the offensive and defensive use situations, the party against whom estoppel is asserted has litigated and lost in an earlier action. Nevertheless, several reasons have been advanced why the two situations should be treated differently.

First, offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does. Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely "switching adversaries."[12] Thus defensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible. Offensive use of collateral estoppel, on the other hand, creates precisely the opposite incentive. Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a "wait and see" attitude, in the hope that the first action by another plaintiff will result in a favorable judgment.

[12] Under the mutuality requirement, a plaintiff could accomplish this result since he would not have been bound by the judgment had the original defendant won.

Thus offensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action.[13] A second argument against offensive use of collateral estoppel is that it may be unfair to a defendant. If a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable. Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant.[14] Still another situation where it might be unfair to apply offensive estoppel is where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.[15]

[13] The Restatement (Second) of Judgments § 88 (3) (Tent. Draft No. 2, Apr. 15, 1975) provides that application of collateral estoppel may be denied if the party asserting it "could have effected joinder in the first action between himself and his present adversary."

C

We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied. The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

In the present case, however, none of the circumstances that might justify reluctance to allow the offensive use of collateral estoppel is present. The application of offensive collateral estoppel will not here reward a private plaintiff who could have joined in the previous action, since the respondent probably could not have joined in the injunctive action brought by the SEC even had he so desired. Similarly, there is no unfairness to the petitioners in applying offensive collateral estoppel in this case. First, in light of the serious allegations made in the SEC's complaint against the petitioners, as well as the foreseeability of subsequent private suits that typically follow a successful Government judgment, the petitioners had every incentive to litigate the SEC lawsuit fully and vigorously.[18] Second, the judgment in the SEC action was not inconsistent with any previous decision. Finally, there will in the respondent's action be no procedural opportunities available to the petitioners that were unavailable in the first action of a kind that might be likely to cause a different result.[19] We conclude, therefore, that none of the considerations that would justify a refusal to allow the use of offensive collateral estoppel is present in this case. Since the petitioners received a "full and fair" opportunity to litigate their claims in the SEC action, the contemporary law of collateral estoppel leads inescapably to the conclusion that the petitioners are collaterally estopped from relitigating the question of whether the proxy statement was materially false and misleading.

II

The question that remains is whether, notwithstanding the law of collateral estoppel, the use of offensive collateral estoppel in this case would violate the petitioners' Seventh Amendment right to a jury trial. […] The Seventh Amendment has never been interpreted in the rigid manner advocated by the petitioners. On the contrary, many procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to be inconsistent with the Seventh Amendment. […]

The law of collateral estoppel, like the law in other procedural areas defining the scope of the jury's function, has evolved since 1791. Under the rationale of [an earlier] case, these developments are not repugnant to the Seventh Amendment simply for the reason that they did not exist in 1791. Thus if, as we have held, the law of collateral estoppel forecloses the petitioners from relitigating the factual issues determined against them in the SEC action, nothing in the

[14] In Professor Currie's familiar example, a railroad collision injures 50 passengers all of whom bring separate actions against the railroad. After the railroad wins the first 25 suits, a plaintiff wins in suit 26. Professor Currie argues that offensive use of collateral estoppel should not be applied so as to allow plaintiffs 27 through 50 automatically to recover. [Currie, Mutuality of Estoppel: Limits of the Bernhard Doctrine, 9 Stan. L. Rev. 281 (1957).]

[15] If, for example, the defendant in the first action was forced to defend in an inconvenient forum and therefore was unable to engage in full scale discovery or call witnesses, application of offensive collateral estoppel may be unwarranted. Indeed, differences in available procedures may sometimes justify not allowing a prior judgment to have estoppel effect in a subsequent action even between the same parties, or where defensive estoppel is asserted against a plaintiff who has litigated and lost. The problem of unfairness is particularly acute in cases of offensive estoppel, however, because the defendant against whom estoppel is asserted typically will not have chosen the forum in the first action.

[18] After a 4-day trial in which the petitioners had every opportunity to present evidence and call witnesses, the District Court held for the SEC. The petitioners then appealed to the Court of Appeals for the Second Circuit, which affirmed the judgment against them. Moreover, the petitioners were already aware of the action brought by the respondent, since it had commenced before the filing of the SEC action.

[19] It is true, of course, that the petitioners in the present action would be entitled to a jury trial of the issues bearing on whether the proxy statement was materially false and misleading had the SEC action never been brought—a matter to be discussed in Part II of this opinion. But the presence or absence of a jury as factfinder is basically neutral, quite unlike, for example, the necessity of defending the first lawsuit in an inconvenient forum.

Seventh Amendment dictates a different result, even though because of lack of mutuality there would have been no collateral estoppel in 1791. […]

Notes & Questions

1. *Parklane Hosiery* marks the Supreme Court's broadest embrace of the doctrine of offensive non-mutual issue preclusion. Notice how far *Parklane Hosiery* carries issue preclusion away from the strict doctrine of mutuality we saw with *Taylor v. Sturgell* in the context of claim preclusion.
2. However, be careful to remember a basic truth of due process: with minimal exceptions, only those who were parties to a prior suit can be bound by a judgment issued in it. Non-mutual issue preclusion does *not* permit the use of preclusion *against* a third party. But, as *Parklane Hosiery* shows, it sometimes permits the use of issue preclusion *by* a third party.
3. The *Parklane Hosiery* Court draws an important distinction between offensive and defensive non-mutual issue preclusion. The latter, which is less controversial and potentially problematic than the former, arises when a defendant wants to use issue preclusion to fend off a lawsuit from a party. The classic example, mentioned in *Parklane Hosiery*, comes from *Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Foundation*, 402 U.S. 313 (1971). There, a university held a patent on an invention. The university sued D1, alleging infringement of the patent. D1 defended the suit by arguing that the patent was invalid because the invention was obvious. The court agreed, and D1 won the case. Undaunted, the university filed a second suit against a new defendant, D2, who was not party to the first suit. D2's defense invoked *defensive* nonmutual issue preclusion to argue that the university could not relitigate the patent's validity, and that the university was instead bound by the issue's determination against it in the prior suit. The Supreme Court agreed with D2, thus establishing the doctrine of defensive non-mutual issue preclusion. Be sure you understand and can explain why *Blonder-Tongue* involved defensive (rather than offensive) non-mutual issue preclusion.
4. *Offensive* non-mutual issue preclusion raises more concerns than its defensive counterpart. For that reason, the Court in *Parklane Hosiery* set out a series of factors that must be considered before permitting offensive non-mutual issue preclusion. Name those factors. Why do you think the Court thought it necessary to limit the doctrine's applicability?
5. Finally, note that even when offensive non-mutual issue preclusion *could* apply, it is left to the discretion of a trial judge whether to apply the doctrine. Why might that be a good idea?

9. Aggregation

9.1. Joinder

So far we have focused primarily on the simplest form of adversarial litigation: one plaintiff sues one defendant. And we have primarily been concerned with cases in which only the plaintiff asserts claims. But the most interesting kinds of litigations concern multiple claims, multiple parties, or both. This chapter therefore begins to explore *complex litigation*.

We begin by investigating counterclaims, which are governed by Rule 13. As the next case shows, counterclaims come in two flavors: compulsory and permissive. You'll notice that the line between the two tracks one of the elements of claim preclusion. This is no accident. See if you can figure out why it is so.

Cordero v. Voltaire, LLC

2013 WL 6415667 (W.D. Tex. Dec. 6, 2013)

AUSTIN, M.J.

Report and Recommendation of the United States Magistrate Judge

TO: THE HONORABLE LEE YEAKEL UNITED STATES DISTRICT JUDGE

[…]

I. General Background

Plaintiffs Carlos Cordero, Omar Benitez, Cory Harvey, Remi Harvey and Toby Marrujo sue their former employer, Defendant Voltaire, LLC, a construction company, to recover unpaid overtime wages allegedly due under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. Plaintiffs Cory Harvey, Toby Marrujo, Remi Harvey and Omar Benitez were employed as laborers with Defendant, while Carlos Cordero was employed as Vice President of Construction. Plaintiffs allege that Defendant willfully failed to pay them at least one and one-half times their regular rate of pay for overtime hours worked as is required under the FLSA.

In response, Defendant alleges that Plaintiffs cannot recover under the FLSA, or that any recovery should be reduced, because Plaintiffs have falsified and inflated the hours they allegedly worked. Specifically, Defendant alleges that "[Plaintiff-Laborers] and numerous other contractors working at Defendant's

job sites would provide their time to Carlos Cordero who would then accumulate that time and provide it to Defendant. Cordero was involved in a scheme to defraud and steal from Defendant which included falsifying and inflating the time [they] claimed to work for Defendant and also conspiring with the other workers to falsify and inflate their time that was turned in to Defendant." In addition, Defendant alleges that Plaintiffs took valuable materials and equipment from it. Based upon the foregoing, Defendant has asserted […] counterclaims for fraud, theft, conversion and breach of fiduciary duty. […]

II. Analysis

Cordero, Remi Harvey, Corey Harvey, and Marrujo have each moved to dismiss the counterclaims […] pursuant to Federal Rules of Civil Procedure 12(b)(1). […]

A. Plaintiffs' Rule 12(b)(1) Motion to Dismiss Defendant's Counterclaims

Cordero argues that the counterclaims for theft, conversion, fraud and breach of fiduciary duty are permissive counterclaims under Federal Rule of Civil Procedure 13(b) and, therefore, must "be supported by independent grounds of federal jurisdiction." […] Although the Court disagrees with some of the legal reasoning, it agrees that some of Voltaire's counterclaims should be dismissed for lack of jurisdiction. […]

2. Supplemental Jurisdiction and Rule 13

[The court concluded that there could be jurisdiction over Voltaire's counterclaims only if they were compulsory rather than permissive.]

3. Are Defendant's Counterclaims Compulsory? […]

[I]t appears that the only counterclaim which is compulsory in this case is the counterclaim against Cordero for fraud. Voltaire alleges that Cordero committed fraud by submitting work statements to it with "falsified and inflated hours," and that he submitted bills for time and expenses that were expended on personal and private projects. […] To prove his FLSA claim, Cordero will have to present evidence showing how many hours he worked, how much he was paid for those hours and how much he should have been paid for those hours. Similarly, to prove its fraud counterclaim, Voltaire will have to present evidence showing that Cordero billed it for false and/or inflated hours and for work expended on personal and private projects. Thus, both claims focus on whether Cordero is owed overtime compensation under the Act and if so, the amount actually owed. […] Based upon the foregoing, the Court recommends that the District Court deny Plaintiff Cordero's Motion to Dismiss Defendant's fraud counterclaim for lack of jurisdiction.

In contrast to the fraud counterclaim, the evidence needed to prove Defendant's counterclaims for theft, conversion, and breach of fiduciary duty is entirely different than the evidence needed to prove Plaintiffs' FLSA claim. Defendant's allegations that Plaintiffs committed theft and conversion by unlawfully

taking valuable equipment and materials and the resulting breach of their fiduciary duties plainly does not rest on the same operative facts as Plaintiffs' FLSA claim that Defendant failed to pay them overtime wages. […]

[…]

[…] The Court therefore recommends that the District Court grant Plaintiff Cordero's Motion to Dismiss Defendant's counterclaims for theft, conversion, and breach of fiduciary duty under Rule 12(b)(1), but deny the Motion with regard to Voltaire's fraud counterclaim. The Court further recommends that the District Court grant Plaintiffs Remi Harvey, Cory Harvey, and Marrujo's Motion to Dismiss Defendant's counterclaims for theft and conversion under Rule 12(b)(1). […]

Notes & Questions

1. What distinguishes compulsory and permissive counterclaims?
2. Based on what you know about the law of former adjudication, what other consequences flow from a counterclaim's classification as compulsory? In other words, what is the implicit penalty for failing to raise a compulsory counterclaim?

The next several cases shift gears from additional claims to additional parties. Rules 19 and 20, respectively, govern whom a plaintiff must or may join as additional parties. Rule 14 controls whom a *defendant* may name as an additional party by filing a third-party complaint, also known as impleader. Finally, Rule 24 regulates when strangers may force their way into an existing case through a mechanism known as intervention.

Mosley v. General Motors Corp.

ROSS, J.

497 F.2d 1330 (8th Cir. 1974)

Nathaniel Mosley and nine other persons joined in bringing this action individually and as class representatives alleging that their rights guaranteed under 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981 were denied by General Motors and Local 25, United Automobile, Aerospace and Agriculture Implement Workers of America [Union] by reason of their color and race. […] Each of the ten named plaintiffs had, prior to the filing of the complaint, filed a charge with the Equal Employment Opportunity Commission [EEOC] asserting the facts underlying these claims. Pursuant thereto, the EEOC made a reasonable cause finding that General Motors, Fisher Body Division and Chevrolet Division, and the Union had engaged in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964. Accordingly, the charging parties were notified by EEOC of their right to institute a civil action in the appropriate federal district court. […]

9. Aggregation

In each of the first eight counts of the twelve-count complaint, eight of the ten plaintiffs alleged that General Motors, Chevrolet Division, had engaged in unlawful employment practices by: "discriminating against Negroes as regards promotions, terms and conditions of employment"; "retaliating against Negro employees who protested actions made unlawful by Title VII of the Act and by discharging some because they protested said unlawful acts"; "failing to hire Negro employees as a class on the basis of race"; "failing to hire females as a class on the basis of sex"; "discharging Negro employees on the basis of race"; and "discriminating against Negroes and females in the granting of relief time." Each additionally charged that the defendant Union had engaged in unlawful employment practices "with respect to the granting of relief time to Negro and female employees" and "by failing to pursue … grievances." The remaining two plaintiffs made similar allegations against General Motors, Fisher Body Division. All of the individual plaintiffs requested injunctive relief, back pay, attorneys' fees and costs. Counts XI and XII of the complaint were class action counts against the two individual divisions of General Motors. They also sought declaratory and injunctive relief, back pay, attorneys' fees and costs. […]

The district court ordered that "insofar as the first ten counts are concerned, those ten counts shall be severed into ten separate causes of action," and each plaintiff was directed to bring a separate action based upon his complaint, duly and separately filed. The court also ordered that the class action would not be dismissed, but rather would be left open "to each of the plaintiffs herein, individually or collectively … to allege a separate cause of action on behalf of any class of persons which such plaintiff or plaintiffs may separately or individually represent."

In reaching this conclusion on joinder, the district court followed the reasoning of *Smith v. North American Rockwell Corp.*, which, in a somewhat analogous situation, found there was no right to relief arising out of the same transaction, occurrence or series of transactions or occurrences, and that there was no question of law or fact common to all plaintiffs sufficient to sustain joinder under Federal Rule of Civil Procedure 20(a). Similarly, the district court here felt that the plaintiffs' joint actions against General Motors and the Union presented a variety of issues having little relationship to one another; that they had only one common problem, *i.e.*, the defendant; and that as pleaded the joint actions were completely unmanageable. Upon entering the order, and upon application of the plaintiffs, the district court found that its decision involved a controlling question of law as to which there is a substantial ground for difference of opinion and that any of the parties might make application for appeal under 28 U.S.C. § 1292(b). We granted the application to permit this interlocutory appeal and for the following reasons we affirm in part and reverse in part.

Rule 20(a) of the Federal Rules of Civil Procedure provides:

> [(1) Plaintiffs. Persons may join in one action as plaintiffs if:
>
> > (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same

> transaction, occurrence, or series of transactions or occurrences; and
>
> (B) any question of law or fact common to all plaintiffs will arise in the action.]

Additionally, Rule 20(b) and Rule 42(b) vest in the district court the discretion to order separate trials or make such other orders as will prevent delay or prejudice. In this manner, the scope of the civil action is made a matter for the discretion of the district court, and a determination on the question of joinder of parties will be reversed on appeal only upon a showing of abuse of that discretion. To determine whether the district court's order was proper herein, we must look to the policy and law that have developed around the operation of Rule 20.

The purpose of the rule is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits. Single trials generally tend to lessen the delay, expense and inconvenience to all concerned. Reflecting this policy, the Supreme Court has said: "Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."

Permissive joinder is not, however, applicable in all cases. The rule imposes two specific requisites to the joinder of parties: (1) a right to relief must be asserted by, or against, each plaintiff or defendant relating to or arising out of the same transaction or occurrence, or series of transactions or occurrences; and (2) some question of law or fact common to all the parties must arise in the action.

In ascertaining whether a particular factual situation constitutes a single transaction or occurrence for purposes of Rule 20, a case by case approach is generally pursued. No hard and fast rules have been established under the rule. However, construction of the terms "transaction or occurrence" as used in the context of Rule 13(a) counterclaims offers some guide to the application of this test. For the purposes of the latter rule, "'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." Accordingly, all "logically related" events entitling a person to institute a legal action against another generally are regarded as comprising a transaction or occurrence. The analogous interpretation of the terms as used in Rule 20 would permit all reasonably related claims for relief by or against different parties to be tried in a single proceeding. Absolute identity of all events is unnecessary.

This construction accords with the result reached in *United States v. Mississippi*, 380 U.S. 128 (1965), a suit brought by the United States against the State of Mississippi, the election commissioners, and six voting registrars of the State,

charging them with engaging in acts and practices hampering and destroying the right of black citizens of Mississippi to vote. The district court concluded that the complaint improperly attempted to hold the six county registrars jointly liable for what amounted to nothing more than individual torts committed by them separately against separate applicants. In reversing, the Supreme Court said:

> But the complaint charged that the registrars had acted and were continuing to act as part of a state-wide system designed to enforce the registration laws in a way that would inevitably deprive colored people of the right to vote solely because of their color. On such an allegation the joinder of all the registrars as defendants in a single suit is authorized by Rule 20(a) of the Federal Rules of Civil Procedure. […] These registrars were alleged to be carrying on activities which were part of a series of transactions or occurrences the validity of which depended to a large extent upon "question[s] of law or fact common to all of them."

Here too, then, the plaintiffs have asserted a right to relief arising out of the same transactions or occurrences. Each of the ten plaintiffs alleged that he had been injured by the same general policy of discrimination on the part of General Motors and the Union. Since a "state-wide system designed to enforce the registration laws in a way that would inevitably deprive colored people of the right to vote" was determined to arise out of the same series of transactions or occurrences, we conclude that a company-wide policy purportedly designed to discriminate against blacks in employment similarly arises out of the same series of transactions or occurrences. Thus the plaintiffs meet the first requisite for joinder under Rule 20(a).

The second requisite necessary to sustain a permissive joinder under the rule is that a question of law or fact common to all the parties will arise in the action. The rule does not require that all questions of law and fact raised by the dispute be common. Yet, neither does it establish any qualitative or quantitative test of commonality. For this reason, cases construing the parallel requirement under Federal Rule of Civil Procedure 23(a) provide a helpful framework for construction of the commonality required by Rule 20. In general, those cases that have focused on Rule 23(a)(2) have given it a permissive application so that common questions have been found to exist in a wide range of contexts. Specifically, with respect to employment discrimination cases under Title VII, courts have found that the discriminatory character of a defendant's conduct is basic to the class, and the fact that the individual class members may have suffered different effects from the alleged discrimination is immaterial for the purposes of the prerequisite. In this vein, one court has said:

> [A]lthough the actual effects of a discriminatory policy may thus vary throughout the class, the existence of the discriminatory policy threatens the entire class. And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class.

The right to relief here depends on the ability to demonstrate that each of the plaintiffs was wronged by racially discriminatory policies on the part of the defendants General Motors and the Union. The discriminatory character of the defendants' conduct is thus basic to each plaintiff's recovery. The fact that each plaintiff may have suffered different effects from the alleged discrimination is immaterial for the purposes of determining the common question of law or fact. Thus, we conclude that the second requisite for joinder under Rule 20(a) is also met by the complaint.

For the reasons set forth above, we conclude that the district court abused its discretion in severing the joined actions. The difficulties in ultimately adjudicating damages to the various plaintiffs are not so overwhelming as to require such severance. If appropriate, separate trials may be granted as to any particular issue after the determination of common questions.

The judgment of the district court disallowing joinder of the plaintiffs' individual actions is reversed and remanded with directions to permit the plaintiffs to proceed jointly. […]

Notes & Questions

1. What is the test under Rule 20 for whether multiple plaintiffs may join together in a single lawsuit?
2. Why might multiple plaintiffs want to do so? Why might a defendant want to stop them from doing so?
3. If permissive joinder is denied, what are the would-be plaintiffs' options?

Price v. CTB, Inc.

DE MENT, J.

168 F. Supp. 2d 1299 (M.D. Ala. 2001)

[Price, a chicken farmer, hired Latco to build a new chicken house. After it was built, Price sued] Latco[, among others, over] […] the quality of its workmanship when it constructed chicken houses for various Alabama farmers. The causes of action against Latco include breach of the construction contract, fraudulent misrepresentation of the caliber of materials to be used, and negligence and wantonness in the construction. Latco moved to file a Third Party Complaint against, inter alios, ITW […]. […] In the Third Party Complaint, Latco alleges that ITW, a nail manufacturer, defectively designed the nails used in the construction of the chicken houses. The specific causes of action include breach of warranty, violation of the Alabama Extended Manufacturer's Liability Doctrine, and common law indemnity. ITW argues that it was improperly impleaded under Rule 14 of the Federal Rules of Civil Procedure, or, alternatively, that the Third Party Complaint is barred by the equitable doctrine of laches.

Under Rule 14(a), a defendant may assert a claim against anyone not a party to the original action if that third party's liability is in some way dependent upon the outcome of the original action. There is a limitation on this general statement, however. Even though it may arise out of the same general set of facts as the main claim, a third party claim will not be permitted when it is based upon a separate and independent claim. Rather, the third party liability must in some way be derivative of the original claim; a third party may be impleaded only when the original defendant is trying to pass all or part of the liability onto that third party.

Latco argues that ITW is the prototypical third party defendant under Rule 14. It asserts that ITW can be found liable for the warranty surrounding its products if Latco is first found liable for faulty construction. Furthermore, insists Latco, this derivative liability merely involves a shift in the overall responsibility of the allegedly defective chicken houses. ITW contends, however, that because Rule 14 is merely a procedural rule, the propriety of its application depends upon the existence of a right to indemnity under the substantive law. ITW accurately states the law in this regard, but its conclusion that there is no viable substantive claim under Alabama law is incorrect.

Conceding that Alabama does not recognize a right to contribution among joint tortfeasors, Latco directs the court's attention to the concept of implied contractual indemnity. Under this doctrine, Alabama courts recognize that a manufacturer of a product has impliedly agreed to indemnify the seller when 1) the seller is without fault, 2) the manufacturer is responsible, and 3) the seller has been required to pay a monetary judgment. Under Latco's theory, should it be found liable for its construction of the chicken houses, it can demonstrate that the true fault lies with the nail guns and the nails manufactured by ITW.

Alabama case law, not to mention the parties' briefs, is especially sparse with respect to the contours of the doctrine of implied indemnity. […] [However, t]he court finds that Alabama law provides Latco a cause of action under common law indemnity against ITW.

It must be noted, however, that, under Alabama law, the doctrine permits recovery only when the party to be indemnified is "without fault." Whether, in fact, such a factual scenario will be proven at trial is irrelevant for present purposes. The only issue before the court is whether there exists a legal basis to implead ITW, not whether ITW is, in fact, liable to Latco. Since Rule 14 permits Latco to implead any party who "may be liable," Fed. R. Civ. P. 14(a), it follows that the court must permit development of the factual record so the extent of that liability may be determined. […]

Furthermore, since Latco has established a basis upon which it may properly implead ITW, the court need not address the applicability of Rule 14 to the other claims in Latco's Third Party Complaint. It is well established that a properly impleaded claim may serve as an anchor for separate and independent claims under Rule 18(a).[3] […] In short, the court finds that Latco has properly impleaded ITW under Rule 14(a).

Accordingly, it is CONSIDERED and ORDERED that ITW's Motion to Dismiss be and the same is hereby DENIED.

Notes & Questions

1. An important lesson of *Price* is that defendants are not usually allowed to bring additional parties into an existing suit. Instead, the default rule is that a defendant who has claims against a third party must file a separate suit to recover his own damages.
2. Rule 14, however, provides a narrow path for complaints against third parties "who is or may be liable to [the defendant] for all or part of the claim against it." Rule 14(a)(1). *Price* explains that the liability required to invoke Rule 14 is a particular kind: it must be derivative. In other words, a defendant must show that the third party would be liable, on a dollar-for-dollar basis, to the defendant for at least some of the plaintiff's damages against the defendant.

While Rule 20 governs permissive joinder of parties, Rule 19 controls *required* joinder of parties. A "required party," under Rule 19, is one in whose absence "the court cannot accord complete relief among existing parties," or one who claims an interest in the subject of the action such that adjudicating the case without them would impair that person or other parties from being able to protect their interests. Rule 19(a)(1). The next case discusses what it takes for a party to be "required."

Temple v. Synthes Corp.

PER CURIAM. 498 U.S. 5 (1990)

Petitioner Temple, a Mississippi resident, underwent surgery in October 1986 in which a "plate and screw device" was implanted in his lower spine. The device was manufactured by respondent Synthes, Ltd. (U.S.A.) (Synthes), a Pennsylvania corporation. Dr. S. Henry LaRocca performed the surgery at St. Charles General Hospital in New Orleans, Louisiana. Following surgery, the device's screws broke off inside Temple's back.

Temple filed suit against Synthes in the United States District Court for the Eastern District of Louisiana. The suit, which rested on diversity jurisdiction, alleged defective design and manufacture of the device. At the same time, Temple filed a state administrative proceeding against Dr. LaRocca and the hospital for malpractice and negligence. At the conclusion of the administrative proceeding, Temple filed suit against the doctor and the hospital in Louisiana state court.

Synthes did not attempt to bring the doctor and the hospital into the federal action by means of a third-party complaint, as provided in Federal Rule of Civil Procedure 14(a). Instead, Synthes filed a motion to dismiss Temple's federal

suit for failure to join necessary parties pursuant to Federal Rule of Civil Procedure 19. Following a hearing, the District Court ordered Temple to join the doctor and the hospital as defendants within twenty days or risk dismissal of the lawsuit. According to the court, the most significant reason for requiring joinder was the interest of judicial economy. The court relied on this Court's decision in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), wherein we recognized that one focus of Rule 19 is "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies." When Temple failed to join the doctor and the hospital, the court dismissed the suit with prejudice.

Temple appealed, and the United States Court of Appeals for the Fifth Circuit affirmed. The court deemed it "obviously prejudicial to the defendants to have the separate litigations being carried on," because Synthes' defense might be that the plate was not defective but that the doctor and the hospital were negligent, while the doctor and hospital, on the other hand, might claim that they were not negligent but that the plate was defective. The Court of Appeals found that claims overlapped and that the District Court therefore had not abused its discretion in ordering joinder under Rule 19. A petition for rehearing was denied.

In his petition for certiorari to this Court, Temple contends that it was error to label joint tortfeasors as indispensable parties under Rule 19(b) and to dismiss the lawsuit with prejudice for failure to join those parties. We agree. Synthes does not deny that it, the doctor, and the hospital are potential joint tortfeasors. It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit. Nothing in the 1966 revision of Rule 19 changed that principle. The Advisory Committee Notes to Rule 19(a) explicitly state that "a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability." Advisory Committee's Notes on Fed. Rule Civ. Proc. 19. There is nothing in Louisiana tort law to the contrary.

The opinion in *Provident Bank*, *supra*, does speak of the public interest in limiting multiple litigation, but that case is not controlling here. There, the estate of a tort victim brought a declaratory judgment action against an insurance company. We assumed that the policyholder was a person "who, under … [Rule 19](a), should be joined if 'feasible' " and went on to discuss the appropriate analysis under Rule 19(b), because the policyholder could not be joined without destroying diversity. After examining the factors set forth in Rule 19(b), we determined that the action could proceed without the policyholder; he therefore was not an indispensable party whose absence required dismissal of the suit.

Here, no inquiry under Rule 19(b) is necessary, because the threshold requirements of Rule 19(a) have not been satisfied. As potential joint tortfeasors with Synthes, Dr. LaRocca and the hospital were merely permissive parties. The Court of Appeals erred by failing to hold that the District Court abused its discretion in ordering them joined as defendants and in dismissing the action when Temple failed to comply with the court's order. For these reasons, we

grant the petition for certiorari, reverse the judgment of the Court of Appeals for the Fifth Circuit, and remand for further proceedings consistent with this opinion.

It is so ordered.

Notes & Questions

1. There are at least three separate proceedings discussed in this case. Identify each, its parties, and its procedural history.
2. Why did the courts below think that the doctor and the hospital were required parties? What interest led them to that conclusion?
3. Why did the Supreme Court disagree that the doctor and the hospital were required parties?
4. Finally, the Court notes that, because the doctor and the hospital were not required parties, there was no need to conduct an inquiry under Rule 19(b). That provision specifies what the consequences are when a party is required but unable to be joined. The next case takes up those rules.

Helzberg's Diamond Shops v. Valley West Des Moines Shopping Center

ALSOP, J.

564 F.2d 816 (8th Cir. 1977)

On February 3, 1975, Helzberg's Diamond Shops, Inc. (Helzberg), a Missouri corporation, and Valley West Des Moines Shopping Center, Inc. (Valley West), an Iowa corporation, executed a written Lease Agreement. The Lease Agreement granted Helzberg the right to operate a full line jewelry store at space 254 in the Valley West Mall in West Des Moines, Iowa. Section 6 of Article V of the Lease Agreement provides:

> [Valley West] agrees it will not lease premises in the shopping center for use as a catalog jewelry store nor lease premises for more than two full line jewelry stores in the shopping center in addition to the leased premises. This clause shall not prohibit other stores such as department stores from selling jewelry from catalogs or in any way restrict the shopping center department stores.

Subsequently, Helzberg commenced operation of a full line jewelry store in the Valley West Mall.

Between February 3, 1975 and November 2, 1976 Valley West and two other corporations entered into leases for spaces in the Valley West Mall for use as full line jewelry stores. Pursuant to those leases the two corporations also initiated actual operation of full line jewelry stores. On November 2, 1976, Valley West and Kirk's Incorporated, Jewelers, an Iowa corporation, doing business as Lord's Jewelers (Lord's), entered into a written Lease Agreement. The Lease

Agreement granted Lord's the right to occupy space 261 in the Valley West Mall. Section I of Article V of the Lease Agreement provides that Lord's will use space 261

> … only as a retail specialty jewelry store (and not as a catalogue or full line jewelry store) featuring watches, jewelry (and the repair of same) and incidental better gift items.

However, Lord's intended to open and operate what constituted a full line jewelry store at space 261.

In an attempt to avoid the opening of a fourth full line jewelry store in the Valley West Mall and the resulting breach of the Helzberg-Valley West Lease Agreement, Helzberg instituted suit seeking preliminary and permanent injunctive relief restraining Valley West's breach of the Lease Agreement. The suit was filed in the United States District Court for the Western District of Missouri. Subject matter jurisdiction was invoked pursuant to 28 U.S.C. § 1332 based upon diversity of citizenship between the parties and an amount in controversy which exceeded [the statutory amount]. Personal jurisdiction was established by service of process on Valley West pursuant to the Missouri "long arm" statute, Rev. Stat. Mo. § 506.500 et seq. (1977). Rule 4(e), Fed. R. Civ. P.

Valley West moved to dismiss pursuant to Rule 19 because Helzberg had failed to join Lord's as a party defendant. That motion was denied. The district court went on to order that

> pending the determination of [the] action on the merits, that [Valley West] be, and it is hereby, enjoined and restrained from allowing, and shall take all necessary steps to prevent, any other tenant in its Valley West Mall (including but not limited to Kirk's Incorporated, Jewelers, d/ b/a Lord's Jewelers) to open and operate on March 30, 1977, or at any other time, or to be operated during the term of [Helzberg's] present leasehold, a fourth full line jewelry store meaning a jewelry store offering for sale at retail a broad range of jewelry items at various prices such as diamonds and diamond jewelry, precious and semi-precious stones, watches, rings, gold jewelry, costume jewelry, gold chains, pendants, bracelets, belt buckles, tie tacs, tie slides and earrings, provided, however, nothing contained herein shall be construed to enjoin [Valley West] from allowing the opening in said Valley West Mall of a small store, known by [Valley West] as a boutique, which sells limited items such as only Indian jewelry, only watches, only earrings, or only pearls.

From this order Valley West appeals.

It is clear that Valley West is entitled to appeal from the order granting preliminary injunctive relief. 28 U.S.C. § 1292(a)(1). However, Valley West does not attack the propriety of the issuance of a preliminary injunction directly; instead, it challenges the District Court's denial of its motion to dismiss for failure to

join an indispensable party and argues that the District Court's order fails for lack of specificity in describing the acts of Valley West to be restrained. […]

Because Helzberg was seeking and the District Court ordered injunctive relief which may prevent Lord's from operating its jewelry store in the Valley West Mall in the manner in which Lord's originally intended, the District Court correctly concluded that Lord's was a party to be joined if feasible. *See* Rule 19(a)[(1)(b)](i), Fed. R. Civ. P. Therefore, because Lord's was not and is not subject to personal jurisdiction in the Western District of Missouri, the District Court was required to determine whether or not Lord's should be regarded as indispensable. After considering the factors which Rule 19(b) mandates be considered, the District Court concluded that Lord's was not to be regarded as indispensable. We agree. […]

Rule 19(b) requires the court to look first to the extent to which a judgment rendered in Lord's absence might be prejudicial to Lord's or to Valley West. Valley West argues that the District Court's order granting preliminary injunctive relief does prejudice Lord's and may prejudice Valley West. We do not agree.

It seems axiomatic that none of Lord's rights or obligations will be ultimately determined in a suit to which it is not a party. Even if, as a result of the District Court's granting of the preliminary injunction, Valley West should attempt to terminate Lord's leasehold interest in space 261 in the Valley West Mall, Lord's will retain all of its rights under its Lease Agreement with Valley West. None of its rights or obligations will have been adjudicated as a result of the present proceedings, proceedings to which it is not a party. Therefore, we conclude that Lord's will not be prejudiced in a way contemplated by Rule 19(b) as a result of this action.

Likewise, we think that Lord's absence will not prejudice Valley West in a way contemplated by Rule 19(b). Valley West contends that it may be subjected to inconsistent obligations as a result of a determination in this action and a determination in another forum that Valley West should proceed in a fashion contrary to what has been ordered in these proceedings.

It is true that the obligations of Valley West to Helzberg, as determined in these proceedings, may be inconsistent with Valley West's obligations to Lord's. However, we are of the opinion that any inconsistency in those obligations will result from Valley West's voluntary execution of two Lease Agreements which impose inconsistent obligations rather than from Lord's absence from the present proceedings.

Helzberg seeks only to restrain Valley West's breach of the Lease Agreement to which Helzberg and Valley West were the sole parties. Certainly, all of the rights and obligations arising under a lease can be adjudicated where all of the parties to the lease are before the court. Thus, in the context of these proceedings the District Court can determine all of the rights and obligations of both Helzberg and Valley West based upon the Lease Agreement between them, even though Lord's is not a party to the proceedings.

Valley West's contention that it may be subjected to inconsistent judgments if Lord's should choose to file suit elsewhere and be awarded judgment is speculative at best. In the first place, Lord's has not filed such a suit. Secondly, there is no showing that another court is likely to interpret the language of the two Lease Agreements differently from the way in which the District Court would. Therefore, we also conclude that Valley West will suffer no prejudice as a result of the District Court's proceeding in Lord's absence. Any prejudice which Valley West may suffer by way of inconsistent judgments would be the result of Valley West's execution of Lease Agreements which impose inconsistent obligations and not the result of the proceedings in the District Court.

Rule 19(b) also requires the court to consider ways in which prejudice to the absent party can be lessened or avoided. The District Court afforded Lord's an opportunity to intervene in order to protect any interest it might have in the outcome of this litigation. Lord's chose not to do so. In light of Lord's decision not to intervene we conclude that the District Court acted in such a way as to sufficiently protect Lord's interests.

Similarly, we also conclude that the District Court's determinations that a judgment rendered in Lord's absence would be adequate and that there is no controlling significance to the fact that Helzberg would have an adequate remedy in the Iowa courts were not erroneous. It follows that the District Court's conclusion that in equity and good conscience the action should be allowed to proceed was a correct one.

In sum, it is generally recognized that a person does not become indispensable to an action to determine rights under a contract simply because that person's rights or obligations under an entirely separate contract will be affected by the result of the action. This principle applies to an action against a lessor who has entered into other leases which also may be affected by the result in the action in which the other lessees are argued to be indispensable parties. We conclude that the District Court properly denied the motion to dismiss for failure to join an indispensable party. […]

In view of the foregoing, it follows that the judgment of the District Court is affirmed.

Notes & Questions

1. Follow the logic of Rule 19 closely. Helzberg's sued Valley West. Valley West moved to dismiss for lack of a required party, Lord's. The court concluded, applying Rule 19(a) that Lord's was in fact a required party. (Why?) Then the court proceeded to determine, under Rule 19(b), what to do in Lord's absence (for jurisdictional reasons, Lord's could not be added to the case). The court then balanced a series of factors to conclude that dismissal was not appropriate, notwithstanding Lord's absence. (What were the factors considered?)

2. Whose fault was it that there were two jewelry stores in the Valley West mall? Who would have benefited most from dismissal of Helzberg's suit? Do the answers to those two questions help explain why the case turned out as it did?

Rule 24 allows non-parties to a case an opportunity to join the case (usually, but not always, as a plaintiff). Just as Rule 19 distinguishes between permissive joinder and required joinder, Rule 24 distinguishes between permissive intervention (Rule 24(b)) and intervention as of right (Rule 24(a)). The next case examines these two bases of intervention.

Natural Resources Defense Council v. United States Nuclear Regulatory Commission

DOYLE, J.

578 F.2d 1341 (10th Cir. 1978)

The American Mining Congress and Kerr-McGee Nuclear Corporation seek review of the order of the United States District Court for the District of New Mexico denying their motions to intervene [as] a matter of right or on a permissive basis, pursuant to Rule 24(a)(2) and (b), Fed. R. Civil Proc.

The underlying action in which the movants requested intervention was instituted by the Natural Resources Defense Council, Inc., and others. In the action, declaratory and injunctive relief is directed to the United States Nuclear Regulatory Commission (NRC) and the New Mexico Environmental Improvement Agency (NMEIA), prohibiting those agencies from issuing licenses for the operation of uranium mills in New Mexico without first preparing environmental impact statements. Kerr-McGee and United Nuclear are potential recipients of the licenses.

Congress, in the Atomic Energy Act of 1954, has authorized the NRC to issue such licenses. NMEIA is involved because under § 274(b) of the Act, the NRC is authorized to enter into agreements with the states allowing the states to issue licenses. Such agreements have been made with about 25 states including New Mexico. Thus, the action below in effect seeks to prevent the use of § 274(b) of the Act so as to avoid the requirement of an impact statement for which provision is made in the National Environmental Policy Act. […]

The relief sought by the plaintiffs' complaint is, first, that NRC's involvement in the licensing procedure in New Mexico is, notwithstanding the delegation to the state, sufficient to constitute major federal action, whereby the impact statement requirement is not eliminated. Second, that if an impact statement is not required in connection with the granting of licenses, the New Mexico program is in conflict with § 274(d)(2) of the Atomic Energy Act of 1954.

The motion of United Nuclear Corporation to intervene is not opposed by the parties and was granted. On May 3, 1977, the date that the complaint herein was filed, NMEIA granted a license to United Nuclear to operate a uranium

mill at Church Rock, New Mexico. The complaint seeks to enjoin the issuance of the license thus granted.

It was after that that Kerr-McGee Nuclear Corporation, Anaconda Company, Gulf Oil Corporation, Phillips Petroleum Company, and the American Mining Congress filed motions to intervene. These motions, insofar as they sought intervention as of right, were denied on the ground that the interests of the parties or movants would be adequately represented by United Nuclear. Permissive intervention was also denied. Kerr-McGee and the American Mining Congress both appeal denial of both intervention as of right and permissive intervention.

Our issue is a limited one. We merely construe and weigh Rule 24(a) of the Fed. R. Civ. P. (intervention as of right) and decide in light of the facts and considerations presented whether the denial of intervention was correct. [The court quoted Rule 24(a).] We do not have a subsection (1) situation involving a statutory conferring of right to intervene. Accordingly, we must consider the standards set forth in subsection (2), which are:

> 1. Whether the applicant claims an interest relating to the property or transaction which is the subject of the action.
>
> 2. Whether the claimants are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect that interest.
>
> 3. Whether their interest is not adequately represented by existing

[…] Our conclusion is that the interests of movants in the subject matter is sufficient to satisfy the requirements of Rule 24 and that the threat of loss of their interest and inability to participate is of such magnitude as to impair their ability to advance their interest.

I

[…] Strictly to require that the movant in intervention have a direct interest in the outcome of the lawsuit strikes us as being too narrow a construction of Rule 24(a)(2). […]

In our case the matter of immediate interest is, of course, the issuance and delivery of the license sought by United Nuclear. However, the consequence of the litigation could well be the imposition of the requirement that an environmental impact statement be prepared before granting any uranium mill license in New Mexico, or, secondly, it could result in an injunction terminating or suspending the agreement between NRC and NMEIA. Either consequence would be felt by United Nuclear and to some degree, of course, by Kerr-McGee, which is said to be one of the largest holders of uranium properties in New Mexico. It operates a uranium mill in Grants, New Mexico, pursuant to an NMEIA license, which application for renewal is pending. A decision in favor of the plaintiffs, which is not unlikely, could have a profound effect upon Kerr-McGee. Hence, it does have an interest within the meaning of Rule 24(a)(2). This interest of Kerr-McGee is in sharp contrast to the minimal interest which was present in

Allard, wherein it was an interest of environmental groups in the protection of living birds. This was considered insufficient to justify intervention in a case involving feathers which are part of Indian artifacts. Their interest was said to be limited to a general interest in the public. The interest asserted on behalf of Kerr-McGee and the American Mining Congress is one which is a genuine threat to Kerr-McGee and the members of the American Mining Congress to a substantial degree.

We do not suggest that Kerr-McGee could expect better treatment from state authorities than federal. We do recognize that a change in procedure would produce impairing complications.

II

The next question is whether, assuming the existence of an interest, the chance of impairment is sufficient to fulfill the requirement of Rule 24(a)(2).

[…] If the relief sought by the plaintiffs is granted, there can be little question but that the interests of the American Mining Congress and of Kerr-McGee would be affected. Plaintiffs contend, however, that appellants would not be bound by such a result if they are not participants. Kerr-McGee points out that even though it may not be res judicata, still it would have a stare decisis effect. Moreover, with NRC and NMEIA as parties, the result might be more profound than stare decisis.

It should be pointed out that the Rule refers to impairment "as a practical matter." Thus, the court is not limited to consequences of a strictly legal nature. The court may consider any significant legal effect in the applicant's interest and it is not restricted to a rigid res judicata test. Hence, the stare decisis effect might be sufficient to satisfy the requirement. It is said that where, as here, the case is of first impression, the stare decisis effect would be important.

Finally, the considerations for requiring an environmental impact statement will be relatively the same in respect to the issuance of a uranium mining license in every instance. Hence, to say that it can be repeatedly litigated is not an answer, for the chance of getting a contrary result in a case which is substantially similar on its facts to one previously adjudicated seems remote.

We are of the opinion, therefore, that appellants have satisfied the impairment criterion.

III

The final question is whether the trial court was correct in its conclusion that United Nuclear would adequately represent Kerr-McGee and the American Mining Congress.

The finding and conclusion was that the representation would be adequate because United Nuclear, a fellow member of the industry, has interests which were the same as those of the appellants and possessed the same level of knowledge and experience with the ability and willingness to pursue the matter and could adequately represent Kerr-McGee and the members of the American Mining Congress. […]

United Nuclear is situated somewhat differently in this case than are the other members of the industry since it has been granted its license. From this it is urged by Kerr-McGee that United Nuclear may be ready to compromise the case by obtaining a mere declaration that while environmental impact statements should be issued, this requirement need be prospective only, whereby it would not affect them. While we see this as a remote possibility, we gravely doubt that United Nuclear would opt for such a result. It is true, however, that United Nuclear has a defense of laches that is not available to Kerr-McGee or the others.

7A C. Wright & A. Miller, Federal Practice & Procedure, § 1909, at 524 (1972), says:

> [I]f [an applicant's] interest is similar to, but not identical with, that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, but he ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee.

While the interest of the two applicants may appear similar, there is no way to say that there is no possibility that they will not be different and the possibility of divergence of interest need not be great in order to satisfy the burden of the applicants under National Farm Lines.

There are other reasons for allowing intervention. There is some value in having the parties before the court so that they will be bound by the result. American Mining Congress represents a number of companies having a wide variety of interests. This can, therefore, provide a useful supplement to the defense of the case. The same can be said of Kerr-McGee.

The trial court was concerned that the addition of these movants would make the litigation unwieldy. If the intervenors are limited to this group, unwieldiness does not become a problem which the trial court cannot control. It does not appear that there would be a need for additional parties in view of the presence of the American Mining Congress. While we do not express an opinion on the possibilities of further additions, we wish to make clear that the present holdings that the two applicants should be allowed to intervene does not say that others should be added.

The order of the district court is reversed and the cause is remanded with instructions to the trial court to grant the appellants, Kerr-McGee's and American Mining Congress', motions to intervene.

Notes & Questions

1. As the court notes, in the absence of a statutory right to intervene, intervention as of right requires three showings: (1) an interest relating to the case; (2) the disposition of which would impair the movant's ability to

protect its interest; and (3) there is no party who would adequately represent the would-be intervenor's interest. The court proceeds through these three requirements in turn. Follow closely its analysis at each stage to get a sense of what each requirement demands.

2. What happened to the argument that the intervenors should be permitted to intervene? Why didn't the court discuss that aspect of the movants' appeal in detail?

9.2. Non-Parties & Judgments

So far we have spoken of aggregation in terms of addition. Instead of one party, twenty. Instead of one claim going one direction, several claims traced by arrows pointing in many directions. But lurking unassuming in the Federal Rules of Civil Procedure is mechanism for aggregation by multiplication. Rule 23 authorizes class actions—representative suits that combine the claims (or defenses) of potentially thousands or even millions of people.

Class actions are important for many reasons, but the chief one is probably economic. By banding together the claims of many in one case, both the litigants and courts can unlock massive economies of scale. For that reason, class actions promise to make the civil litigation system more efficient and, we might therefore say, fairer.

But there is a risk with class actions. Because they litigate the claims of people who are not present before the court but rather are represented by a lead plaintiff or defendant, they threaten to extinguish individual's rights without affording them notice and an opportunity to be heard. If you've made it this far, your due process alarm is sounding. So too does that alarm sound at the Supreme Court.

The next case sets the stage, by reminding us of a fact already learned from *Taylor v. Sturgell*: those who are not parties to a case cannot be bound by a judgment rendered in it. The flip side of that insight, as the remainder of the chapter will show, is that the class action offers a way to bring non-parties into a case, and thereby bind them—win *or* lose.

Martin v. Wilks

REHNQUIST, C.J., delivered the opinion of the Court. 490 U.S. 755 (1989)

A group of white firefighters sued the city of Birmingham, Alabama (City), and the Jefferson County Personnel Board (Board) alleging that they were being denied promotions in favor of less qualified black firefighters. They claimed that the City and the Board were making promotion decisions on the basis of race in reliance on certain consent decrees, and that these decisions constituted impermissible racial discrimination in violation of the Constitution and federal

statutes. The District Court held that the white firefighters were precluded from challenging employment decisions taken pursuant to the decrees, even though these firefighters had not been parties to the proceedings in which the decrees were entered. We think this holding contravenes the general rule that a person cannot be deprived of his legal rights in a proceeding to which he is not a party.

The [initial] litigation […] began in 1974, when the Ensley Branch of the NAACP and seven black individuals filed separate class-action complaints against the City [of Birmingham] and the Board. They alleged that both had engaged in racially discriminatory hiring and promotion practices in various public service jobs in violation of Title VII of the Civil Rights Act of 1964 and other federal law. After a bench trial on some issues, but before judgment, the parties entered into two consent decrees, one between the black individuals and the City and the other between them and the Board. These proposed decrees set forth an extensive remedial scheme, including long-term and interim annual goals for the hiring of blacks as firefighters. The decrees also provided for goals for promotion of blacks within the department. The District Court entered an order provisionally approving the decrees and directing publication of notice of the upcoming fairness hearings. Notice of the hearings, with a reference to the general nature of the decrees, was published in two local newspapers. At that hearing, the Birmingham Firefighters Association (BFA) appeared and filed objections as amicus curiae. After the hearing, but before final approval of the decrees, the BFA and two of its members also moved to intervene on the ground that the decrees would adversely affect their rights. The District Court denied the motions as untimely and approved the decrees. Seven white firefighters, all members of the BFA, then filed a complaint against the City and the Board seeking injunctive relief against enforcement of the decrees. The seven argued that the decrees would operate to illegally discriminate against them; the District Court denied relief. […]

A new group of white firefighters, the Wilks respondents, then brought suit against the City and the Board in District Court. They too alleged that, because of their race, they were being denied promotions in favor of less qualified blacks in violation of federal law. The Board and the City admitted to making race conscious employment decisions, but argued the decisions were unassailable because they were made pursuant to the consent decrees. A group of black individuals, the Martin petitioners, were allowed to intervene in their individual capacities to defend the decrees.

The defendants moved to dismiss the reverse discrimination cases as impermissible collateral attacks on the consent decrees. […] After trial the District Court granted the motion to dismiss. […]

On appeal, the Eleventh Circuit reversed. It held that "[b]ecause … [the Wilks respondents] were neither parties nor privies to the consent decrees, … their independent claims of unlawful discrimination are not precluded." […]

We granted certiorari and now affirm the Eleventh Circuit's judgment. All agree that "[i]t is a principle of general application in Anglo-American jurispru-

dence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) [*see infra*]. This rule is part of our "deep-rooted historic tradition that everyone should have his own day in court." 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4449, p. 417 (1981) (18 Wright). A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.[2] Petitioners argue that, because respondents failed to timely intervene in the initial proceedings, their current challenge to actions taken under the consent decree constitutes an impermissible "collateral attack." They argue that respondents were aware that the underlying suit might affect them and if they chose to pass up an opportunity to intervene, they should not be permitted to later litigate the issues in a new action. The position has sufficient appeal to have commanded the approval of the great majority of the Federal Courts of Appeals, but we agree with the contrary view expressed by the Court of Appeals for the Eleventh Circuit in this case.

We begin with the words of Justice Brandeis in *Chase National Bank v. Norwalk*, 291 U.S. 431 (1934):

> The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. … Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.

While these words were written before the adoption of the Federal Rules of Civil Procedure, we think the Rules incorporate the same principle; a party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined. […] Against the background of permissive intervention set forth in Chase National Bank, the drafters cast Rule 24, governing intervention, in permissive terms. *See* Fed. Rule Civ. Proc. 24(a) (intervention as of right) ("[on timely motion, the court must permit anyone to intervene"]); Fed. Rule Civ. Proc. 24(b) (permissive intervention) (["on timely motion, the court may permit anyone to intervene"]). They determined that the concern for finality and completeness of judgments would be "better [served] by mandatory joinder procedures." 18 Wright § 4452, p. 453. Accordingly, Rule 19(a) provides for mandatory joinder in circumstances where a judgment rendered in the absence of a person may "leave [an existing party] subject to a substantial risk of incurring … inconsistent obligations … ." Rule 19(b) sets forth the factors to be considered by a court in deciding whether to allow an action to proceed in the absence of an interested party.

Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree.[6] The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on them a burden of bringing in additional

[2] We have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party. *See Hansberry v. Lee*, 311 U.S. 32, 41–42 (1940) ("class" or "representative" suits); Fed. Rule Civ. Proc. 23 (same). Additionally, where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate pre-existing rights if the scheme is otherwise consistent with due process. Neither of these exceptions, however, applies in these cases.

[6] The dissent argues, on the one hand, that respondents have not been "bound" by the decree but, rather, that they are only suffering practical adverse effects from the consent decree. On the other hand, the dissent characterizes respondents' suit not as an assertion of their own independent rights, but as a collateral attack on the consent decrees which, it is said, can only proceed on very limited grounds. Respondents in their suit have alleged that they are being racially discriminated against by their employer in violation of Title VII: either the fact that the disputed employment decisions are being made pursuant to a consent decree is a defense to respondents' Title VII claims or it is not. If it is a defense to challenges to employment practices which would otherwise violate Title VII, it is very difficult to see why respondents are not being "bound" by the decree.

parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit. The linchpin of the "impermissible collateral attack" doctrine—the attribution of preclusive effect to a failure to intervene—is therefore quite inconsistent with Rule 19 and Rule 24. […]

Petitioners […] rely on our decision in *Provident Tradesmans Bank* as authority for the view which they espouse. In that case we discussed Rule 19 shortly after parts of it had been substantially revised, but we expressly left open the question of whether preclusive effect might be attributed to a failure to intervene.

Petitioners contend that a different result should be reached because the need to join affected parties will be burdensome and ultimately discouraging to civil rights litigation. Potential adverse claimants may be numerous and difficult to identify; if they are not joined, the possibility for inconsistent judgments exists. Judicial resources will be needlessly consumed in relitigation of the same question.

Even if we were wholly persuaded by these arguments as a matter of policy, acceptance of them would require a rewriting rather than an interpretation of the relevant Rules. But we are not persuaded that their acceptance would lead to a more satisfactory method of handling cases like this one. It must be remembered that the alternatives are a duty to intervene based on knowledge, on the one hand, and some form of joinder, as the Rules presently provide, on the other. No one can seriously contend that an employer might successfully defend against a Title VII claim by one group of employees on the ground that its actions were required by an earlier decree entered in a suit brought against it by another, if the later group did not have adequate notice or knowledge of the earlier suit.

The difficulties petitioners foresee in identifying those who could be adversely affected by a decree granting broad remedial relief are undoubtedly present, but they arise from the nature of the relief sought and not because of any choice between mandatory intervention and joinder. Rule 19's provisions for joining interested parties are designed to accommodate the sort of complexities that may arise from a decree affecting numerous people in various ways. We doubt that a mandatory intervention rule would be any less awkward. As mentioned, plaintiffs who seek the aid of the courts to alter existing employment policies, or the employer who might be subject to conflicting decrees, are best able to bear the burden of designating those who would be adversely affected if plaintiffs prevail; these parties will generally have a better understanding of the scope of likely relief than employees who are not named but might be affected. Petitioners' alternative does not eliminate the need for, or difficulty of, identifying persons who, because of their interests, should be included in a lawsuit. It merely shifts that responsibility to less able shoulders.

Nor do we think that the system of joinder called for by the Rules is likely to produce more relitigation of issues than the converse rule. The breadth of a lawsuit and concomitant relief may be at least partially shaped in advance

through Rule 19 to avoid needless clashes with future litigation. And even under a regime of mandatory intervention, parties who did not have adequate knowledge of the suit would relitigate issues. Additional questions about the adequacy and timeliness of knowledge would inevitably crop up. We think that the system of joinder presently contemplated by the Rules best serves the many interests involved in the run of litigated cases, including cases like the present one. […]

STEVENS, J., with whom BRENNAN, J., MARSHALL, J., and BLACKMUN, J., join, dissenting.

As a matter of a law there is a vast difference between persons who are actual parties to litigation and persons who merely have the kind of interest that may as a practical matter be impaired by the outcome of a case. Persons in the first category have a right to participate in a trial and to appeal from an adverse judgment; depending on whether they win or lose, their legal rights may be enhanced or impaired. Persons in the latter category have a right to intervene in the action in a timely fashion, or they may be joined as parties against their will. But if they remain on the sidelines, they may be harmed as a practical matter even though their legal rights are unaffected. One of the disadvantages of sideline-sitting is that the bystander has no right to appeal from a judgment no matter how harmful it may be.

In this case the Court quite rightly concludes that the white firefighters who brought the second series of Title VII cases could not be deprived of their legal rights in the first series of cases because they had neither intervened nor been joined as parties. The consent decrees obviously could not deprive them of any contractual rights, such as seniority or accrued vacation pay, or of any other legal rights, such as the right to have their employer comply with federal statutes like Title VII. There is no reason, however, why the consent decrees might not produce changes in conditions at the white firefighters' place of employment that, as a practical matter, may have a serious effect on their opportunities for employment or promotion even though they are not bound by the decrees in any legal sense. The fact that one of the effects of a decree is to curtail the job opportunities of nonparties does not mean that the non-parties have been deprived of legal rights or that they have standing to appeal from that decree without becoming parties. […]

Notes & Questions

(4) Start by focusing on the various stages of litigation discussed in the Court's opinion. In the first, the NAACP and a group of Black firefighters filed class action suits against the City and Board for racially discriminatory hiring practices in violation of federal law. That first round of litigation resulted in a pair of consent decrees (essentially court-enforced settlements) setting benchmarks for the future hiring and promotion of Black firefighters. As is required with class-action settlements (*see Amchem v. Ortiz*, *infra*), the court conducted a hearing to determine whether the consent decrees were fair. At the fairness hearing, the Birmingham Firefighters Association—representing mostly

white firefighters—objected to the consent decrees as unfair to white firefighters. The BFA and two individual white firefighters also sought to intervene in the original litigation to argue against the consent decrees. The court rejected both the objections and the motion to intervene, and approved the consent decrees, which went into effect.

Next, a new group of seven white firefighters—all members of the BFA but none of whom had appeared in the earlier litigation—filed a new lawsuit against the City and Board arguing that the consent decrees caused the hiring process to be illegally biased against *them*. The court dismissed that suit.

Finally, *another* set of white firefighters (led by Wilks, respondent in the Supreme Court) filed *another* lawsuit raising essentially the same arguments as the prior suit. Then, a group of Black firefighters (led by Martin, the petitioner in the Supreme Court) moved for, and were granted, leave to intervene to defend the legality of the consent decrees. As part of their defense of the consent decrees, Martin and the Black firefighters argued that Wilks and the white firefighters were seeking to relitigate that which had already been decided against them in the earlier litigation.

(5) Part of the reason why this case is perplexing is because the Wilks firefighters had turned down so many opportunities to raise their arguments earlier in the litigation: They could have objected to the fairness of the consent decrees, as the BFA did; they could have moved to intervene in the original suit; or they could have joined the subsequent suit on behalf of the seven white firefighters. Instead, they stayed on the sidelines, waiting to see what would happen at those earlier stages. Only when their interests weren't vindicated by others did they file their own suit. At a certain level, that seems wasteful of judicial resources and unfair to the parties to the earlier litigation.

(6) At the same time, the Court's opinion in *Martin v. Wilks* simply insists on the same principle that animated *Taylor v. Sturgell*: each person is entitled to his own day in court—even if similarly situated litigants have already litigated similar claims or arguments. *Martin* makes this point by emphasizing the voluntary nature of intervention under Rule 24. Simply because a litigant declines the opportunity to intervene in an earlier suit does not mean that he has forfeited his right to his day in court.

(7) What if anything could the NAACP and the original Black plaintiffs have done to ensure no future suits would be possible?

9.3. Class Actions

Hansberry v. Lee

STONE, J., delivered the opinion of the Court.

311 U.S. 32 (1940)

The question is whether the Supreme Court of Illinois, by its adjudication that petitioners in this case are bound to a judgment rendered in an earlier litigation to which they were not parties, has deprived them of the due process of law guaranteed by the Fourteenth Amendment. […]

[The Hansberrys, a black family, bought a house in an area of Chicago allegedly covered by a racially restrictive covenant.* The covenant at issue had been recognized as valid and binding in an earlier suit, *Burke v. Kleiman*, filed in Illinois state court. In *Burke*, a property owner filed a class action "on behalf of herself and other property owners in like situation" sued four named individuals allegedly in violation of the covenant. The covenant by its terms could not take effect unless signed by owners of 95 percent of the covered property. Burke was litigated in the Illinois courts, where the parties had stipulated (falsely) that the requisite 95 percent had signed. (In fact, the signers represented only 54 percent.) Nevertheless, the *Burke* court adopted the stipulation in its findings and therefore upheld the covenant.

In the instant action, Lee sued both the Hansberrys and the family who had sold the property to them seeking an injunction to halt breach of the covenant. The Hansberrys resisted the suit by arguing that the covenant was not valid because too few owners had signed it. Lee countered by pointing to *Burke v. Kleiman* and arguing that the Hansberrys were bound by the judgment in that earlier suit. The Supreme Court of Illinois determined that the earlier *Burke* case had been a class action, that the Hansberrys and the family who sold to them were members of the class of plaintiffs in *Burke*, and that they were therefore bound by the findings in the previous action even though those findings were factually erroneous.]

To the defense that the agreement had never become effective because owners of 95 per cent of the frontage had not signed it, respondents pleaded that that issue was res judicata by the decree in an earlier suit. To this petitioners pleaded, by way of rejoinder, that they were not parties to that suit or bound by its decree, and that denial of their right to litigate, in the present suit, the issue of performance of the condition precedent to the validity of the agreement would be a denial of due process of law guaranteed by the Fourteenth Amendment. It does not appear, nor is it contended that any of petitioners is the successor in interest to or in privity with any of the parties in the earlier suit.

The [state] […] court, after a trial on the merits, found that owners of only about 54 per cent of the frontage had signed the agreement, and that the only support of the judgment in the Burke case was a false and fraudulent stipulation of the parties that owners of 95 per cent had signed. But it ruled that the issue of

* [Such covenants were held unenforceable eight years later in *Shelley v. Kraemer*, 334 U.S. 1 (1948). –*Ed.*]

performance of the condition precedent to the validity of the agreement was res judicata as alleged and entered a decree for respondents. […]

From this the Supreme Court of Illinois concluded in the present case that *Burke v. Kleiman* was a "class" or "representative" suit, and that in such a suit, "where the remedy is pursued by a plaintiff who has the right to represent the class to which he belongs, other members of the class are bound by the results in the case unless it is reversed or set aside on direct proceedings"; that petitioners in the present suit were members of the class represented by the plaintiffs in the earlier suit and consequently were bound by its decree. […]

State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes.

It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Pennoyer v. Neff.* A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statutes of the United States prescribe, *Pennoyer v. Neff*; and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require.

To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.

The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable. Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree. […]

[T]here is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is res judicata as to members of the class who are not formal parties to the suit. Here, as elsewhere, the Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits, nor does it compel the adoption of the particular rules thought by this Court to be appropriate for the federal courts. With a proper regard for divergent local institutions and interests, this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.

It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties, or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter.

In all such cases, so far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented, though absent, which would satisfy the requirements of due process and full faith and credit. Nor do we find it necessary for the decision of this case to say that, when the only circumstance defining the class is that the determination of the rights of its members turns upon a single issue of fact or law, a state could not constitutionally adopt a procedure whereby some of the members of the class could stand in judgment for all, provided that the procedure were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue. We decide only that the procedure and the course of litigation sustained here by the plea of res judicata do not satisfy these requirements.

The restrictive agreement did not purport to create a joint obligation or liability. If valid and effective its promises were the several obligations of the signers and those claiming under them. The promises ran severally to every other signer. It is plain that in such circumstances all those alleged to be bound by the agreement would not constitute a single class in any litigation brought to enforce it. Those who sought to secure its benefits by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance, for the agreement by its terms imposes obligations and confers rights on the owner of each plot of land who signs it. If those who thus seek to secure the benefits of the agreement were rightly regarded by the state Supreme Court as constituting a class, it is evident that those signers or their successors who are interested in challenging the validity of the agreement and

resisting its performance are not of the same class in the sense that their interests are identical so that any group who had elected to enforce rights conferred by the agreement could be said to be acting in the interest of any others who were free to deny its obligation.

Because of the dual and potentially conflicting interests of those who are putative parties to the agreement in compelling or resisting its performance, it is impossible to say, solely because they are parties to it, that any two of them are of the same class. Nor without more, and with the due regard for the protection of the rights of absent parties which due process exacts, can some be permitted to stand in judgment for all.

It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group, merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far. Apart from the opportunities it would afford for the fraudulent and collusive sacrifice of the rights of absent parties, we think that the representation in this case no more satisfies the requirements of due process than a trial by a judicial officer who is in such situation that he may have an interest in the outcome of the litigation in conflict with that of the litigants.

The plaintiffs in the Burke case sought to compel performance of the agreement in behalf of themselves and all others similarly situated. They did not designate the defendants in the suit as a class or seek any injunction or other relief against others than the named defendants, and the decree which was entered did not purport to bind others. In seeking to enforce the agreement the plaintiffs in that suit were not representing the petitioners here whose substantial interest is in resisting performance. The defendants in the first suit were not treated by the pleadings or decree as representing others or as foreclosing by their defense the rights of others; and, even though nominal defendants, it does not appear that their interest in defeating the contract outweighed their interest in establishing its validity. For a court in this situation to ascribe to either the plaintiffs or defendants the performance of such functions on behalf of petitioners here, is to attribute to them a power that it cannot be said that they had assumed to exercise, and a responsibility which, in view of their dual interests it does not appear that they could rightly discharge.

Reversed.

MCREYNOLDS, J., ROBERTS, J., and REED, J., concur in the result.

Notes & Questions

1. *Hansberry* sets important limits on the degree to which non-parties can be bound by judgments in class-action suits. The source of this limitation is constitutional due process, which as you know by now guarantees, at a minimum, notice and an opportunity to be heard. *See, e.g.*, *Mullane v. Central Hanover Bank & Trust*, *supra*.

2. Compare *Hansberry* with *Taylor v. Sturgell* and *Martin v. Wilks*, *supra*. In all three cases, it was argued that people who were not parties to an earlier suit were nevertheless bound by the judgment in that suit. In all three cases, the Supreme Court rejected the argument, recognizing instead the "deep-rooted historic tradition that everyone should have his own day in court." *Martin*, 490 U.S. at 752.

3. On the other side of the same coin, *Hansberry* also has important consequences for the finality of judgments. Because the Hansberrys were not adequately represented in the *Burke* case, they had the power to "collaterally attack" the earlier judgment. In other words, due process limits the doctrines of claim and issue preclusion. As a result, parties are almost always free to challenge prior judgments on due process grounds. Keep this in mind when you learn about personal jurisdiction and read *Pennoyer v. Neff*.

4. Of course, the stakes of *Hansberry* were more significant than just the preclusive effect of class-action judgments. The case concerned a type of legal arrangement that was a key building block in edifice of de jure racism in the early twentieth century United States. But you would hardly know that from reading the case, which is silent on the underlying questions of racial segregation. Why do you think that is?

5. The youngest daughter of the Hansberry family, Lorraine, was a path-breaking playwright. Her most famous play, *A Raisin in the Sun*, became the longest-running Black-written play in Broadway history (530 performances), the first Broadway show ever written by a Black woman, and the first Broadway play with a Black director. The production starred Sidney Poitier and Ruby Dee in the leading roles of Walter and Ruth Younger—roles those two reprised one year later in a celebrated film adaptation.

   The play tells the story of a poor Black family living on Chicago's South Side who, with a $10,000 life-insurance payment, buy a house in an all-white neighborhood. Much of the play's drama is precipitated by efforts by white residents to stop the family from moving in. Sound familiar?

   Given the fact that the Hansberrys won at the Supreme Court, it is natural to assume the ending is a happy one. But Lorraine Hansberry wasn't so sure. Shortly before her death from cancer at the young age of 34, Hansberry remembered the litigation as quixotic and cruel:

My father was typical of a generation of Negroes who believed that the "American way" could successfully be made to work to democratize the United States. Thus, twenty-five years ago, he spent a small personal fortune, his considerable talents, and many years of his life fighting, in association with NAACP attorneys, Chicago's "restrictive covenants" in one of this nation's ugliest ghettoes.

That fight also required that our family occupy the disputed property in a hellishly hostile "white neighborhood" in which, literally, howling mobs surrounded our house. One of their missiles almost took the life of the then eight-year-old signer of this letter. My memories of this "correct" way of fighting white supremacy in America include being spat at, cursed and pummeled in the daily trek to and from school. And I also remember my desperate and courageous mother, patrolling our house all night with a loaded German luger, doggedly guarding her four children, while my father fought the respectable part of the battle in the Washington court.

The fact that my father and the NAACP "won" a Supreme Court decision, in a now famous case which bears his name in the lawbooks, is—ironically—the sort of "progress" our satisfied friends allude to when they presume to deride the more radical means of struggle.

[…] The entire situation suggests that the nation be reminded of the too little noted final lines of Langston Hughes' mighty poem:

> What happens to a dream deferred
> Does it dry up
> Like a raisin in the sun?
> Or fester like a sore—
> And then run?
> Does it stink like rotten meat?
> Or crust and sugar over—
> Like a syrupy sweet?
>
> Maybe it just sags
> Like a heavy load.
>
> *Or does it explode?*

Lorraine Hansberry, To Be Young, Gifted and Black 51–52 (Robert Nemiroff ed. 1969).

Wal-Mart Stores, Inc. v. Dukes

564 U.S. 338 (2011)

SCALIA, J., delivered the opinion of the Court.

We are presented with one of the most expansive class actions ever. The District Court and the Court of Appeals approved the certification of a class comprising about one and a half million plaintiffs, current and former female employees of

petitioner Wal-Mart who allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by discriminating against women. In addition to injunctive and declaratory relief, the plaintiffs seek an award of backpay. We consider whether the certification of the plaintiff class was consistent with Federal Rules of Civil Procedure 23(a) and (b)(2).

I

A

Petitioner Wal-Mart is the Nation's largest private employer. It operates four types of retail stores throughout the country: Discount Stores, Supercenters, Neighborhood Markets, and Sam's Clubs. Those stores are divided into seven nationwide divisions, which in turn comprise 41 regions of 80 to 85 stores apiece. Each store has between 40 and 53 separate departments and 80 to 500 staff positions. In all, Wal-Mart operates approximately 3,400 stores and employs more than one million people.

Pay and promotion decisions at Wal-Mart are generally committed to local managers' broad discretion, which is exercised "in a largely subjective manner." Local store managers may increase the wages of hourly employees (within limits) with only limited corporate oversight. As for salaried employees, such as store managers and their deputies, higher corporate authorities have discretion to set their pay within preestablished ranges.

Promotions work in a similar fashion. Wal-Mart permits store managers to apply their own subjective criteria when selecting candidates as "support managers," which is the first step on the path to management. Admission to Wal-Mart's management training program, however, does require that a candidate meet certain objective criteria, including an above-average performance rating, at least one year's tenure in the applicant's current position, and a willingness to relocate. But except for those requirements, regional and district managers have discretion to use their own judgment when selecting candidates for management training. Promotion to higher office—*e.g.*, assistant manager, co-manager, or store manager—is similarly at the discretion of the employee's superiors after prescribed objective factors are satisfied.

B

The named plaintiffs in this lawsuit, representing the 1.5 million members of the certified class, are three current or former Wal-Mart employees who allege that the company discriminated against them on the basis of their sex by denying them equal pay or promotions, in violation of Title VII of the Civil Rights Act of 1964. […]

These plaintiffs, respondents here, do not allege that Wal-Mart has any express corporate policy against the advancement of women. Rather, they claim that their local managers' discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees. And, respondents say, because Wal-Mart is aware of this effect, its refusal to cabin its managers' authority amounts to disparate treatment. Their

complaint seeks injunctive and declaratory relief, punitive damages, and backpay. It does not ask for compensatory damages.

Importantly for our purposes, respondents claim that the discrimination to which they have been subjected is common to all Wal-Mart's female employees. The basic theory of their case is that a strong and uniform "corporate culture" permits bias against women to infect, perhaps subconsciously, the discretionary decision-making of each one of Wal-Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice. Respondents therefore wish to litigate the Title VII claims of all female employees at Wal-Mart's stores in a nationwide class action.

C

Class certification is governed by Federal Rule of Civil Procedure 23. [The opinion quoted Rule 23(a), noting that all class actions must satisfy those requirements.]

[T]he proposed class must satisfy at least one of the three requirements listed in Rule 23(b). Respondents rely on Rule 23(b)(2), which applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[2]

[2] Rule 23(b)(1) allows a class to be maintained where "prosecuting separate actions by or against individual class members would create a risk of" either "(A) inconsistent or varying adjudications," or "(B) adjudications … that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Rule 23(b)(3) states that a class may be maintained where "questions of law or fact common to class members predominate over any questions affecting only individual members," and a class action would be "superior to other available methods for fairly and efficiently adjudicating the controversy." The applicability of these provisions to the plaintiff class is not before us.

Invoking these provisions, respondents moved the District Court to certify a plaintiff class consisting of "'[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices.'" As evidence that there were indeed "questions of law or fact common to" all the women of Wal-Mart, as Rule 23(a)(2) requires, respondents relied chiefly on three forms of proof: statistical evidence about pay and promotion disparities between men and women at the company, anecdotal reports of discrimination from about 120 of Wal-Mart's female employees, and the testimony of a sociologist, Dr. William Bielby, who conducted a "social framework analysis" of Wal-Mart's "culture" and personnel practices, and concluded that the company was "vulnerable" to gender discrimination.

Wal-Mart unsuccessfully moved to strike much of this evidence. It also offered its own countervailing statistical and other proof in an effort to defeat Rule 23(a)'s requirements of commonality, typicality, and adequate representation. Wal-Mart further contended that respondents' monetary claims for backpay could not be certified under Rule 23(b)(2), first because that Rule refers only to injunctive and declaratory relief, and second because the backpay claims could not be manageably tried as a class without depriving Wal-Mart of its right to present certain statutory defenses. With one limitation not relevant here, the District Court granted respondents' motion and certified their proposed class. [Wal-Mart appealed, relying on Rule 23(f), which permits a Court of Appeals to accept an appeal from an order "granting or denying class-action certification."]

D

A divided en banc Court of Appeals substantially affirmed the District Court's certification order. […]

[As part of its ruling,] the Court of Appeals determined that the action could be manageably tried as a class action because the District Court could adopt the approach the Ninth Circuit approved in *Hilao v. Estate of Marcos*, 103 F.3d 767, 782–787 (1996). There compensatory damages for some 9,541 class members were calculated by selecting 137 claims at random, referring those claims to a special master for valuation, and then extrapolating the validity and value of the untested claims from the sample set. […]

II

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." In order to justify a departure from that rule, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The Rule's four requirements—numerosity, commonality, typicality, and adequate representation—"effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.' "

A

The crux of this case is commonality—the rule requiring a plaintiff to show that "there are questions of law or fact common to the class." Rule 23(a)(2).[5] That language is easy to misread, since "[a]ny competently crafted class complaint literally raises common 'questions.' " Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 131–132 (2009). For example: Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury." This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

> "What matters to class certification … is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution

[5] We have previously stated in this context that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157–158, n.13 (1982). In light of our disposition of the commonality question, however, it is unnecessary to resolve whether respondents have satisfied the typicality and adequate-representation requirements of Rule 23(a).

> of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."

Nagareda, *supra*, at 132.

Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc. We recognized in Falcon that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and that certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." Frequently that "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. " '[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Falcon*.[6] Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation.

In this case, proof of commonality necessarily overlaps with respondents' merits contention that Wal-Mart engages in a pattern or practice of discrimination.[7] That is so because, in resolving an individual's Title VII claim, the crux of the inquiry is "the reason for a particular employment decision." Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question why was I disfavored.

B

This Court's opinion in *Falcon* describes how the commonality issue must be approached[:]

> "Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion [or higher pay] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claim will share common questions of law or fact and that the individual's claim will be typical of the class claims."

Falcon suggested two ways in which that conceptual gap might be bridged. First, if the employer "used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)." Second, "[s]ignificant proof that an employer operated under a general policy of

[6] A statement in one of our prior cases, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), is sometimes mistakenly cited to the contrary: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." But in that case, the judge had conducted a preliminary inquiry into the merits of a suit, not in order to determine the propriety of certification under Rules 23(a) and (b) (he had already done that, *see id.*, at 165), but in order to shift the cost of notice required by Rule 23(c)(2) from the plaintiff to the defendants. To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest dictum and is contradicted by our other cases.

[7] In a pattern-or-practice case, the plaintiff tries to "establish by a preponderance of the evidence that … discrimination was the company's standard operating procedure[,] the regular rather than the unusual practice." If he succeeds, that showing will support a rebuttable inference that all class members were victims of the discriminatory practice, and will justify "an award of prospective relief," such as "an injunctive order against continuation of the discriminatory practice."

discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." We think that statement precisely describes respondents' burden in this case. The first manner of bridging the gap obviously has no application here; Wal-Mart has no testing procedure or other company-wide evaluation method that can be charged with bias. The whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard.

The second manner of bridging the gap requires "significant proof" that Wal-Mart "operated under a general policy of discrimination." That is entirely absent here. Wal-Mart's announced policy forbids sex discrimination, and as the District Court recognized the company imposes penalties for denials of equal employment opportunity. The only evidence of a "general policy of discrimination" respondents produced was the testimony of Dr. William Bielby, their sociological expert. Relying on "social framework" analysis, Bielby testified that Wal-Mart has a "strong corporate culture," that makes it " 'vulnerable' " to "gender bias." He could not, however, "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart. At his deposition [...] Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking. [...] Bielby['s testimony] is worlds away from"significant proof" that Wal-Mart "operated under a general policy of discrimination."

C

The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's "policy" of allowing discretion by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action. [...]

To be sure, we have recognized that, "in appropriate cases," giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since "an employer's undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination." But the recognition that this type of Title VII claim "can" exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common. [...]

Respondents have not identified a common mode of exercising discretion that pervades the entire company—aside from their reliance on Dr. Bielby's social frameworks analysis that we have rejected. In a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction. Respondents attempt to make that showing by means of statistical and anecdotal evidence, but their evidence falls well short.

The statistical evidence consists primarily of regression analyses performed by Dr. Richard Drogin, a statistician, and Dr. Marc Bendick, a labor economist. After considering regional and national data, Drogin concluded that "there are statistically significant disparities between men and women at Wal-Mart … [and] these disparities … can be explained only by gender discrimination." Bendick compared workforce data from Wal-Mart and competitive retailers and concluded that Wal-Mart "promotes a lower percentage of women than its competitors."

Even if they are taken at face value, these studies are insufficient to establish that respondents' theory can be proved on a classwide basis. […] As Judge Ikuta observed in her dissent, "[i]nformation about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that a companywide policy of discrimination is implemented by discretionary decisions at the store and district level." A regional pay disparity, for example, may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends. […]

Respondents' anecdotal evidence suffers from the same defects, and in addition is too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory. […] Here […] respondents filed some 120 affidavits reporting experiences of discrimination—about 1 for every 12,500 class members—relating to only some 235 out of Wal-Mart's 3,400 stores. […] Even if every single one of these accounts is true, that would not demonstrate that the entire company "operate[s] under a general policy of discrimination." […]

In sum, we agree with Chief Judge Kozinski that the members of the class:

> "held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed. … Some thrived while others did poorly. They have little in common but their sex and this lawsuit." (dissenting opinion).

III

We also conclude that respondents' claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2). Our opinion in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (per curiam) expressed serious doubt about whether claims for monetary relief may be certified under that provision. We now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.

A

Rule 23(b)(2) allows class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting

the class as a whole." One possible reading of this provision is that it applies only to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all. We need not reach that broader question in this case, because we think that, at a minimum, claims for individualized relief (like the backpay at issue here) do not satisfy the Rule. The key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." Nagareda, 84 N.Y.U. L. Rev. at 132. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

That interpretation accords with the history of the Rule. Because Rule 23 "stems from equity practice" that predated its codification, in determining its meaning we have previously looked to the historical models on which the Rule was based. As we observed in *Amchem*, "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of what (b)(2) is meant to capture. In particular, the Rule reflects a series of decisions involving challenges to racial segregation—conduct that was remedied by a single classwide order. In none of the cases cited by the Advisory Committee as examples of (b)(2)'s antecedents did the plaintiffs combine any claim for individualized relief with their classwide injunction.

Permitting the combination of individualized and classwide relief in a (b)(2) class is also inconsistent with the structure of Rule 23(b). Classes certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment—that individual adjudications would be impossible or unworkable, as in a (b)(1) class,[11] or that the relief sought must perforce affect the entire class at once, as in a (b)(2) class. For that reason these are also mandatory classes: The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action. Rule 23(b)(3), by contrast, is an "adventuresome innovation" of the 1966 amendments, framed for situations "in which 'class-action treatment is not as clearly called for' " (quoting Advisory Committee's Notes, 28 U.S.C. App., p. 697 (1994 ed.)). It allows class certification in a much wider set of circumstances but with greater procedural protections. Its only prerequisites are that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(b)(3). And unlike (b)(1) and (b)(2) classes, the (b)(3) class is not mandatory; class members are entitled to receive "the best notice that is practicable under the circumstances" and to withdraw from the class at their option. *See* Rule 23(c)(2)(B).

[11] Rule 23(b)(1) applies where separate actions by or against individual class members would create a risk of "establish[ing] incompatible standards of conduct for the party opposing the class," Rule 23(b)(1)(A), such as "where the party is obliged by law to treat the members of the class alike," or where individual adjudications "as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests," Rule 23(b)(1)(B), such as in " 'limited fund' cases, … in which numerous persons make claims against a fund insufficient to satisfy all claims."

Given that structure, we think it clear that individualized monetary claims be-

long in Rule 23(b)(3). The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary to a (b)(2) class. When a class seeks an indivisible injunction benefiting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident. But with respect to each class member's individualized claim for money, that is not so—which is precisely why (b)(3) requires the judge to make findings about predominance and superiority before allowing the class. Similarly, (b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause. In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process. While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here. […]

B

Against that conclusion, respondents argue that their claims for backpay were appropriately certified as part of a class under Rule 23(b)(2) because those claims do not "predominate" over their requests for injunctive and declaratory relief. They rely upon the Advisory Committee's statement that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." […]

Respondents' predominance test […] creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief. In this case, for example, the named plaintiffs declined to include employees' claims for compensatory damages in their complaint. That strategy of including only backpay claims made it more likely that monetary relief would not "predominate." But it also created the possibility (if the predominance test were correct) that individual class members' compensatory-damages claims would be precluded by litigation they had no power to hold themselves apart from. If it were determined, for example, that a particular class member is not entitled to backpay because her denial of increased pay or a promotion was not the product of discrimination, that employee might be collaterally estopped from independently seeking compensatory damages based on that same denial. That possibility underscores the need for plaintiffs with individual monetary claims to decide for themselves whether to tie their fates to the class representatives' or go it alone—a choice Rule 23(b)(2) does not ensure that they have. […]

C

The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as

a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings. We disapprove that novel project. Because the Rules Enabling Act forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b); a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims. And because the necessity of that litigation will prevent backpay from being "incidental" to the classwide injunction, respondents' class could not be certified even assuming, arguendo, that "incidental" monetary relief can be awarded to a 23(b)(2) class.

* * *

The judgment of the Court of Appeals is Reversed.

GINSBURG, J., with whom BREYER, J., SOTOMAYOR, J., and KAGAN, J., join, concurring in part and dissenting in part.

The class in this case, I agree with the Court, should not have been certified under Federal Rule of Civil Procedure 23(b)(2). The plaintiffs, alleging discrimination in violation of Title VII, seek monetary relief that is not merely incidental to any injunctive or declaratory relief that might be available. A putative class of this type may be certifiable under Rule 23(b)(3), if the plaintiffs show that common class questions "predominate" over issues affecting individuals—*e.g.*, qualification for, and the amount of, backpay or compensatory damages—and that a class action is "superior" to other modes of adjudication

Whether the class the plaintiffs describe meets the specific requirements of Rule 23(b)(3) is not before the Court, and I would reserve that matter for consideration and decision on remand.[1] The Court, however, disqualifies the class at the starting gate, holding that the plaintiffs cannot cross the "commonality" line set by Rule 23(a)(2). In so ruling, the Court imports into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment. […]

[1] The plaintiffs requested Rule 23(b)(3) certification as an alternative, should their request for (b)(2) certification fail.

* * *

The Court errs in importing a "dissimilarities" notion suited to Rule 23(b)(3) into the Rule 23(a) commonality inquiry. I therefore cannot join Part II of the Court's opinion.

Notes & Questions

1. Rule 23 governs class actions in federal court. It both states the criteria that must be met before a class may be certified and lays down special procedures that apply in class-action cases. To certify a class, a court must

find both that: the four elements of Rule 23(a)—numerosity, commonality, representativeness, and adequacy of representation—are satisfied; *and* that one of the three elements of Rule 23(b) are satisfied.

2. *Wal-Mart* speaks to both Rule 23(a) and Rule 23(b). First, all nine members of the Court agreed that the plaintiffs had failed to satisfy the requirements of Rule 23(b). The case was litigated as a "(b)(2)" class, meaning that was the only of three Rule 23(b) paths chosen by the plaintiffs. Rule 23(b)(2) (sometimes referred to simply as a "civil-rights class") typically applies when the party is seeking injunctive relief. The full Court said that, because the class was seeking back pay, it could not qualify as a (b)(2) class.

3. Second, by a vote of 5–4, the Court also held that the plaintiffs failed to satisfy the requirements of Rule 23(a). In particular, the Court held that the plaintiffs had failed to show *commonality* under Rule 23(a)(2). The Court explained that, because the class was so numerous and geographically dispersed, and because the methods for hiring and promotion in Wal-Mart stores, there were no "questions of law or fact common to the class." Is that conclusion consistent with *Mosley v. General Motors*, *supra*, which held (under Rule 20) that employees alleging discrimination by the same employer at different plants could join together in a single suit? Key to the Court's analysis is an insistence, which it credits to Professor Richard Nagareda, that commonality requires not just common questions but in fact common answers.

4. Perhaps some of the Court's resistance to the class in *Wal-Mart* has to do with its size. As certified, the class contained more than 1.5 million members. Certification alone dramatically shifts the balance of power in litigation, as Judge Posner has explained, even if a defendant has defenses to class claims, even a small risk of losing—and the potentially ruinous liability that would attach—means that defendants "may not wish to roll the[] dice. That is putting it mildly. They will be under intense pressure to settle." *In re Rhone-Poulenc*, 51 F.3d 1293, 1298 (7th Cir. 1995). If that was true of the 5,000 class members from *Rhone-Poulenc*, it is true many times over for a class of 1.5 million.

5. The size of the class points to a larger issue with classwide litigation. There are problems in our economy and society that affect thousands or millions of people: things like unfair workplace practices, unsafe products, anticompetitive business practices. Each of these kinds of harms can give rise to individual lawsuits. But if every suit had to be litigated individually, the sheer volume of cases would grind the courts to a halt. In the absence of an administrative scheme to resolve these cases *en masse*, class actions offer one of the only paths out of a decades-long morass.

Asbestos caused the first, and probably still the paradigmatic, wave of mass torts that threatened to overwhelm the courts. Used for millennia because of its fire resistance and quality as an insulator, asbestos exploded in industrial popularity in the early 20th century. It was used in everything from pipes to

home appliances to athletic clothing. Unfortunately, it eventually became clear that asbestos is toxic to humans, causing a variety of ailments. The most serious ailments are asbestosis, which can lead to things like lung cancer and heart disease, and mesothelioma, a cancer that is highly correlated (80% or more) with asbestos exposure. Most relevant to our inquiry is the fact that injury from asbestos exposure has a very long incubation period: a typical case of mesothelioma will not manifest for 40 years after exposure to asbestos. But once it takes hold, it is deadly: mesothelioma has low survival rates even among cancers.

These features of asbestos posed significant problems for courts trying to adjudicate asbestos lawsuits, which began appearing on dockets in large numbers in the 1970s. Because the producers of asbestos were not making much money selling asbestos products anymore (it was banned for most uses by that time), there was a limited amount of money to go around to those injured by asbestos. Yet it was clear that a large number of as-yet unidentified plaintiffs would come forward in the future, once injuries manifested from their past asbestos exposure. How could a court ensure everyone was treated equally across decades? Trying to solve this problem has been one of the great engines of creativity in complex litigation for the last 50 years, as the next case shows.

Amchem Products, Inc. v. Windsor

GINSBURG, J., delivered the opinion of the Court. 521 U.S. 591 (1997)

This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class-action certification sought to achieve global settlement of current and future asbestos-related claims. The class proposed for certification potentially encompasses hundreds of thousands, perhaps millions, of individuals tied together by this commonality: each was, or some day may be, adversely affected by past exposure to asbestos products manufactured by one or more of 20 companies. Those companies, defendants in the lower courts, are petitioners here. […]

I

A

The settlement-class certification we confront evolved in response to an asbestos-litigation crisis. A United States Judicial Conference Ad Hoc Committee on Asbestos Litigation, appointed by The Chief Justice in September 1990, described facets of the problem in a 1991 report:

> [This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past and current filing data, and because of latency period that may last as long as 40 years for some

> asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.
>
> The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 2–3 (Mar. 1991).

Real reform, the report concluded, required federal legislation creating a national asbestos dispute-resolution scheme. […] To this date, no congressional response has emerged.

In the face of legislative inaction, the federal courts—lacking authority to replace state tort systems with a national toxic tort compensation regime—endeavored to work with the procedural tools available to improve management of federal asbestos litigation. Eight federal judges, experienced in the superintendence of asbestos cases, urged the Judicial Panel on Multidistrict Litigation (MDL Panel), to consolidate in a single district all asbestos complaints then pending in federal courts. Accepting the recommendation, the MDL Panel transferred all asbestos cases then filed, but not yet on trial in federal courts to a single district, the United States District Court for the Eastern District of Pennsylvania; pursuant to the transfer order, the collected cases were consolidated for pretrial proceedings before Judge Weiner. The order aggregated pending cases only; no authority resides in the MDL Panel to license for consolidated proceedings claims not yet filed.

B

After the consolidation, attorneys for plaintiffs and defendants formed separate steering committees and began settlement negotiations. […] Settlement talks […] concentrated on devising an administrative scheme for disposition of asbestos claims not yet in litigation. In these negotiations, counsel for masses of inventory plaintiffs[*] endeavored to represent the interests of the anticipated future claimants, although those lawyers then had no attorney-client relationship with such claimants.

Once negotiations seemed likely to produce an agreement purporting to bind potential plaintiffs, CCR[, a group of defendants,] agreed to settle, through separate agreements, the claims of plaintiffs who had already filed asbestos-related lawsuits. […] After settling the inventory claims, CCR, together with the plaintiffs' lawyers CCR had approached, launched this case, exclusively involving persons outside the MDL Panel's province—plaintiffs without already pending lawsuits.[3]

[*] [The settlement divided class members into two groups: "inventory" and "exposure-only" plaintiffs. The former were those who had already filed claims; the latter were those who had neither experienced illness nor filed claims. –*Ed.*]

[3] It is basic to comprehension of this proceeding to notice that no transferred case is included in the settlement at issue, and no case covered by the settlement existed as a civil action at the time of the MDL Panel transfer.

C

The class action thus instituted was not intended to be litigated. Rather, within the space of a single day, January 15, 1993, the settling parties—CCR defendants and the representatives of the plaintiff class described below—presented to the District Court a complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification.

The complaint identified nine lead plaintiffs, designating them and members of their families as representatives of a class comprising all persons who had not filed an asbestos-related lawsuit against a CCR defendant as of the date the class action commenced, but who (1) had been exposed—occupationally or through the occupational exposure of a spouse or household member—to asbestos or products containing asbestos attributable to a CCR defendant, or (2) whose spouse or family member had been so exposed. Untold numbers of individuals may fall within this description. All named plaintiffs alleged that they or a member of their family had been exposed to asbestos-containing products of CCR defendants. More than half of the named plaintiffs alleged that they or their family members had already suffered various physical injuries as a result of the exposure. The others alleged that they had not yet manifested any asbestos-related condition. The complaint delineated no subclasses; all named plaintiffs were designated as representatives of the class as a whole.

[…]

A stipulation of settlement accompanied the pleadings; it proposed to settle, and to preclude nearly all class members from litigating against CCR companies, all claims not filed before January 15, 1993, involving compensation for present and future asbestos-related personal injury or death. An exhaustive document exceeding 100 pages, the stipulation presents in detail an administrative mechanism and a schedule of payments to compensate class members who meet defined asbestos-exposure and medical requirements. The stipulation describes four categories of compensable disease: mesothelioma; lung cancer; certain "other cancers" (colon-rectal, laryngeal, esophageal, and stomach cancer); and "non-malignant conditions" (asbestosis and bilateral pleural thickening). Persons with "exceptional" medical claims—claims that do not fall within the four described diagnostic categories—may in some instances qualify for compensation, but the settlement caps the number of "exceptional" claims CCR must cover. […]

For each qualifying disease category, the stipulation specifies the range of damages CCR will pay to qualifying claimants. Payments under the settlement are not adjustable for inflation. Mesothelioma claimants—the most highly compensated category—are scheduled to receive between $20,000 and $200,000. The stipulation provides that CCR is to propose the level of compensation within the prescribed ranges; it also establishes procedures to resolve disputes over medical diagnoses and levels of compensation.

Class members are to receive no compensation for certain kinds of claims, even if otherwise applicable state law recognizes such claims. […] Although not entitled to present compensation, exposure-only claimants and pleural claimants

may qualify for benefits when and if they develop a compensable disease and meet the relevant exposure and medical criteria. Defendants forgo defenses to liability, including statute of limitations pleas.

Class members, in the main, are bound by the settlement in perpetuity, while CCR defendants may choose to withdraw from the settlement after ten years. A small number of class members—only a few per year—may reject the settlement and pursue their claims in court. Those permitted to exercise this option, however, may not assert any punitive damages claim or any claim for increased risk of cancer. Aspects of the administration of the settlement are to be monitored by the AFL-CIO and class counsel. Class counsel are to receive attorneys' fees in an amount to be approved by the District Court.

D

On January 29, 1993, as requested by the settling parties, the District Court conditionally certified, under Federal Rule of Civil Procedure 23(b)(3), an encompassing opt-out class. […] Judge Weiner assigned to Judge Reed, also of the Eastern District of Pennsylvania, "the task of conducting fairness proceedings and of determining whether the proposed settlement is fair to the class." [The district court approved the settlement.]

E

The Court of Appeals [reversing] […] found that "serious intra-class conflicts precluded the class from meeting the adequacy of representation requirement" of Rule 23(a)(4). […]

III

To place this controversy in context, we briefly describe the characteristics of class actions for which the Federal Rules provide. Rule 23, governing federal-court class actions, stems from equity practice and gained its current shape in an innovative 1966 revision. […]

In the decades since the 1966 revision of Rule 23, class action practice has become ever more "adventuresome" as a means of coping with claims too numerous to secure their "just, speedy, and inexpensive determination" one by one. *See* Fed. Rule Civ. Proc. 1. The development reflects concerns about the efficient use of court resources and the conservation of funds to compensate claimants who do not line up early in a litigation queue. […]

Among current applications of Rule 23(b)(3), the "settlement only" class has become a stock device. Although all Federal Circuits recognize the utility of Rule 23(b)(3) settlement classes, courts have divided on the extent to which a proffered settlement affects court surveillance under Rule 23's certification criteria. […]

IV

We granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification. […]

Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of the rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold. *See* Fed. Rule Civ. Proc. 23(c), (d).[16] And, of overriding importance, courts must be mindful that the rule as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure "shall not abridge … any substantive right." 28 U.S.C. § 2072(b).

[16] Portions of the opinion dissenting in part appear to assume that settlement counts only one way—in favor of certification. To the extent that is the dissent's meaning, we disagree. Settlement, though a relevant factor, does not inevitably signal that class action certification should be granted more readily than it would be were the case to be litigated. For reasons the Third Circuit aired, proposed settlement classes sometimes warrant more, not less caution on the question of certification.

Rule 23(e) [at the time of the decision,] on settlement of class actions, read[] in its entirety: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." This prescription was designed to function as an additional requirement, not a superseding direction, for the "class action" to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b). The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments—checks shorn of utility—in the settlement class context. […]

Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is "fair," then certification is proper. Applying to this case criteria the rulemakers set, we conclude that the Third Circuit's appraisal is essentially correct. Although that court should have acknowledged that settlement is a factor in the calculus, a remand is not warranted on that account. The Court of Appeals' opinion amply demonstrates why—with or without a settlement on the table—the sprawling class the District Court certified does not satisfy Rule 23's requirements. […]

A

We address first the requirement of Rule 23(b)(3) that "[common] questions of law or fact […] predominate over any questions affecting only individual members." The District Court concluded that predominance was satisfied based on two factors: class members' shared experience of asbestos exposure and their common "interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system." […]

The predominance requirement stated in Rule 23(b)(3), we hold, is not met by the factors on which the District Court relied. The benefits asbestos-exposed

persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement. […]

B

Nor can the class approved by the District Court satisfy Rule 23(a)(4)'s requirement that the named parties "will fairly and adequately protect the interests of the class." The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. […]

As the Third Circuit pointed out, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future. […]

The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency. […]

The Third Circuit found no assurance here—either in the terms of the settlement or in the structure of the negotiations—that the named plaintiffs operated under a proper understanding of their representational responsibilities. That assessment, we conclude, is on the mark.

C

Because we have concluded that the class in this case cannot satisfy the requirements of common issue predominance and adequacy of representation, we need not rule, definitively, on the notice given here. In accord with the Third Circuit, however, we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous.

V

The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load CCR, class counsel, and the District Court heaped upon it. As this case exemplifies, the rulemakers' prescriptions

for class actions may be endangered by "those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the rule] with distaste." C. Wright, Law of Federal Courts 508 (5th ed. 1994). […]

O'CONNOR, J., took no part in the consideration or decision of this case.

BREYER, J., with whom STEVENS, J., joins, concurring in part and dissenting in part.

Although I agree with the Court's basic holding that "settlement is relevant to a class certification," I find several problems in its approach that lead me to a different conclusion. First, I believe that the need for settlement in this mass tort case, with hundreds of thousands of lawsuits, is greater than the Court's opinion suggests. Second, I would give more weight than would the majority to settlement-related issues for purposes of determining whether common issues predominate. Third, I am uncertain about the Court's determination of adequacy of representation, and do not believe it appropriate for this Court to second-guess the District Court on the matter without first having the Court of Appeals consider it. Fourth, I am uncertain about the tenor of an opinion that seems to suggest the settlement is unfair. And fifth, in the absence of further review by the Court of Appeals, I cannot accept the majority's suggestions that "notice" is inadequate. […]

Notes & Questions

1. *Amchem* says that even classes proposed to be certified solely for the purposes of settlement must satisfy the requirements of Rule 23, including both Rule 23(a) & (b). Rule 23(b)'s requirement of predominance proved fatal to the proposed class in *Amchem*. See if you can explain why.

2. On one level, this makes sense. Rule 23 contains certain requirements, and those requirements are there to ensure that the due process rights of absent class members are not trampled upon. *See, e.g.*, *Hansberry v. Lee*, *supra*. But on another level, *Amchem* is madness. By 1997, hundreds of thousands of suits had been filed. Even at that time, it was estimated that the total number of claimants would exceed one million. Asbestos litigation has bankrupt *multiple* Fortune 500 companies. Total liability has now reached roughly a quarter *trillion* dollars. Yet only a fraction of the money generated by asbestos litigation was actually paid to victims. The rest is paid to lawyers on both sides trying to identify, manage, and litigate the unending stream of cases. The possibility of a global settlement would have stopped the flow of cases, reduced litigation costs, and perhaps brought some sense to the problem.

3. After *Amchem*, the next major attempt at a global asbestos settlement came in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). In that case, one asbestos manufacturer entered a deal with a group of plaintiffs' lawyers in a coffee shop in Tyler, Texas to settle all asbestos claims against it for

$1.535 billion. To ensure global repose, the parties structured the settlement by creating a fixed fund to pay out claims ($1.525 billion of the fund came from insurance companies; the other $10 million came from Fibreboard itself). Then, after the agreement was struck, a group of plaintiffs filed suit in federal court seeking to certify a class of all present and future claimants against Fibreboard. The lead plaintiffs invoked Rule 23(b)(1)(B)—the provision for so-called "limited fund" classes. / / The Supreme Court rejected the proposed class and thus doomed the settlement. The Court held that the proposed settlement stretched the bounds of the "limited fund" beyond recognition, because the only limit on the settlement fund was how much Fibreboard and its insurers were willing to give up.

4. Both *Amchem* and *Ortiz* represent one of the chief concerns with class action litigation. Because it is typically driven not by clients but by lawyers, and because plaintiffs' attorneys typically work on contingency, there is an incentive for the lawyers to settle even if it is not in the best interests of some (or all) of the proposed class. Making this problem worse, defense attorneys understand this dynamic and go shopping for plaintiffs' lawyers who will cut the best deal that still offers global repose. Viewed from this angle, the Court's interventions in *Amchem* and *Ortiz* protect absent class members' due process rights against the threat of being sold out by attorneys on both sides. Yet it is worth pausing to ask whether those same absent class members any better off as asbestos litigation drags into its sixth decade?

9.4. Multidistrict Litigation

Class actions are not the only way to aggregate and manage large volumes of mass tort cases. In 1968, just two years after Rule 23(b)(3) damages classes were added to the Federal Rules, Congress enacted the first multidistrict litigation (MDL) statute, 28 U.S.C. § 1407. The statute authorizes a special panel of federal judges—the Judicial Panel on Multidistrict Litigation—to transfer and consolidate (for pretrial purposes only) cases that concern similar subject matter. To date, the JPML has created more than 1800 MDLs comprising more than 1 million cases (many of them putative class actions). Today, the biggest MDLs concern such topics as earplugs, talc, hernia mesh, heartburn medication, nicotine vape products, weed killers, and PFAS. Though MDLs are most common for products liability mass torts, they can involve any subject matter, as the following case shows.

Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach

523 U.S. 26 (1998)

Justice Souter delivered the opinion of the Court, which was unanimous except insofar as Scalia, J., did not join Part II—C.

Title 28 U.S.C. § 1407(a) authorizes the Judicial Panel on Multidistrict Litigation to transfer civil actions with common issues of fact "to any district for coordinated or consolidated pretrial proceedings," but imposes a duty on the Panel to remand any such action to the original district "at or before the conclusion of such pretrial proceedings." The issue here is whether a district court conducting such "pretrial proceedings" may invoke § 1404(a) to assign a transferred case to itself for trial. We hold it has no such authority.

I

In 1992, petitioners, Lexecon Inc., a law and economics consulting firm, and one of its principals (collectively, Lexecon), brought this diversity action in the Northern District of Illinois against respondents, the law firms of Milberg Weiss Bershad Hynes & Lerach (Milberg) and Cotchett, Illston & Pitre (Cotchett), claiming malicious prosecution, abuse of process, tortious interference, commercial disparagement, and defamation. The suit arose out of the firms' conduct as counsel in a prior class action brought against Charles Keating and the American Continental Corporation for violations of the securities and racketeering laws. Lexecon also was a defendant, charged with giving federal and state banking regulators inaccurate and misleading reports about the financial condition of the American Continental Corporation and its subsidiary Lincoln Savings and Loan. Along with other actions arising out of the failure of Lincoln Savings, the case against Lexecon was transferred under § 1407(a)[*] for pretrial proceedings before Judge Bilby in the District of Arizona, where the matters so consolidated were known as the Lincoln Savings litigation. Before those proceedings were over, the class-action plaintiffs and Lexecon reached what they termed a "resolution," under which the claims against Lexecon were dismissed in August 1992.

Lexecon then filed this case in the Northern District of Illinois charging that the prior class action terminated in its favor when the respondent law firms' clients voluntarily dismissed their claims against Lexecon as meritless, amounting to nothing more, according to Lexecon, than a vendetta. When these allegations came to the attention of Judge Bilby, he issued an order stating his understanding of the terms of the resolution agreement between Lexecon and the class-action plaintiffs. Judge Bilby's characterization of the agreement being markedly at odds with the allegations in the instant action, Lexecon appealed his order to the Ninth Circuit.

Milberg, joined by Cotchett, then filed a motion under § 1407(a) with the Judicial Panel on Multidistrict Litigation seeking transfer of [Lexecon's case originally filed in Illinois] to Judge Bilby for consolidation with the Lincoln Savings litigation. Although the judge entered a recusal because of the order he had taken it upon himself to issue, the law firms nonetheless renewed their motion for a § 1407(a) transfer.

The Panel ordered a transfer in early June 1993 and assigned the case to Judge Roll, noting that Lexecon's claims "share questions of fact with an as yet unapproved settlement involving Touche Ross, Lexecon, Inc. and the investor plaintiffs in the Lincoln Savings investor class actions in MDL-834." The Panel

[*] [Section 1407(a) authorizes consolidation of "civil actions involving one or more common questions of fact … pending in different districts" before a single judge "for coordinated or consolidated pretrial proceedings." The statute also provides that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred." –*Ed.*]

observed that "i) a massive document depository is located in the District of Arizona and ii) the Ninth Circuit has before it an appeal of an order [describing the terms of Lexecon's dismissal from the Lincoln Savings litigation] in MDL-834 which may be relevant to the *Lexecon* claims." Prior to any dispositive action on Lexecon's instant claims in the District of Arizona, the Ninth Circuit appeal mentioned by the Panel was dismissed, and the document depository was closed down.

In November 1993, Judge Roll dismissed Lexecon's state-law malicious prosecution and abuse of process claims, applying a "heightened pleading standard," Although the law firms then moved for summary judgment on the claims remaining, the judge deferred action pending completion of discovery, during which time the remaining parties to the Lincoln Savings litigation reached a final settlement, on which judgment was entered in March 1994.

In August 1994, Lexecon moved that the District Court refer the case back to the Panel for remand to the Northern District of Illinois, thus heeding the point of Multidistrict Litigation Rule 14(d), which provides that "[t]he Panel is reluctant to order remand absent a suggestion of remand from the transferee district court." The law firms opposed a remand because discovery was still incomplete and filed a counter motion under § 1404(a)[*] requesting the District of Arizona to "transfer" the case to itself for trial. Judge Roll deferred decision on these motions as well.

[*] [Section 1404(a) provides that, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." –*Ed.*]

In November 1994, Lexecon again asked the District Court to request the Panel to remand the case to the Northern District of Illinois. Again the law firms objected and requested a § 1404 transfer, and Judge Roll deferred ruling once more. On April 24, 1995, however, he granted summary judgment in favor of the law firms on all remaining claims except one in defamation brought against Milberg, and at the same time he dismissed Milberg's counterclaims. Cotchett then made a request for judgment under Federal Rule of Civil Procedure 54(b). Lexecon objected to the exercise of Rule 54(b) discretion, but did not contest the authority of the District Court in Arizona to enter a final judgment in Cotchett's favor. On June 7, 1995, the court granted respondent Cotchett's Rule 54(b) request.

In the meantime, the Arizona court had granted the law firms' § 1404(a) motions to assign the case to itself for trial, and simultaneously had denied Lexecon's motions to request the Panel to remand under § 1407(a). Lexecon sought immediate review of these last two rulings by filing a petition for mandamus in the Ninth Circuit. [The Ninth Circuit denied relief.]

Trial on the surviving defamation claim then went forward in the District of Arizona, ending in judgment for Milberg, from which Lexecon appealed to the Ninth Circuit. [The Ninth Circuit again affirmed, holding in relevant part that a transferee court had the power to transfer a case to itself for trial.] We granted certiorari to decide whether § 1407(a) does permit a transferee court to entertain a § 1404(a) transfer motion to keep the case for trial.

II

A

In defending the Ninth Circuit majority, Milberg may claim ostensible support from two quarters. First, the Panel has itself sanctioned such assignments in [its own Rule] 14(b)[, which] provides that "[e]ach transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406." Thus, out of the 39,228 cases transferred under § 1407 and terminated as of September 30, 1995, 279 of the 3,787 ultimately requiring trial were retained by the courts to which the Panel had transferred them. Although the Panel's rule and the practice of self-assignment have not gone without challenge, federal courts have treated such transfers with approval […].

The second source of ostensible authority for Milberg's espousal of the self-assignment power here is a portion of text of the multidistrict litigation statute itself:

> "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a).

Although the statute limits a transferee court's authority to the conduct of "coordinated or consolidated" proceedings and to those that are "pretrial," these limitations alone raise no obvious bar to a transferee's retention of a case under § 1404. If "consolidated" proceedings alone were authorized, there would be an argument that self-assignment of one or some cases out of many was not contemplated, but because the proceedings need only be "coordinated," no such narrow limitation is apparent. While it is certainly true that the instant case was not "consolidated" with any other for the purpose literally of litigating identical issues on common evidence, it is fair to say that proceedings to resolve pretrial matters were "coordinated" with the conduct of earlier cases sharing the common core of the Lincoln Savings debacle, if only by being brought before judges in a district where much of the evidence was to be found and overlapping issues had been considered. Judge Bilby's recusal following his decision to respond to Lexecon's Illinois pleadings may have limited the prospects for coordination, but it surely did not eliminate them. Hence, the requirement that a transferee court conduct "coordinated or consolidated" proceedings did not preclude the transferee Arizona court from ruling on a motion (like the § 1404 request) that affects only one of the cases before it.

Likewise, at first blush, the statutory limitation to "pretrial" proceedings suggests no reason that a § 1407 transferor court could not entertain a § 1404(a) motion. Section 1404(a) authorizes a district court to transfer a case in the interest of justice and for the convenience of the parties and witnesses. *See* § 1404(a). Such transfer requests are typically resolved prior to discovery and thus are classic "pretrial" motions.

Beyond this point, however, the textual pointers reverse direction, for § 1407 not only authorizes the Panel to transfer for coordinated or consolidated pretrial proceedings, but obligates the Panel to remand any pending case to its originating court when, at the latest, those pretrial proceedings have run their course.

"Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." § 1407(a) (proviso without application here omitted). The Panel's instruction comes in terms of the mandatory "shall," which normally creates an obligation impervious to judicial discretion. In the absence of any indication that there might be circumstances in which a transferred case would be neither "terminated" nor subject to the remand obligation, then, the statutory instruction stands flatly at odds with reading the phrase "coordinated or consolidated pretrial proceedings" so broadly as to reach its literal limits, allowing a transferee court's self-assignment to trump the provision imposing the Panel's remand duty. If we do our job of reading the statute whole, we have to give effect to this plain command, even if doing that will reverse the longstanding practice under the statute and the rule.

As the Ninth Circuit panel majority saw it, however, the inconsistency between an expansive view of "coordinated or consolidated pretrial" proceedings and the uncompromising terms of the Panel's remand obligation disappeared as merely an apparent conflict, not a real one. The "focus" of § 1407 was said to be constituting the Panel and defining its authority, not circumscribing the powers of district courts under § 1404(a). Milberg presses this point in observing that § 1407(a) does not, indeed, even apply to transferee courts, being concerned solely with the Panel's duties, whereas § 1407(b), addressed to the transferee courts, says nothing about the Panel's obligation to remand. But this analysis fails to persuade, for the very reason that it rejects that central tenet of interpretation, that a statute is to be considered in all its parts when construing any one of them. To emphasize that § 1407(b) says nothing about the Panel's obligation when addressing a transferee court's powers is simply to ignore the necessary consequence of self-assignment by a transferee court: it conclusively thwarts the Panel's capacity to obey the unconditional command of § 1407(a).

A like use of blinders underlies the Circuit majority's conclusion that the Panel was not even authorized to remand the case under its Rule 14(c), the terms of which condition the remand responsibility on a suggestion of the transferee court, a motion filed directly with the Panel, or the Panel's *sua sponte* decision to remand. None of these conditions was fulfilled, according to the Court of Appeals, which particularly faulted Lexecon for failing to file a remand motion directly with the Panel, as distinct from the transferee court. This analysis, too, is unpersuasive; it just ignores the fact that the statute places an obligation on the Panel to remand no later than the conclusion of pretrial proceedings in the transferee court, and no exercise in rule making can read that obligation out of the statute. *See* 28 U.S.C. § 1407(f) (express requirement that rules be consistent with statute).

B

Milberg proffers two further arguments for overlooking the tension between a broad reading of a court's pretrial authority and the Panel's remand obligation. First, it relies on a subtle reading of the provision of § 1407(a) limiting the Panel's remand obligation to cases not "previously terminated" during the pretrial period. To be sure, this exception to the Panel's remand obligation indicates that the Panel is not meant to issue ceremonial remand orders in cases already concluded by summary judgment, say, or dismissal. But according to Milberg, the imperative to remand is also inapplicable to cases self-assigned under § 1404, because the self-assignment "terminates" the case insofar as its venue depends on § 1407. When the § 1407 character of the action disappears, Milberg argues, the strictures of § 1407 fall away as well, relieving the Panel of any further duty in the case. The trouble with this creative argument, though, is that the statute manifests no such subtlety. Section 1407(a) speaks not in terms of imbuing transferred actions with some new and distinctive venue character, but simply in terms of "civil actions" or "actions." It says that such an action, not its acquired personality, must be terminated before the Panel is excused from ordering remand. The language is straightforward, and with a straightforward application ready to hand, statutory interpretation has no business getting metaphysical.

Second, Milberg tries to draw an inference in its favor from the one subsection of § 1407 that does authorize the Panel to transfer a case for trial as well as pretrial proceedings. Subsection (h) provides that,

> "[n]otwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act."

Milberg fastens on the introductory language explicitly overriding the "provisions of section 1404 or subsection (f)," which would otherwise, respectively, limit a district court to transferring a case "to any other district or division where it might have been brought," § 1404(a), and limit the Panel to prescribing rules "not inconsistent with Acts of Congress," § 1407(f). On Milberg's reasoning, these overrides are required because the cited provisions would otherwise conflict with the remainder of subsection (h) authorizing the Panel to order trial of certain Clayton Act cases in the transferee court. The argument then runs that since there is no override of subsection (a) of § 1407, subsection (a) must be consistent with a transfer for trial as well as pretrial matters. This reasoning is fallacious, however. Subsections (a) and (h) are independent sources of transfer authority in the Panel; each is apparently written to stand on its own feet. Subsection (h) need not exclude the application of subsection (a), because nothing in (a) would by its terms limit any provision of (h).

Subsection (h) is not merely valueless to Milberg, however; it is ammunition for Lexecon. For the one point that subsection (h) does demonstrate is that

Congress knew how to distinguish between trial assignments and pretrial proceedings in cases subject to § 1407. Although the enactment of subsection (a) preceded the enactment of subsection (h), the fact that the later section distinguishes trial assignments from pretrial proceedings generally is certainly some confirmation for our conclusion, on independent grounds, that the subjects of pretrial proceedings in subsections (a) and (b) do not include self-assignment orders.

C

There is, finally, nothing left of Milberg's position beyond an appeal to legislative history, some of which turns out to ignore the question before us, and some of which may support Lexecon. Milberg cites a House Report on the bill that became § 1407, which addresses the question of trial transfer in multidistrict litigation cases by saying that, "[o]f course, 28 U.S.C. 1404, providing for changes of venue generally, is available in those instances where transfer of a case for all purposes is desirable." H. R. Rep. No. 1130, 90th Cong., 2d Sess., p. 4 (1968). But the question is not whether a change of venue may be ordered in a case consolidated under § 1407(a); on any view of § 1407(a), if an order may be made under § 1404(a), it may be made after remand of the case to the originating district court. The relevant question for our purposes is whether a transferee court, and not a transferor court, may grant such a motion, and on this point, the language cited by Milberg provides no guidance.

If it has anything to say to us here, the legislative history tends to confirm that self-assignment is beyond the scope of the transferee court's authority. The same House Report that spoke of the continued vitality of § 1404 in § 1407 cases also said this:

> "The proposed statute affects only the pretrial stages in multidistrict litigation. It would not affect the place of trial in any case or exclude the possibility of transfer under other Federal statutes. […]
>
> "The subsection requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not, therefore, include the trial of cases in the consolidated proceedings." H. R. Rep., at 3–4.

The comments of the bill's sponsors further suggest that application of § 1407 (before the addition of subsection (h)) would not affect the place of trial. See, *e.g.,* Multidistrict Litigation: Hearings on S. 3815 and S. 159 before the Subcommittee on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess., pt. 2, p. 110 (1967) (Sen. Tydings) ("[W]hen the deposition and discovery is completed, then the original litigation is remanded to the transferor district for the trial"). Both the House and the Senate Reports stated that Congress would have to amend the statute if it determined that multidistrict litigation cases should be consolidated for trial.

D

In sum, none of the arguments raised can unsettle the straightforward language imposing the Panel's responsibility to remand, which bars recognizing any self-assignment power in a transferee court and consequently entails the invalidity of the Panel's Rule 14(b). *See* 28 U.S.C. § 1407(f). Milberg may or may not be correct that permitting transferee courts to make self-assignments would be more desirable than preserving a plaintiff's choice of venue (to the degree that § 1407(a) does so), but the proper venue for resolving that issue remains the floor of Congress. *See Amchem Products, Inc. v. Windsor*.

III

The remaining question goes to the remedy, which Milberg argues may be omitted under the harmless-error doctrine. Milberg posits a distinction between a first category of cases erroneously litigated in a district in which (absent waiver) venue may never be laid under the governing statute, and a second category, in which the plaintiff might originally have chosen to litigate in the trial forum to which it was unwillingly and erroneously carried, as by a transfer under § 1404. In the first, reversal is necessary; in the second, affirmance is possible if no independent and substantial right was violated in a trial whose venue was determined by a discretionary decision. Since Lexecon could have brought suit in the Arizona district consistently with the general venue requirements of 28 U.S.C. § 1391, and since the transfer for trial was made on the authority of § 1404(a), Milberg argues, this case falls within the second category and should escape reversal because none of Lexecon's substantial rights was prejudicially affected. Assuming the distinction may be drawn, however, we think this case bears closer analogy to those in the first category, in which reversal with new trial is required because venue is precluded by the governing statute.

Milberg's argument assumes the only kind of statute entitled to respect in accordance with its uncompromising terms is a statute that categorically limits a plaintiff's initial choice of forum. But there is no apparent reason why courts should not be equally bound by a venue statute that just as categorically limits the authority of courts (and special panels) to override a plaintiff's choice. If the former statute creates interests too substantial to be denied without a remedy, the latter statute ought to be recognized as creating interests equally substantial. In each instance the substantiality of the protected interest is attested by a congressional judgment that in the circumstances described in the statute no discretion is to be left to a court faced with an objection to a statutory violation. To render relief discretionary in either instance would be to allow uncorrected defiance of a categorical congressional judgment to become its own justification. Accordingly, just as we agree with Milberg that the strict limitation on venue under, say, § 1391(a) (diversity action "may … be brought only …") is sufficient to establish the substantial character of any violation, the equally strict remand requirement contained in § 1407 should suffice to establish the substantial significance of any denial of a plaintiff's right to a remand once the pretrial stage has been completed.

[…]

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Part II.

Jurisdiction & Choice of Law

10. Introduction

In the first half of this course of study, you mastered the Rules. You learned about the life cycle of a civil suit in federal court from start to finish, from chose in action to judgment. Now you know what belongs in a complaint, how to analyze a motion to dismiss, what evidence suffices to survive a motion for summary judgment, and how to determine the preclusive effect of a prior judgment.

You also saw how the Rules draw upon deeper values, most notably due process. Our civil justice system aims at the ideal that every litigant should get one, but only one, chance to air her claims in court. Most often, that principle demands notice and an opportunity to be heard. But as we have seen, striking the appropriate balance between accuracy and efficiency requires constant tradeoffs—tradeoffs embedded in nearly every Rule in the book.

Now we will take a step back and focus on two prior questions. First, which court or courts are competent to decide a given dispute? This is the question of jurisdiction, the power of a court to proceed to judgment. Without proper jurisdiction, a putative judgment isn't worth the paper it's printed on. To issue a valid judgment, then, a court must have jurisdiction over both the parties and the subject matter of the dispute.

Second, which body of law should a court of competent jurisdiction apply once it has agreed to hear a case? Our system of judicial federalism often tasks federal courts with deciding disputes traditionally governed by ordinary common law. Should federal courts deciding such cases make their own common law, or should they instead apply substantive state law? And how do the Rules we learned last semester fit into that question? This is the nub of the *Erie* doctrine, a vexing choice-of-law puzzle that forces us to confront the role of federal courts in a constitutional order that prizes both federalism and the separation of powers.

As we have so far, we will at times turn our gaze upward to high theory or downward to the doctrinal details. We must not lose sight of either, as we can learn much about the political theory undergirding our system of judicial federalism by focusing on how courts have disposed of narrow legal questions. And a proper resolution of complex edge cases requires a deeper understanding of the larger aims of our civil justice system.

11. Personal Jurisdiction

11.1. Origins

Personal jurisdiction refers to a court's ability to assert jurisdiction over a civil defendant. Because of the case that follows, personal jurisdiction is now constitutional in nature. It flows from the due process clauses of the constitution. That makes personal jurisdiction a powerful concept, because a judgment entered without personal jurisdiction is unenforceable in a future suit.

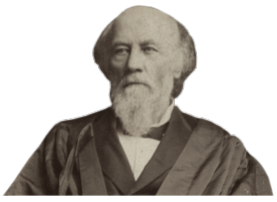
Pennoyer v. Neff concerns two separate lawsuits: one that has already happened, and one that is presently before the court. The earlier lawsuit was an attempt to collect a debt (less than $300) allegedly owed to a lawyer, John Mitchell, by his former client, Marcus Neff. Because Neff was living in another state at the time, he was not afforded personal service of process and instead received only "constructive" notice. When Neff didn't respond to the suit, Mitchell sought and won a default judgment. After the default judgment was entered, Neff acquired 300 acres of land from the federal government in what is now downtown Portland, Oregon. Mitchell then sought to enforce his default judgment against Neff by asking the sheriff to seize Neff's land and sell it at auction. Sylvester Pennoyer bought the land and was given a sheriff's deed to prove his title. Some time later, Neff returned to Oregon and discovered that Pennoyer was in possession of his land.

The second suit, then, was brought by Neff against Pennoyer to recover his 300 acres of property. Each man had a deed to the property: Neff's was from the federal government; Pennoyer's was from the sheriff who sold it at auction to satisfy Mitchell's default judgment against Neff. The court hearing the second suit had to decide who had the superior legal claim to the property.

Pennoyer v. Neff

FIELD, J., delivered the opinion of the Court. 95 U.S. 714 (1877)

This is an action to recover the possession of a tract of land, of the alleged value of $15,000, situated in the State of Oregon. The plaintiff asserts title to the premises by a patent of the United States issued to him in 1866, under the act of Congress of Sept. 27, 1850, usually known as the Donation Law of Oregon. The defendant claims to have acquired the premises under a sheriff's deed,



made upon a sale of the property on execution issued upon a judgment recovered against the plaintiff in one of the circuit courts of the State. The case turns upon the validity of this judgment.

It appears from the record that the judgment was rendered in February, 1866, in favor of J.H. Mitchell, for less than $300, including costs, in an action brought by him upon a demand for services as an attorney; that, at the time the action was commenced and the judgment rendered, the defendant therein, the plaintiff here, was a non-resident of the State that he was not personally served with process, and did not appear therein; and that the judgment was entered upon his default in not answering the complaint, upon a constructive service of summons by publication.

The Code of Oregon provides for [constructive] service when an action is brought against a non-resident and absent defendant, who has property within the State. It also provides, where the action is for the recovery of money or damages, for the attachment of the property of the non-resident. And it also declares that no natural person is subject to the jurisdiction of a court of the State, "unless he appear in the court, or be found within the State, or be a resident thereof, or have property therein; and, in the last case, only to the extent of such property at the time the jurisdiction attached." Construing this latter provision to mean that, in an action for money or damages where a defendant does not appear in the court, and is not found within the State, and is not a resident thereof, but has property therein, the jurisdiction of the court extends only over such property, the declaration expresses a principle of general, if not universal, law. The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse. In the case against the plaintiff, the property here in controversy sold under the judgment rendered was not attached, nor in any way brought under the jurisdiction of the court. Its first connection with the case was caused by a levy of the execution. It was not, therefore, disposed of pursuant to any adjudication, but only in enforcement of a personal judgment, having no relation to the property, rendered against a non-resident without service of process upon him in the action, or his appearance therein. The court below did not consider that an attachment of the property was essential to its jurisdiction or to the validity of the sale, but held that the judgment was invalid from defects in the affidavit upon which the order of publication was obtained, and in the affidavit by which the publication was proved.

There is some difference of opinion among the members of this court as to the rulings [by the court below regarding] these alleged defects. […]

If, therefore, we were confined to the rulings of the court below upon the defects in the affidavits mentioned, we should be unable to uphold its decision. But it was also contended in that court, and is insisted upon here, that the judgment in the State court against the plaintiff was void for want of personal service of process on him, or of his appearance in the action in which it was rendered, and that the premises in controversy could not be subjected to the

payment of the demand of a resident creditor except by a proceeding in rem; that is, by a direct proceeding against the property for that purpose. If these positions are sound, the ruling of the Circuit Court as to the invalidity of that judgment must be sustained, notwithstanding our dissent from the reasons upon which it was made. And that they are sound would seem to follow from two well-established principles of public law respecting the jurisdiction of an independent State over persons and property. The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. Laws, c. 2; Wheat. Int. Law, pt. 2, c. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nullity, and incapable of binding such persons or property in any other tribunals." Story, Confl. Laws, sect. 539.

But as contracts made in one State may be enforceable only in another State, and property may be held by non-residents, the exercise of the jurisdiction which every State is admitted to possess over persons and property within its own territory will often affect persons and property without it. To any influence exerted in this way by a State affecting persons resident or property situated elsewhere, no objection can be justly taken; whilst any direct exertion of authority upon them, in an attempt to give ex-territorial operation to its laws, or to enforce an ex-territorial jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the State in which the persons are domiciled or the property is situated, and be resisted as usurpation.

Thus the State, through its tribunals, may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title, so far as such formalities can be complied with; and the exercise of this

jurisdiction in no manner interferes with the supreme control over the property by the State within which it is situated.

So the State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-residents have no property in the State, there is nothing upon which the tribunals can adjudicate.

[…]

[…] If, without personal service, judgments in personam, obtained ex parte against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished.

Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a nonresident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear: Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability.

The want of authority of the tribunals of a State to adjudicate upon the obligations of non-residents, where they have no property within its limits, is not denied by the court below: but the position is assumed, that, where they have property within the State, it is immaterial whether the property is in the first instance brought under the control of the court by attachment or some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner; or such demands be first established in a personal action, and the property of the non-resident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement, that the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void: it cannot occupy the doubtful position of being valid if property be found, and void if there be none. Even if the position assumed were confined to cases where the non-resident defendant possessed property in the State at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If before the levy the property should be sold, then, according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law: the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently. In *Webster v. Reid*, the plaintiff claimed title to land sold under judgments recovered in suits brought in a territorial court of Iowa, upon publication of notice under a law of the territory, without service of process; and the court said:

"These suits were not a proceeding *in rem* against the land, but were *in personam* against the owners of it. Whether they all resided within the territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case, there was no personal notice, nor an attachment or other proceeding against the land, until after the judgments. The judgments, therefore, are nullities, and did not authorize the executions on which the land was sold."

The force and effect of judgments rendered against non-residents without personal service of process upon them, or their voluntary appearance, have been the subject of frequent consideration in the courts of the United States and of the several States, as attempts have been made to enforce such judgments in States other than those in which they were rendered, under the provision of the Constitution requiring that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State"; and the act of Congress [the current version of which is codified at 28 U.S.C. § 1738] providing for the mode of authenticating such acts, records, and proceedings, and declaring that, when thus authenticated, "they shall have such faith and

credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are or shall be taken." In the earlier cases, it was supposed that the act gave to all judgments the same effect in other States which they had by law in the State where rendered. But this view was afterwards qualified so as to make the act applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject-matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the State itself to exercise authority over the person or the subject-matter. […]

[…]

Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.

Except in cases affecting the personal status of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, as hereinafter mentioned, the substituted service of process by publication, allowed by the law of Oregon and by similar laws in other States, where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the State is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding in rem. As stated by Cooley in his Treatise on Constitutional Limitations, 405, for any other purpose than to subject the property of a non-resident to valid claims against him in the State, "due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

[…]

It follows from the views expressed that the personal judgment recovered in the State court of Oregon against the plaintiff herein, then a non-resident of the State, was without any validity, and did not authorize a sale of the property in controversy.

To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a State may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. […]

Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the nonresidents both within and without the State. […] Nor do we doubt that a State, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law.

In the present case, there is no feature of this kind, and, consequently, no consideration of what would be the effect of such legislation in enforcing the contract of a non-resident can arise. The question here respects only the validity of a money judgment rendered in one State, in an action upon a simple contract against the resident of another, without service of process upon him, or his appearance therein.

Judgment affirmed.

[The dissenting opinion of Justice HUNT is omitted.]

Notes & Questions

1. *Pennoyer* made personal jurisdiction a constitutional limitation on a court's power derived from the due process clause of the Fourteenth Amendment. Those facts remain true today.
2. *Pennoyer*'s concept of personal jurisdiction is territorial. The Oregon court's power extended to people and things within the physical borders of the state—but no farther. This part of *Pennoyer*, as we will soon see,

lasted for more than 70 years, but it is no longer true that personal jurisdiction is so rigidly territorial.

3. What role, if any, does the due process requirement of notice play in the Court's discussion of due process? Was the notice afforded to Neff in the first suit constitutionally sufficient?

4. What would it have taken for the original judgment to be enforceable? Is there anything Mitchell or the earlier court could have done to make sure it had jurisdiction? If so, what?

5. The Court draws a distinction between two types of personal jurisdiction: *in personam* and *in rem*. What is meant by each of those terms?

6. What exceptions did the Court note to its general territorial theory of personal jurisdiction?

11.2. Long-Arm Statutes

Pennoyer v. Neff constitutionalized personal jurisdiction by making it a requirement of due process. Put differently, *Pennoyer* held that the Fourteenth Amendment limits state courts' ability to exercise personal jurisdiction over persons outside the territorial boundaries of the state. You can think of the due process dimension of personal jurisdiction as the maximum that states can exercise under the Constitution.

But states do not have to exercise personal jurisdiction over absent parties to the maximum extent allowed under the Constitution. Instead, states can voluntarily limit the personal jurisdiction of their courts via legislation known as long-arm statutes. In some states, the relevant long-arm statute authorizes state courts to exercise personal jurisdiction to the maximum extent permitted under the Constitution. In other states, including Missouri, the long-arm statute places meaningful limits on personal jurisdiction.

Proper analysis of personal jurisdiction issues thus requires a two-step process. First, you must apply the state's long-arm statute to determine whether state law authorizes the court to exercise personal jurisdiction over the defendant. If the answer is no, then there is no personal jurisdiction, and the analysis is complete. If personal jurisdiction is authorized by the long-arm statute, however, you must analyze whether it also complies with due process.

This section introduces state long-arm statutes and how to interpret and apply them.

Hess v. Pawloski

Mr. Justice Butler delivered the opinion of the Court. 274 U.S. 352 (1927)

This action was brought by defendant in error to recover damages for personal injuries. The declaration alleged that plaintiff in error negligently and wantonly drove a motor vehicle on a public highway in Massachusetts and that by reason thereof the vehicle struck and injured defendant in error. Plaintiff in error is a resident of Pennsylvania. No personal service was made on him and no property belonging to him was attached. The service of process was made in compliance with c. 90, General Laws of Massachusetts, as amended by Stat. 1923, c. 431, § 2, the material parts of which follow:

> The acceptance by a non-resident of the rights and privileges conferred by section three or four, as evidenced by his operating a motor vehicle thereunder, or the operation by a non-resident of a motor vehicle on a public way in the commonwealth other than under said sections, shall be deemed equivalent to an appointment by such non-resident of the registrar or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him, growing out of any accident or collision in which said non-resident may be involved while operating a motor vehicle on such a way, and said acceptance or operation shall be a signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as if served on him personally. Service of such process shall be made by leaving a copy of the process with a fee of two dollars in the hands of the registrar, or in his office, and such service shall be sufficient service upon the said non-resident; provided, that notice of such service "and a copy of the process are forthwith sent by registered mail by the plaintiff to the defendant," and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the writ and entered with the declaration. The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action.

[Defendant] appeared specially for the purpose of contesting jurisdiction and filed an answer in abatement and moved to dismiss on the ground that, the service of process, if sustained, would deprive him of his property without due process of law in violation of the Fourteenth Amendment. The court overruled the answer in abatement and denied the motion. The Supreme Judicial Court […] affirmed the order. […]

The question is whether the Massachusetts enactment contravenes the due process clause of the Fourteenth Amendment.

The process of a court of one State cannot run into another and summon a party there domiciled to respond to proceedings against him. Notice sent outside the State to a non-resident is unavailing to give jurisdiction in an action against him

personally for money recovery. *Pennoyer v. Neff*. There must be actual service within the State of notice upon him or upon some one authorized to accept service for him. A personal judgment rendered against a non-resident, who has neither been served with process nor appeared in the suit is without validity. The mere transaction of business in a State by non-resident natural persons does not imply consent to be bound by the process of its courts. The power of a State to exclude foreign corporations, although not absolute but qualified, is the ground on which such an implication is supported as to them. But a State may not withhold from non-resident individuals the right of doing business therein. The privileges and immunities clause of the Constitution, § 2, Art. IV, safeguards to the citizens of one State the right "to pass through, or to reside in any other state for purposes of trade, agriculture, professional pursuits, or otherwise." And it prohibits state legislation discriminating against citizens of other States.

Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. The measure in question operates to require a non-resident to answer for his conduct in the State where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights. Under the statute the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the non-resident may be involved. It is required that he shall actually receive and receipt for notice of the service and a copy of the process. And it contemplates such continuances as may be found necessary to give reasonable time and opportunity for defense. It makes no hostile discrimination against non-residents but tends to put them on the same footing as residents. Literal and precise equality in respect of this matter is not attainable; it is not required. The State's power to regulate the use of its highways extends to their use by non-residents as well as by residents. And, in advance of the operation of a motor vehicle on its highway by a non-resident, the State may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use. That case recognizes power of the State to exclude a non-resident until the formal appointment is made. And, having the power so to exclude, the State may declare that the use of the highway by the nonresident is the equivalent of the appointment of the registrar as agent on whom process may be served. The difference between the formal and implied appointment is not substantial so far as concerns the application of the due process clause of the Fourteenth Amendment.

Judgment affirmed.

Mo. Rev. Stat. § 506.500

Actions in which outstate service is authorized — jurisdiction of Missouri courts applicable, when. —

1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:

    1) The transaction of any business within this state;
    2) The making of any contract within this state;
    3) The commission of a tortious act within this state;
    4) The ownership, use, or possession of any real estate situated in this state;
    5) The contracting to insure any person, property or risk located within this state at the time of contracting;
    6) Engaging in an act of sexual intercourse within this state with the mother of a child on or near the probable period of conception of that child.

2. Any person, whether or not a citizen or resident of this state, who has lived in lawful marriage within this state, submits himself to the jurisdiction of the courts of this state as to all civil actions for dissolution of marriage or for legal separation and all obligations arising for maintenance of a spouse, support of any child of the marriage, attorney's fees, suit money, or disposition of marital property, if the other party to the lawful marriage lives in this state or if a third party has provided support to the spouse or to the children of the marriage and is a resident of this state.

3. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

Missouri ex rel. PPG Indus., Inc. v. McShane

Mary R. Russell, Judge.

560 S.W.3d 888 (Mo. 2018)

PPG Industries, Inc., seeks a writ of prohibition directing the circuit court to dismiss the underlying claim against it for lack of personal jurisdiction. PPG asserts the Circuit Court of St. Louis County cannot exercise personal jurisdiction over it because the underlying claim arises solely out of PPG's wide-reaching, passive website and does not arise from its contacts with Missouri. This Court issued a preliminary writ of prohibition. Because the circuit court lacks personal jurisdiction over PPG, the preliminary writ is made permanent.

Background

Hilboldt Curtainwall, Inc., a Missouri corporation, agreed to provide building materials for a Missouri-based construction project. Hilboldt, as a subcontractor, was to supply curtainwalls, which included coated aluminum extrusions. The project specifications required the aluminum extrusions be coated with a product made by PPG, a Pennsylvania-based corporation, or an approved substitute. Hilboldt alleges that after seeing on PPG's website that Finishing Dynamics, LLC, was an "approved" applicator of the required coating, it contracted with Finishing Dynamics to apply the coating.

When Finishing Dynamics failed to properly coat the aluminum extrusions, rendering them defective and unusable in the construction project, Hilboldt sued PPG and Finishing Dynamics. The count against PPG was for negligent misrepresentation based on PPG's online representation that Finishing Dynamics was an "approved extrusion applicator." PPG filed a motion to dismiss for lack of personal jurisdiction, arguing its website was insufficient to render it subject to the state's personal jurisdiction. After the circuit court overruled PPG's motion to dismiss, PPG filed a petition for a writ of prohibition in this Court seeking to prevent the circuit court from taking any further action in the case other than dismissing the claim against it. This Court issued a preliminary writ of prohibition.

Standard of Review

The Missouri Constitution vests this Court with the authority to issue and determine original remedial writs. Mo. Const. art. V, sec. 4. Prohibition is a discretionary writ that will only issue to (1) prevent a court from acting in excess of its authority or jurisdiction; (2) remedy a court acting in excess of its authority or jurisdiction or abusing its discretion; or (3) avoid irreparable harm to a party. "Prohibition is the proper remedy to prevent further action of the trial court where personal jurisdiction of the defendant is lacking."

Analysis

The question before this Court is whether the circuit court erred in overruling PPG's motion to dismiss and finding the circuit court had personal jurisdiction over PPG. Hilboldt asserts the circuit court has personal jurisdiction under section 506.500, Missouri's long-arm statute, because PPG committed a tortious act—negligent misrepresentation—in Missouri. PPG argues Hilboldt failed to establish the circuit court has personal jurisdiction in that PPG is a Pennsylvania-based corporation and its only ties to Missouri in the instant case were the representations made on its passive website, which were not aimed specifically at Missouri consumers. To answer this question, a brief review of the concepts of personal jurisdiction is helpful.

[…]

Missouri courts use a two-prong test to determine if personal jurisdiction exists over a nonresident defendant. First, the out-of-state defendant's conduct "must fall within Missouri's long-arm statute, section 506.600." Once it has been determined the nonresident defendant's conduct is covered under the

long-arm statute, the court must then determine whether the defendant has sufficient minimum contacts with Missouri to satisfy due process.

Missouri's long-arm statute provides:

> Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts: […]
> (3) The commission of a tortious act within the state.

Section 506.500.1(3).

Included in the tortious act section of the long-arm statute are "[e]xtraterritorial acts that produce consequences in the state, such as fraud." Hilboldt concedes PPG's conduct was extraterritorial but nevertheless argues the circuit court has jurisdiction over PPG because "PPG's misrepresentations … were received by Hilboldt in Missouri, relied upon by Hilboldt in Missouri, and … caused injury to Hilboldt in Missouri." Hilboldt contends these "consequences in the state" are sufficient to find PPG committed a tortious act in Missouri.

Hilboldt principally relies on *Bryant* [*v. Smith Interior Design Grp., Inc.*, 310 S.W.3d 227, 232 (Mo. 2010)] to further its argument that PPG acted tortiously within Missouri. In *Bryant*, an out-of-state defendant sent allegedly fraudulent documents to a Missouri resident and concealed its fraud in subsequent communications with that resident over telephone, email, and written correspondence. The allegations of directed action into the state of Missouri were "sufficient to demonstrate the commission of a tortious act within this state and to place [the defendant] within the reach of Missouri's long-arm statute." "Where a defendant knowingly sends into a state a false statement, intended that it should there be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that state."

Bryant is distinguishable on its facts. In *Bryant*, the defendant sent physical mail and emails and made phone calls directly to the Missouri plaintiff. Here, no such direct or individual communication was made to Hilboldt. PPG did not contact any Hilboldt representative through its website, nor did Hilboldt interact with any PPG representative using the website. The website was not used to complete any transaction, facilitate any communication, or beget any interaction between Hilboldt and PPG. And although the website was accessible by Missouri residents, it was not targeted at Missouri residents. PPG sent nothing into Missouri, nor did it attempt to solicit web traffic from Missouri specifically. PPG did nothing more than publish information that was equally as available to individuals in each of the other 49 states as it was to residents of Missouri.

The absolute remoteness of the connection between PPG's online representation and the forum state bears emphasizing. PPG merely indicated on its website that Finishing Dynamics was one of an indeterminate number of compa-

nies it had deemed "approved extrusion applicator[s]." This wide-reaching, public posting of information was the extent of PPG's "action" at issue here. Given the broad and general nature of PPG's website, PPG's suit-related contacts with Missouri are not sufficient to be considered tortious acts within the state.[4]

[4] Further, compare this case with *Good World Deals, LLC. v. Gallagher*, 554 S.W.3d 905, 911-13 (Mo. App. W.D. 2018) (determining extraterritorial conduct of defendant in the form of sending allegedly false and misleading emails, text messages, and telephone calls to plaintiff in Missouri, which caused plaintiff to suffer financial harm in Missouri, was sufficient to find a tortious act occurred in Missouri). In contrast, PPG did absolutely nothing intentionally or specifically directed into Missouri.

Additionally, the information on PPG's website that Hilboldt allegedly relied upon was used to enter into a contract with a third party, Finishing Dynamics—a contract in which PPG had no role. And it was this third party's alleged unilateral mistake that is the true basis for the underlying lawsuit, which muddles the connection between PPG and Missouri even further. Without more, the website's accessibility in Missouri is insufficient to confer personal jurisdiction.

The mere allegation that a website, accessible by internet users in every state in the country, published false or misleading statements cannot be enough to conclude the website owner acted tortiously within Missouri. To find specific jurisdiction under these facts would allow PPG—and virtually any other company with a website—to be sued in Missouri if its website was viewed by a party who believes it was aggrieved by the information obtained. Such a result would open up Missouri courts to suits against companies who lack even negligible contacts with the state. […] This cannot be the proper result. […]

PPG's connection to Missouri, based solely on its passive internet activity, is so very attenuated and so very remote that any consequences felt in Missouri in this case cannot reasonably be attributed to PPG's online activity. Because PPG's conduct does not fall within Missouri's long-arm statute, Hilboldt cannot demonstrate its claim satisfies the first prong of the test for personal jurisdiction.[6] As such, the circuit court does not have personal jurisdiction over PPG.

[6] Because this is dispositive of the case, this Court need not discuss the second prong of the personal jurisdiction test, the due process analysis.

Conclusion

Because there was no tortious act within the state, the circuit court lacks personal jurisdiction over PPG. The circuit court should have sustained PPG's motion to dismiss for lack of personal jurisdiction. The preliminary writ of prohibition is made permanent, and the circuit court is directed to dismiss the underlying claim against PPG. All concur.

11.3. Minimum Contacts

Technological, economic, and social change put tremendous pressure on the territorial models of personal jurisdiction, as Hess illustrates. One of the most important challenges as the Pennoyer model began to break down was the question of where, exactly, a corporation was "present" for purposes of personal jurisdiction. In light of this uncertainty, corporations ordered their behavior so that they could do business in a jurisdiction without being subject to suit there.

The next case, which set the agenda for the next 80 years (and counting), resolved that problem by reorienting personal jurisdiction around a defendant's contacts with the forum.

International Shoe Co. v. Washington

MR. CHIEF JUSTICE STONE delivered the opinion of the Court. 326 U.S. 310 (1945)

The questions for decision are (1) whether, within the limitations of the due process clause of the Fourteenth Amendment, the appellant, a Delaware corporation, has by its activities in the State of Washington rendered itself amenable to proceedings in the courts of that state to recover unpaid contributions to the state unemployment compensation fund enacted by state statutes, Washington Unemployment Compensation Act, and (2) whether the state can exact those contributions consistently with the due process clause of the Fourteenth Amendment.

The statutes in question set up a comprehensive scheme of unemployment compensation, the costs of which are defrayed by contributions required to be made by employers to a state unemployment compensation fund. The contributions are a specified percentage of the wages payable annually by each employer for his employees' services in the state. The assessment and collection of the contributions and the fund are administered by appellees. Section 14(c) of the Act authorizes appellee Commissioner to issue an order and notice of assessment of delinquent contributions upon prescribed personal service of the notice upon the employer if found within the state, or, if not so found, by mailing the notice to the employer by registered mail at his last known address. […]

In this case notice of assessment for the years in question was personally served upon a sales solicitor employed by appellant in the State of Washington, and a copy of the notice was mailed by registered mail to appellant at its address in St. Louis, Missouri. Appellant appeared specially before the office of unemployment and moved to set aside the order and notice of assessment on the ground that the service upon appellant's salesman was not proper service upon appellant; that appellant was not a corporation of the State of Washington and was not doing business within the state; that it had no agent within the state upon whom service could be made; and that appellant is not an employer and does not furnish employment within the meaning of the statute.

[…]

The facts as found by the appeal tribunal and accepted by the state Superior Court and Supreme Court, are not in dispute. Appellant is a Delaware corporation, having its principal place of business in St. Louis, Missouri, and is engaged in the manufacture and sale of shoes and other footwear. It maintains places of business in several states, other than Washington, at which its manufacturing is carried on and from which its merchandise is distributed interstate through several sales units or branches located outside the State of Washington.

Appellant has no office in Washington and makes no contracts either for sale or purchase of merchandise there. It maintains no stock of merchandise in that state and makes there no deliveries of goods in intrastate commerce. During the years from 1937 to 1940, now in question, appellant employed eleven to thirteen salesmen under direct supervision and control of sales managers located in St. Louis. These salesmen resided in Washington; their principal activities were confined to that state; and they were compensated by commissions based upon the amount of their sales. The commissions for each year totaled more than $31,000. Appellant supplies its salesmen with a line of samples, each consisting of one shoe of a pair, which they display to prospective purchasers. On occasion they rent permanent sample rooms, for exhibiting samples, in business buildings, or rent rooms in hotels or business buildings temporarily for that purpose. The cost of such rentals is reimbursed by appellant. The authority of the salesmen is limited to exhibiting their samples and soliciting orders from prospective buyers, at prices and on terms fixed by appellant. The salesmen transmit the orders to appellant's office in St. Louis for acceptance or rejection, and when accepted the merchandise for filling the orders is shipped f.o.b. from points outside Washington to the purchasers within the state. All the merchandise shipped into Washington is invoiced at the place of shipment from which collections are made. No salesman has authority to enter into contracts or to make collections.

[…]

Appellant […] insists that its activities within the state were not sufficient to manifest its "presence" there and that in its absence the state courts were without jurisdiction, that consequently it was a denial of due process for the state to subject appellant to suit. […] And appellant further argues that since it was not present within the state, it is a denial of due process to subject it to taxation or other money exaction. It thus denies the power of the state to lay the tax or to subject appellant to a suit for its collection.

Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer v. Neff*. But now that the capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Milliken v. Meyer*. *See Hess v. Pawkloski*.

Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its "presence" without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far "present" there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms

"present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. Those demands may be met by such contacts of the corporation with the state of the forum as to make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An "estimate of the inconveniences" which would result to the corporation from a trial away from its "home" or principal place of business is relevant in this connection.

"Presence" in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.

While it has been held, in cases on which appellant relies, that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.

Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit. True, some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents. But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction.

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.

But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.

We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellant's "presence" there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual. Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit.

[…]

Appellant having rendered itself amenable to suit upon obligations arising out of the activities of its salesmen in Washington, the state may maintain the present suit *in personam* to collect the tax laid upon the exercise of the privilege of employing appellant's salesmen within the state. For Washington has made one of those activities, which taken together establish appellant's "presence" there for purposes of suit, the taxable event by which the state brings appellant within the reach of its taxing power. The state thus has constitutional power to lay the tax and to subject appellant to a suit to recover it. The activities which establish its "presence" subject it alike to taxation by the state and to suit to recover the tax.

Affirmed.

MR. JUSTICE BLACK delivered the following opinion.

[…]

I believe that the Federal Constitution leaves to each State, without any "ifs" or "buts," a power to tax and to open the doors of its courts for its citizens to sue corporations whose agents do business in those States. Believing that

the Constitution gave the States that power, I think it a judicial deprivation to condition its exercise upon this Court's notion of "fair play," however appealing that term may be. Nor can I stretch the meaning of due process so far as to authorize this Court to deprive a State of the right to afford judicial protection to its citizens on the ground that it would be more "convenient" for the corporation to be sued somewhere else.

There is a strong emotional appeal in the words "fair play" "justice," and "reasonableness." But they were not chosen by those who wrote the original Constitution or the Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws passed by elected legislative representatives. No one, not even those who most feared a democratic government, ever formally proposed that courts should be given power to invalidate legislation under any such elastic standards. […]

True, the State's power is here upheld. But the rule announced means that tomorrow's judgment may strike down a State or Federal enactment on the ground that it does not conform to the Court's idea of natural justice. […]

Notes & Questions

1. Why did the International Shoe Company have so many unusual policies? For example, sales personnel were given only one of each shoe to take with them for display purposes. And they were given no authority to enter into sales contracts directly. Instead, contracts were finalized and orders were fulfilled and shipped from ISC's warehouse in Missouri "f.o.b." (What does "f.o.b." mean?) Why would the company take all of these steps?
2. Which inquiry is easier? Figuring out where a corporation is "present" or figuring out where it has contacts and how many contacts are enough to satisfy due process? Why? Does the constitution provide any guidance on which one is required?
3. The major question after *International Shoe* was decided was whether any portion of *Pennoyer* survived the revolutionary transformation from territorial jurisdiction to minimum contacts. The next two cases explore the vitality of two types of service that had traditionally been recognized under the *Pennoyer* regime but were arguably inconsistent with the minimum contacts approach ushered in by *International Shoe*.

Shaffer v. Heitner

MARSHALL, J., delivered the opinion of the Court. 433 U.S. 186 (1977)

The controversy in this case concerns the constitutionality of a Delaware statute that allows a court of that State to take jurisdiction of a lawsuit by sequestering

any property of the defendant that happens to be located in Delaware. Appellants contend that the sequestration statute as applied in this case violates the Due Process Clause of the Fourteenth Amendment both because it permits the state courts to exercise jurisdiction despite the absence of sufficient contacts among the defendants, the litigation, and the State of Delaware and because it authorizes the deprivation of defendants' property without providing adequate procedural safeguards. We find it necessary to consider only the first of these contentions.

I

Appellee Heitner, a nonresident of Delaware, is the owner of one share of stock in the Greyhound Corporation, a business incorporated under the laws of Delaware with its principal place of business in Phoenix, Ariz. On May 22, 1974, he filed a shareholder's derivative suit in the Court of Chancery for New Castle County, Del., in which he named as defendants Greyhound, its wholly owned subsidiary Greyhound Lines, Inc., and 28 present or former officers or directors of one or both of the corporations. In essence, Heitner alleged that the individual defendants had violated their duties to Greyhound by causing it and its subsidiary to engage in actions that resulted in the corporation's being held liable for substantial damages in a private antitrust suit and a large fine in a criminal contempt action. The activities which led to these penalties took place in Oregon.

Simultaneously with his complaint, Heitner filed a motion for an order of sequestration of the Delaware property of the individual defendants pursuant to 10 Del. C. § 366. This motion was accompanied by a supporting affidavit of counsel which stated that the individual defendants were nonresidents of Delaware. The affidavit identified the property to be sequestered as

> common stock, 3% Second Cumulative Preferenced Stock and stock unit credits of the Defendant Greyhound Corporation, a Delaware corporation, as well as all options and all warrants to purchase said stock issued to said individual Defendants and all contractral [sic] obligations, all rights, debts or credits due or accrued to or for the benefit of any of the said Defendants under any type of written agreement, contract, or other legal instrument of any kind whatever between any of the individual Defendants and said corporation.

The requested sequestration order was signed the day the motion was filed. Pursuant to that order, the sequestrator "seized" approximately 82,000 shares of Greyhound common stock belonging to 19 of the defendants, and options belonging to another two defendants. These seizures were accomplished by placing "stop transfer" orders or their equivalents on the books of the Greyhound Corporation. So far as the record shows, none of the certificates representing the seized property was physically present in Delaware. The stock was considered to be in Delaware, and so subject to seizure, by virtue of 8 Del. C. § 169, which makes Delaware the situs of ownership of all stock in Delaware corporations.

All 28 defendants were notified of the initiation of the suit by certified mail directed to their last known addresses and by publication in a New Castle County newspaper. The 21 defendants whose property was seized (hereafter referred to as appellants) responded by entering a special appearance for the purpose of moving to quash service of process and to vacate the sequestration order. They contended that the ex parte sequestration procedure did not accord them due process of law and that the property seized was not capable of attachment in Delaware. In addition, appellants asserted that under the rule of *International Shoe Co. v. Washington*, they did not have sufficient contacts with Delaware to sustain the jurisdiction of that State's courts.

[…]

II

The Delaware courts rejected appellants' jurisdictional challenge by noting that this suit was brought as a quasi *in rem* proceeding. Since *quasi in rem* jurisdiction is traditionally based on attachment or seizure of property present in the jurisdiction, not on contacts between the defendant and the State, the courts considered appellants' claimed lack of contacts with Delaware to be unimportant. This categorical analysis assumes the continued soundness of the conceptual structure founded on the century-old case of *Pennoyer v. Neff*.

[The Court reviewed *Pennoyer* and its rationale.]

From our perspective, the importance of *Pennoyer* is not its result, but the fact that its principles and corollaries derived from them became the basic elements of the constitutional doctrine governing state-court jurisdiction. As we have noted, under *Pennoyer* state authority to adjudicate was based on the jurisdiction's power over either persons or property. This fundamental concept is embodied in the very vocabulary which we use to describe judgments. If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated "in personam" and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court's power over property within its territory, the action is called "in rem" or "quasi in rem." The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court. In *Pennoyer*'s terms, the owner is affected only "indirectly" by an *in rem* judgment adverse to his interest in the property subject to the court's disposition.

By concluding that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established," *Pennoyer* sharply limited the availability of *in personam* jurisdiction over defendants not resident in the forum State. If a nonresident defendant could not be found in a State, he could not be sued there. On the other hand, since the State in which property was located was considered to have exclusive sovereignty over that property, *in rem* actions could proceed regardless of the owner's location. Indeed, since a State's process could not reach beyond its borders, this Court held after *Pennoyer* that due process did not require any effort to give a property owner personal notice that his property was involved in an *in rem* proceeding.

The *Pennoyer* rules generally favored nonresident defendants by making them harder to sue. This advantage was reduced, however, by the ability of a resident plaintiff to satisfy a claim against a nonresident defendant by bringing into court any property of the defendant located in the plaintiff's State. For example, in the well-known case of *Harris v. Balk*, Epstein, a resident of Maryland, had a claim against Balk, a resident of North Carolina. Harris, another North Carolina resident, owed money to Balk. When Harris happened to visit Maryland, Epstein garnished his debt to Balk. Harris did not contest the debt to Balk and paid it to Epstein's North Carolina attorney. When Balk later sued Harris in North Carolina, this Court held that the Full Faith and Credit Clause, U.S. Const., Art. IV, § 1, required that Harris' payment to Epstein be treated as a discharge of his debt to Balk. This Court reasoned that the debt Harris owed Balk was an intangible form of property belonging to Balk, and that the location of that property traveled with the debtor. By obtaining personal jurisdiction over Harris, Epstein had "arrested" his debt to Balk, and brought it into the Maryland court. Under the structure established by *Pennoyer*, Epstein was then entitled to proceed against that debt to vindicate his claim against Balk, even though Balk himself was not subject to the jurisdiction of a Maryland tribunal.

Pennoyer itself recognized that its rigid categories, even as blurred by the kind of action typified by Harris, could not accommodate some necessary litigation. Accordingly, Mr. Justice Field's opinion carefully noted that cases involving the personal status of the plaintiff, such as divorce actions, could be adjudicated in the plaintiff's home State even though the defendant could not be served within that State. Similarly, the opinion approved the practice of considering a foreign corporation doing business in a State to have consented to being sued in that State. This basis for *in personam* jurisdiction over foreign corporations was later supplemented by the doctrine that a corporation doing business in a State could be deemed "present" in the State, and so subject to service of process under the rule of *Pennoyer*.

The advent of automobiles, with the concomitant increase in the incidence of individuals causing injury in States where they were not subject to *in personam* actions under *Pennoyer*, required further moderation of the territorial limits on jurisdictional power. This modification, like the accommodation to the realities of interstate corporate activities, was accomplished by use of a legal fiction that left the conceptual structure established in *Pennoyer* theoretically unaltered. The fiction used was that the out-of-state motorist, who it was assumed could be excluded altogether from the State's highways, had by using those highways appointed a designated state official as his agent to accept process. *See Hess v. Pawloski*. Since the motorist's "agent" could be personally served within the State, the state courts could obtain *in personam* jurisdiction over the nonresident driver.

The motorists' consent theory was easy to administer since it required only a finding that the out-of-state driver had used the State's roads. By contrast, both the fictions of implied consent to service on the part of a foreign corporation and of corporate presence required a finding that the corporation was "doing

business" in the forum State. Defining the criteria for making that finding and deciding whether they were met absorbed much judicial energy. While the essentially quantitative tests which emerged from these cases purported simply to identify circumstances under which presence or consent could be attributed to the corporation, it became clear that they were in fact attempting to ascertain "what dealings make it just to subject a foreign corporation to local suit." In International Shoe, we acknowledged that fact.

[…]

It is clear, therefore, that the law of state-court jurisdiction no longer stands securely on the foundation established in *Pennoyer.* We think that the time is ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions *in rem* as well as *in personam*.

III

The case for applying to jurisdiction *in rem* the same test of "fair play and substantial justice" as governs assertions of jurisdiction *in personam* is simple and straightforward. It is premised on recognition that "[t]he phrase, 'judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing."[23] Restatement (Second) of Conflict of Laws § 56, introductory note. This recognition leads to the conclusion that in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising "jurisdiction over the interests of persons in a thing." The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum contacts standard elucidated in *International Shoe*.

[23] It is true that the potential liability of a defendant in an *in rem* action is limited by the value of the property, but that limitation does not affect the argument. The fairness of subjecting a defendant to state-court jurisdiction does not depend on the size of the claim being litigated.

This argument, of course, does not ignore the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest. The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State. The presence of property may also favor jurisdiction in cases, such as suits for injury suffered on the land of an absentee owner, where the defendant's ownership of the property is conceded but the cause of action is otherwise related to rights and duties growing out of that ownership.

It appears, therefore, that jurisdiction over many types of actions which now are or might be brought *in rem* would not be affected by a holding that any assertion of state-court jurisdiction must satisfy the *International Shoe* standard. For the type of *quasi in rem* action typified by *Harris v. Balk* and the present case,

however, accepting the proposed analysis would result in significant change. These are cases where the property which now serves as the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action. Thus, although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction.

[…]

Since acceptance of the *International Shoe* test would most affect this class of cases, we examine the arguments against adopting that standard as they relate to this category of litigation. Before doing so, however, we note that this type of case also presents the clearest illustration of the argument in favor of assessing assertions of jurisdiction by a single standard. For in cases such as Harris and this one, the only role played by the property is to provide the basis for bringing the defendant into court. Indeed, the express purpose of the Delaware sequestration procedure is to compel the defendant to enter a personal appearance. In such cases, if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of the jurisdiction should be equally impermissible.

The primary rationale for treating the presence of property as a sufficient basis for jurisdiction to adjudicate claims over which the State would not have jurisdiction if *International Shoe* applied is that a wrongdoer "should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an *in personam* suit." Restatement § 66, Comment a.

This justification, however, does not explain why jurisdiction should be recognized without regard to whether the property is present in the State because of an effort to avoid the owner's obligations. Nor does it support jurisdiction to adjudicate the underlying claim.

[…]

It might also be suggested that allowing *in rem* jurisdiction avoids the uncertainty inherent in the *International Shoe* standard and assures a plaintiff of a forum.[37] We believe, however, that the fairness standard of *International Shoe* can be easily applied in the vast majority of cases. Moreover, when the existence of jurisdiction in a particular forum under *International Shoe* is unclear, the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of "fair play and substantial justice." That cost is too high.

[37] This case does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff.

We are left, then, to consider the significance of the long history of jurisdiction based solely on the presence of property in a State. […] "[T]raditional notions of fair play and substantial justice" can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage. The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would

serve only to allow state court jurisdiction that is fundamentally unfair to the defendant.

We therefore conclude that all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.[39]

[39] It would not be fruitful for us to re-examine the facts of cases decided on the rationales of *Pennoyer* and *Harris* to determine whether jurisdiction might have been sustained under the standard we adopt today. To the extent that prior decisions are inconsistent with this standard, they are overruled.

IV

The Delaware courts based their assertion of jurisdiction in this case solely on the statutory presence of appellants' property in Delaware. Yet that property is not the subject matter of this litigation, nor is the underlying cause of action related to the property. Appellants' holdings in Greyhound do not, therefore, provide contacts with Delaware sufficient to support the jurisdiction of that State's courts over appellants. If it exists, that jurisdiction must have some other foundation.

Appellee Heitner did not allege and does not now claim that appellants have ever set foot in Delaware. Nor does he identify any act related to his cause of action as having taken place in Delaware. Nevertheless, he contends that appellants' positions as directors and officers of a corporation chartered in Delaware provide sufficient "contacts, ties, or relations," *International Shoe Co. v. Washington*, with that State to give its courts jurisdiction over appellants in this stockholder's derivative action. This argument is based primarily on what Heitner asserts to be the strong interest of Delaware in supervising the management of a Delaware corporation. That interest is said to derive from the role of Delaware law in establishing the corporation and defining the obligations owed to it by its officers and directors. In order to protect this interest, appellee concludes, Delaware's courts must have jurisdiction over corporate fiduciaries such as appellants.

[…]

[But] Appellants have simply had nothing to do with the State of Delaware. Moreover, appellants had no reason to expect to be haled before a Delaware court. Delaware, unlike some States, has not enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the State. And "[i]t strains reason … to suggest that anyone buying securities in a corporation formed in Delaware 'impliedly consents' to subject himself to Delaware's … jurisdiction on any cause of action." Appellants, who were not required to acquire interests in Greyhound in order to hold their positions, did not by acquiring those interests surrender their right to be brought to judgment only in States with which they had "minimum contacts." The Due Process Clause

> "does not contemplate that a state may make binding a judgment … against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co. v. Washington*.

Delaware's assertion of jurisdiction over appellants in this case is inconsistent with that constitutional limitation on state power. The judgment of the Delaware Supreme Court must, therefore, be reversed.

It is so ordered.

REHNQUIST, J., took no part in the consideration or decision of this case.

POWELL, J., concurring.

I agree that the principles of *International Shoe Co. v. Washington* should be extended to govern assertions of *in rem* as well as *in personam* jurisdiction in state court. I also agree that neither the statutory presence of appellants' stock in Delaware nor their positions as directors and officers of a Delaware corporation can provide sufficient contacts to support the Delaware courts' assertion of jurisdiction in this case.

I would explicitly reserve judgment, however, on whether the ownership of some forms of property whose situs is indisputably and permanently located within a State may, without more, provide the contacts necessary to subject a defendant to jurisdiction within the State to the extent of the value of the property. In the case of real property, in particular, preservation of the common law concept of *quasi in rem* jurisdiction arguably would avoid the uncertainty of the general *International Shoe* standard without significant cost to "traditional notions of fair play and substantial justice." Subject to that reservation, I join the opinion of the Court.

STEVENS, J., concurring in the judgment.

The Due Process Clause affords protection against "judgments without notice." *International Shoe* Co. v. Washington (opinion of Black, J.).

[…]

One who purchases shares of stock on the open market can hardly be expected to know that he has thereby become subject to suit in a forum remote from his residence and unrelated to the transaction. As a practical matter, the Delaware sequestration statute created an unacceptable risk of judgment without notice […] . I therefore agree with the Court that on the record before us no adequate basis for jurisdiction exists and that the Delaware statute is unconstitutional on its face.

How the Court's opinion may be applied in other contexts is not entirely clear to me. […] My uncertainty as to the reach of the opinion, and my fear that it purports to decide a great deal more than is necessary to dispose of this case, persuade me merely to concur in the judgment.

BRENNAN, J., concurring in part and dissenting in part.

I join Parts I-III of the Court's opinion. I fully agree that the minimum contacts analysis developed in *International Shoe Co. v. Washington* represents a far more sensible construct for the exercise of state court jurisdiction than the patchwork of legal and factual fictions that has been generated from the decision in *Pennoyer v. Neff*. It is precisely because the inquiry into minimum contacts is now

of such overriding importance, however, that I must respectfully dissent from Part IV of the Court's opinion.

[…]

I, therefore, would approach the minimum contacts analysis differently than does the Court. Crucial to me is the fact that appellants voluntarily associated themselves with the State of Delaware, "invoking the benefits and protections of its laws," *Hanson v. Denckla*; *International Shoe Co. v. Washington*, by entering into a long term and fragile relationship with one of its domestic corporations. They thereby elected to assume powers and to undertake responsibilities wholly derived from that State's rules and regulations, and to become eligible for those benefits that Delaware law makes available to its corporations' officials. *E.g.*, 8 Del. C. §§ 143 (interest-free loans); 145 (indemnification). While it is possible that countervailing issues of judicial efficiency and the like might clearly favor a different forum, they do not appear on the meager record before us; and, of course, we are concerned solely with "minimum" contacts, not the "best" contacts. I thus do not believe that it is unfair to insist that appellants make themselves available to suit in a competent forum that Delaware might create for vindication of its important public policies directly pertaining to appellants' fiduciary associations with the State.

Notes & Questions

1. After *Pennoyer*, a common tactic to obtain jurisdiction against an out-of-state defendant was to attach property they owned within the forum state. Under the holding in *Harris v. Balk*, this attach-and-then-sue strategy, known as *quasi in rem*, authorized personal jurisdiction over the property owner up to the value of the property attached. *Shaffer* did away with all that, ruling most forms of *quasi in rem* jurisdiction unconstitutional.
2. Even though attaching property does not automatically grant personal jurisdiction over its owner, as it once did, it can still be valuable for a plaintiff to attach a defendant's property, usually to ensure that the property is not moved elsewhere while the action is pending.
3. *Shaffer*'s holding was justified as an attempt to apply *International Shoe*'s minimum-contacts regime to *in rem* and *quasi in rem* suits. As the next case illustrates, though, some remnants of *Pennoyer*'s territorial paradigm remain good law.

Burnham v. Superior Court

SCALIA, J., announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and KENNEDY, J., joined, and in which WHITE, J., joined as to Parts I, II-A, II-B, and II-C.

495 U.S. 604 (1990)

The question presented is whether the Due Process Clause of the Fourteenth Amendment denies California courts jurisdiction over a nonresident, who was personally served with process while temporarily in that State, in a suit unrelated to his activities in the State.

I

Petitioner Dennis Burnham married Francie Burnham in 1976, in West Virginia. In 1977 the couple moved to New Jersey, where their two children were born. In July 1987 the Burnhams decided to separate. They agreed that Mrs. Burnham, who intended to move to California, would take custody of the children. Shortly before Mrs. Burnham departed for California that same month, she and petitioner agreed that she would file for divorce on grounds of "irreconcilable differences."

In October 1987, petitioner filed for divorce in New Jersey state court on grounds of "desertion." Petitioner did not, however, obtain an issuance of summons against his wife, and did not attempt to serve her with process. Mrs. Burnham, after unsuccessfully demanding that petitioner adhere to their prior agreement to submit to an "irreconcilable differences" divorce, brought suit for divorce in California state court in early January 1988.

In late January, petitioner visited southern California on business, after which he went north to visit his children in the San Francisco Bay area, where his wife resided. He took the older child to San Francisco for the weekend. Upon returning the child to Mrs. Burnham's home on January 24, 1988, petitioner was served with a California court summons and a copy of Mrs. Burnham's divorce petition. He then returned to New Jersey.

[…]

II

A

[…]

To determine whether the assertion of personal jurisdiction is consistent with due process, we have long relied on the principles traditionally followed by American courts in making out the territorial limits of each State's authority. That criterion was first announced in *Pennoyer v. Neff*, in which we stated that due process "mean[s] a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights," including the "well-established principles of public law respecting the jurisdiction of an independent State over persons and property." In what has become the classic expression of the criterion, we said in *International Shoe Co. v. Washington*, that a State Court's assertion of personal jurisdiction satisfies the Due Process Clause if it does not violate " 'traditional notions of fair play and substantial justice.' " Since *International Shoe*, we have only been called upon to decide whether these "traditional notions" permit States to exercise jurisdiction over absent defendants in a manner that deviates from the rules of jurisdiction applied in the 19th century. We

have held such deviations permissible, but only with respect to suits arising out of the absent defendant's contacts with the State. The question we must decide today is whether due process requires a similar connection between the litigation and the defendant's contacts with the State in cases where the defendant is physically present in the State at the time process is served upon him.

B

Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State. The view developed early that each State had the power to hale before its courts any individual who could be found within its borders, and that once having acquired jurisdiction over such a person by properly serving him with process, the State could retain jurisdiction to enter judgment against him, no matter how fleeting his visit. That view had antecedents in English common-law practice, which sometimes allowed "transitory" actions, arising out of events outside the country, to be maintained against seemingly nonresident defendants who were present in England. Justice Story believed the principle, which he traced to Roman origins, to be firmly grounded in English tradition: "[B]y the common law[,] personal actions, being transitory, may be brought in any place, where the party defendant may be found," for "every nation may … rightfully exercise jurisdiction over all persons within its domains." J. Story, Commentaries on the Conflict of Laws §§ 554, 543 (1846).

Recent scholarship has suggested that English tradition was not as clear as Story thought. Accurate or not, however, judging by the evidence of contemporaneous or near-contemporaneous decisions, one must conclude that Story's understanding was shared by American courts at the crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted. […]

[…]

C

Despite this formidable body of precedent, petitioner contends, in reliance on our decisions applying the *International Shoe* standard, that in the absence of "continuous and systematic" contacts with the forum, a nonresident defendant can be subjected to judgment only as to matters that arise out of or relate to his contacts with the forum. This argument rests on a thorough misunderstanding of our cases.

[…]

As *International Shoe* suggests, the defendant's litigation-related "minimum contacts" may take the place of physical presence as the basis for jurisdiction[.] […]

[But n]othing in *International Shoe* or the cases that have followed it, however, offers support for the very different proposition petitioner seeks to establish today: that a defendant's presence in the forum is not only unnecessary to

validate novel, nontraditional assertions of jurisdiction, but is itself no longer sufficient to establish jurisdiction. […]

The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of "traditional notions of fair play and substantial justice." That standard was developed by analogy to "physical presence," and it would be perverse to say it could now be turned against that touchstone of jurisdiction.

D

Petitioner's strongest argument, though we ultimately reject it, relies upon our decision in *Shaffer v. Heitner*.

It goes too far to say, as petitioner contends, that *Shaffer* compels the conclusion that a State lacks jurisdiction over an individual unless the litigation arises out of his activities in the State. *Shaffer*, like *International Shoe*, involved jurisdiction over an absent defendant, and it stands for nothing more than the proposition that when the "minimum contact" that is a substitute for physical presence consists of property ownership it must, like other minimum contacts, be related to the litigation. Petitioner wrenches out of its context our statement in Shaffer that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." When read together with the two sentences that preceded it, the meaning of this statement becomes clear:

> The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.
>
> We *therefore conclude* that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny. (emphasis added).

Shaffer was saying, in other words, not that all bases for the assertion of *in personam* jurisdiction (including, presumably, in-state service) must be treated alike and subjected to the "minimum contacts" analysis of *International Shoe*; but rather that *quasi in rem* jurisdiction, that fictional "ancient form," and *in personam* jurisdiction, are really one and the same and must be treated alike—leading to the conclusion that *quasi in rem* jurisdiction, *i.e.*, that form of *in personam* jurisdiction based upon a "property ownership" contact and by definition unaccompanied by personal, in-state service, must satisfy the litigation-relatedness requirement of *International Shoe.* […] *International Shoe* confined its "minimum contacts" requirement to situations in which the defendant "be not present within the territory of the forum," and nothing in *Shaffer* expands that requirement beyond that.

It is fair to say, however, that while our holding today does not contradict *Shaffer*, our basic approach to the due process question is different. We have conducted no independent inquiry into the desirability or fairness of the prevailing in-state service rule, leaving that judgment to the legislatures that are free to amend it; for our purposes, its validation is its pedigree, as the phrase "traditional notions of fair play and substantial justice" makes clear. *Shaffer* did conduct such an independent inquiry, asserting that "'traditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage." Perhaps that assertion can be sustained when the "perpetuation of ancient forms" is engaged in by only a very small minority of the States. Where, however, as in the present case, a jurisdictional principle is both firmly approved by tradition and still favored, it is impossible to imagine what standard we could appeal to for the judgment that it is "no longer justified." While in no way receding from or casting doubt upon the holding of *Shaffer* or any other case, we reaffirm today our time-honored approach. For new procedures, hitherto unknown, the Due Process Clause requires analysis to determine whether "traditional notions of fair play and substantial justice" have been offended. *International Shoe*. But a doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets that standard.

[…]

White, J., concurring in part and concurring in the judgment.

I join Parts I, II-A, II-B, and II-C of Justice Scalia's opinion and concur in the judgment of affirmance. The rule allowing jurisdiction to be obtained over a nonresident by personal service in the forum State, without more, has been and is so widely accepted throughout this country that I could not possibly strike it down, either on its face or as applied in this case, on the ground that it denies due process of law guaranteed by the Fourteenth Amendment. Although the Court has the authority under the Amendment to examine even traditionally accepted procedures and declare them invalid, *e.g.*, *Shaffer v. Heitner*, there has been no showing here or elsewhere that as a general proposition the rule is so arbitrary and lacking in common sense in so many instances that it should be held violative of due process in every case. Furthermore, until such a showing is made, which would be difficult indeed, claims in individual cases that the rule would operate unfairly as applied to the particular nonresident involved need not be entertained. At least this would be the case where presence in the forum State is intentional, which would almost always be the fact. Otherwise, there would be endless, fact-specific litigation in the trial and appellate courts, including this one. Here, personal service in California, without more, is enough, and I agree that the judgment should be affirmed.

BRENNAN, J., with whom MARSHALL, J., BLACKMUN, J., and O'CONNOR, J., join, concurring in the judgment.

I agree with Justice Scalia that the Due Process Clause of the Fourteenth Amendment generally permits a state court to exercise jurisdiction over a defendant if he is served with process while voluntarily present in the forum State. I do not perceive the need, however, to decide that a jurisdictional rule that " 'has been immemorially the actual law of the land,' " automatically comports with due process simply by virtue of its "pedigree." Although I agree that history is an important factor in establishing whether a jurisdictional rule satisfies due process requirements, I cannot agree that it is the only factor such that all traditional rules of jurisdiction are, ipso facto, forever constitutional. Unlike Justice Scalia, I would undertake an "independent inquiry into the … fairness of the prevailing in-state service rule." I therefore concur in the judgment.

[…]

I believe that the approach adopted by Justice Scalia's opinion today—reliance solely on historical pedigree—is foreclosed by our decisions in *International Shoe Co. v. Washington* and *Shaffer v. Heitner*. […] The critical insight of Shaffer is that all rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process. […]

[…]

STEVENS, J., concurring in the judgment.

As I explained in my separate writing, I did not join the Court's opinion in *Shaffer v. Heitner* because I was concerned by its unnecessarily broad reach. The same concern prevents me from joining either Justice Scalia's or Justice Brennan's opinion in this case. For me, it is sufficient to note that the historical evidence and consensus identified by Justice Scalia, the considerations of fairness identified by Justice Brennan, and the common sense displayed by Justice White, all combine to demonstrate that this is, indeed, a very easy case.*

* Perhaps the adage about hard cases making bad law should be revised to cover easy cases.

Notes & Questions

1. This case is one in which it is important to count votes. When the Supreme Court has nine members, as it typically does, it takes five votes to create a majority. How many votes did Justice Scalia get for his opinion?

2. When no opinion garners five votes, the lead opinion is termed a "plurality" rather than a "majority." In *Marks v. United States*, 430 U.S. 188, 193 (1977), the Supreme Court said, in a case without a majority opinion, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." What are the narrowest grounds on which five justices agreed in *Burnham*?

3. The plurality in Burnham took a very different approach to understanding personal jurisdiction than did the Court in *Shaffer*. Can you articulate what separates the two approaches? What tradeoffs are implicated by the

choice between the two approaches? Which one do you think is better? Why?

4. What does *Burnham* tell us, if anything, about what remains of Pennoyer? Does it signal a willingness to return to *Pennoyer*'s territorial paradigm, even if only sometimes?

11.4. Specific Personal Jurisdiction

An important line in modern personal jurisdiction doctrine distinguishes between *specific* personal jurisdiction and *general* personal jurisdiction. The former refers to personal jurisdiction resting only on those of defendants' contacts with the forum state that are related to the lawsuit itself. Unrelated contacts with the forum are not relevant to specific jurisdiction. By contrast, general jurisdiction looks at all of defendants' contacts with the forum state, but applies a much higher bar of "minimum contacts": for general jurisdiction, due process demands that the defendant be "essentially at home" in the forum state. We will begin by looking in some depth at specific personal jurisdiction. As we do so, keep in mind that only the defendants' contacts with the forum state that are related to the lawsuit are relevant for personal jurisdiction purposes. Later, we will turn to general jurisdiction and the standards for being "at home" in a forum.

McGee v. International Life Insurance Co.

Opinion of the Court by BLACK, J., announced by DOUGLAS, J. 355 U.S. 220 (1957)

[…]

The material facts are relatively simple. In 1944, Lowell Franklin, a resident of California, purchased a life insurance policy from the Empire Mutual Insurance Company, an Arizona corporation. In 1948 the respondent agreed with Empire Mutual to assume its insurance obligations. Respondent then mailed […] to Franklin in California [an offer] to insure him in accordance with the terms of the policy he held with Empire Mutual. […] He accepted this offer and from that time until his death in 1950 paid premiums by mail from his California home to respondent's Texas office. Petitioner, Franklin's mother, was the beneficiary under the policy. She sent proofs of his death to the respondent but it refused to pay claiming that he had committed suicide. It appears that neither Empire Mutual nor respondent has ever had any office or agent in California. And so far as the record before us shows, respondent has never solicited or done any insurance business in California apart from the policy involved here.

Since *Pennoyer v. Neff*, this Court has held that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter

binding judgments against persons not served with process within their boundaries. But just where this line of limitation falls has been the subject of prolific controversy, particularly with respect to foreign corporations. In a continuing process of evolution this Court accepted and then abandoned "consent," "doing business," and "presence" as the standard for measuring the extent of state judicial power over such corporations. More recently in *International Shoe Co. v. Washington*, the Court decided that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

Looking back over this long history […] a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

Turning to this case we think it apparent that the Due Process Clause did not preclude the California court from entering a judgment binding on respondent. It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State. *Cf. Hess v. Pawloski*; *Pennoyer v. Neff*. The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof. Often the crucial witnesses—as here on the company's defense of suicide—will be found in the insured's locality. Of course there may be inconvenience to the insurer if it is held amenable to suit in California where it had this contract but certainly nothing which amounts to a denial of due process. There is no contention that respondent did not have adequate notice of the suit or sufficient time to prepare its defenses and appear.

Hanson v. Denckla

57 U.S. 235 (1958)

WARREN, C.J., delivered the opinion of the Court.

[Dora Browning Donner, then a resident of Pennsylvania, created a trust instrument in Delaware, naming a Delaware bank as trustee. Donner retained

power over the trust, including most importantly the power to name a new owner of the trust upon her death. Later, after the trust was created, Donner moved to Florida, where she lived the rest of her life. Shortly before passing, Donner transferred control of the trust to separate Delaware trusts controlled by one of her daughters, for the benefit of two of her grandchildren. After Donner's death, a dispute arose in Florida probate court between Donner's three daughters. In particular, Donner's *other* two daughters claimed that the transfer of the trust was invalid. In connection with that dispute, the two daughters challenging the transfer served process on the Delaware trustee by mail and publication. The trustee challenged the Florida court's personal jurisdiction over it.]

Appellees […] urge that the circumstances of this case amount to sufficient affiliation with the State of Florida to empower its courts to exercise personal jurisdiction over this nonresident defendant. Principal reliance is placed upon *McGee v. International Life Ins. Co.* In *McGee* the Court noted the trend of expanding personal jurisdiction over nonresidents. As technological has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff* to the flexible standard of *International Shoe Co. v. Washington*. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him. *See International Shoe Co. v. Washington*.

We fail to find such contacts in the circumstances of this case. The defendant trust company has no office in Florida, and transacts no business there. None of the trust assets has ever been held or administered in Florida, and the record discloses no solicitation of business in that State either in person or by mail.

The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State. In that respect, it differs from *McGee*. In *McGee*, the nonresident defendant solicited a reinsurance agreement with a resident of California. The offer was accepted in that State, and the insurance premiums were mailed from there until the insured's death. Noting the interest California has in providing effective redress for its residents when nonresident insurers refuse to pay claims on insurance they have solicited in that State, the Court upheld jurisdiction because the suit "was based on a contract which had substantial connection with that State." In contrast, this action involves the validity of an agreement that was entered without any connection with the forum State. The agreement was executed in Delaware by a trust company incorporated in that State and a settlor domiciled in Pennsylvania. The

first relationship Florida had to the agreement was years later when [Donner] became domiciled there, and the trustee remitted the trust income to her in the State. From Florida Mrs. Donner carried on several bits of trust administration. But the record discloses no instance in which the trustee performed any acts in Florida that bear the same relationship to the agreement as the solicitation in *McGee*. Consequently, this suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida. […]

[…]

[Nor does it make any difference that Donner named the new owner of the trust from Florida.] The unilateral activity of those [like Donner] who claim some relationship with a nonresident defendant [the Delaware trustee] cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. *International Shoe Co. v. Washington*. […]

[…]

[The dissenting opinions for Justices BLACK, BURTON, BRENNAN, and DOUGLAS are omitted.]

Notes & Questions

1. It is sometimes said that *McGee* supported personal jurisdiction over the defendant based on just a single contact, the insurance policy. Is it true that there was only one case-related contact between the defendant and the forum state? Can you think of other possible such contacts?
2. *Hanson* stands for, among other things, the proposition that the unilateral conduct of a third party cannot affect the defendant's amenability to suit in a particular forum. In other words, Donner's actions could not make the trust subject to personal jurisdiction in Florida, because Donner's actions do not reflect a choice on the part of the trust to avail itself of the benefits of Florida's laws.
3. There is tension between *McGee* and *Hanson*. Can you explain why they rest uneasily side by side? What can we infer about the rules governing personal jurisdiction by looking at them together?

Note on "Effects-Based" Jurisdiction

What if a defendant takes some action with knowledge that the effects will be felt in another state? Can knowingly causing effects in another state constitute minimum contacts under *International Shoe*? The Supreme Court first

addressed this question in *Kulko v. Superior Court*, 436 U.S. 84 (1978). The case arose out of a child-custody dispute. At first, the mother lived in California, while the father and ex-husband lived in New York with the couple's two children. After a time, the father bought a plane ticket so their daughter could move to California to live with her mother. Next, the mother bought a plane ticket for the son to fly to California (without the father's knowledge) and live there as well. Soon thereafter, the mother sued in California state court seeking to modify the couple's child-support agreement. The California state courts found jurisdiction to be proper on the theory that the father's decision to send his son to live in California caused sufficient effects in that state as to constitute the requisite minimum contacts.

The Supreme Court reversed, 6-3:

> The circumstances in this case clearly render "unreasonable" California's assertion of personal jurisdiction. There is no claim that appellant has visited physical injury on either property or persons within the State of California. *Cf. Hess v. Pawloski*. The cause of action herein asserted arises, not from the defendant's commercial transactions in interstate commerce, but rather from his personal, domestic relations. It thus cannot be said that appellant has sought a commercial benefit from solicitation of business from a resident of California that could reasonably render him liable to suit in state court; appellant's activities cannot fairly be analogized to an insurer's sending an insurance contract and premium notices into the State to an insured resident of the State. *Cf. McGee v. International Life Insurance Co.* Furthermore, the controversy between the parties arises from a separation that occurred in the State of New York; appellee Horn seeks modification of a contract that was negotiated in New York and that she flew to New York to sign. As in *Hanson v. Denckla*, the instant action involves an agreement that was entered into with virtually no connection with the forum State. […]
>
> Finally, basic considerations of fairness point decisively in favor of appellant's State of domicile as the proper forum for adjudication of this case, whatever the merits of appellee's underlying claim. It is appellant who has remained in the State of the marital domicile, whereas it is appellee who has moved across the continent. […] Appellant has at all times resided in New York State, and, until the separation and appellee's move to California, his entire family resided there as well. As noted above, appellant did no more than acquiesce in the stated preference of one of his children to live with her mother in California. This single act is surely not one that a reasonable parent would expect to result in the substantial financial burden and personal strain of litigating a child-support suit in a forum 3,000 miles away, and we therefore see no basis on which it can be said that appellant could reasonably have anticipated being "haled before a [California] court," *Shaffer v. Heitner*. To make jurisdiction in a case such as this turn on whether appellant bought

> his daughter her ticket or instead unsuccessfully sought to prevent her departure would impose an unreasonable burden on family relations, and one wholly unjustified by the "quality and nature" of appellant's activities in or relating to the State of California. *International Shoe Co. v. Washington*.

The cases that follow explore the circumstances when knowingly causing effects within the out-of-state forum suffices to permit the exercise of specific personal jurisdiction over the non-resident defendant. As you read them, ask yourself why their outcome differs from that in *Kulko*.

World-Wide Volkswagen Corp. v. Woodson

444 U.S. 286 (1980)

WHITE, J., delivered the opinion of the Court.

The issue before us is whether, consistently with the Due Process Clause of the Fourteenth Amendment, an Oklahoma court may exercise *in personam* jurisdiction over a nonresident automobile retailer and its wholesale distributor in a products-liability action, when the defendants' only connection with Oklahoma is the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma.

I

Respondents Harry and Kay Robinson purchased a new Audi automobile from petitioner Seaway Volkswagen, Inc. (Seaway) in Massena, N.Y., in 1976. The following year the Robinson family, who resided in New York, left that State for a new home in Arizona. As they passed through the State of Oklahoma, another car struck their Audi in the rear, causing a fire which severely burned Kay Robinson and her two children.[1] The Robinsons subsequently brought a products-liability action in the District Court for Creek County, Okla. claiming that their injuries resulted from defective design and placement of the Audi's gas tank and fuel system. They joined as defendants the automobile's manufacturer, Audi NSU Auto Union Aktiengesellschaft (Audi); its importer, Volkswagen of America, Inc. (Volkswagen); its regional distributor, petitioner World-Wide Volkswagen Corporation (World-Wide); and its retail dealer, petitioner Seaway. Seaway and World-Wide entered special appearances,[3] claiming that Oklahoma's exercise of jurisdiction over them would offend the limitations on the State's jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment.

[1] The driver of the other automobile does not figure in the present litigation.

[3] Volkswagen also entered a special appearance in the District Court, but unlike World-Wide and Seaway did not seek review in the Supreme Court of Oklahoma and is not a petitioner here. Both Volkswagen and Audi remain as defendants in the litigation pending before the District Court in Oklahoma.

The facts presented to the District Court showed that World-Wide is incorporated and has its business office in New York. It distributes vehicles, parts and accessories, under contract with Volkswagen, to retail dealers in New York, New Jersey, and Connecticut. Seaway, one of these retail dealers, is incorporated and has its place of business in New York. Insofar as the record reveals, Seaway and World-Wide are fully independent corporations whose relations

with each other and with Volkswagen and Audi are contractual only. Respondents adduced no evidence that either World-Wide or Seaway does any business in Oklahoma, ships or sells any products to or in that State, has an agent to receive process there, or purchases advertisements in any media calculated to reach Oklahoma. In fact, as respondents' counsel conceded at oral argument, there was no showing that any automobile sold by World-Wide or Seaway has ever entered Oklahoma with the single exception of the vehicle involved in the present case.

[…] Petitioners then sought a writ of prohibition in the Supreme Court of Oklahoma to restrain the District Judge, respondent Charles S. Woodson, from exercising *in personam* jurisdiction over them. […]

The Supreme Court of Oklahoma denied the writ. […] The Court's rationale was contained in the following paragraph:

> In the case before us, the product being sold and distributed by the petitioners is by its very design and purpose so mobile that petitioners can foresee its possible use in Oklahoma. This is especially true of the distributor, who has the exclusive right to distribute such automobile in New York, New Jersey and Connecticut. The evidence presented below demonstrated that goods sold and distributed by the petitioners were used in the State of Oklahoma, and under the facts we believe it reasonable to infer, given the retail value of the automobile, that the petitioners derive substantial income from automobiles which from time to time are used in the State of Oklahoma. This being the case, we hold that under the facts presented, the trial court was justified in concluding that the petitioners derive substantial revenue from goods used or consumed in this State.

We granted certiorari to consider an important constitutional question with respect to state-court jurisdiction and to resolve a conflict between the Supreme Court of Oklahoma and the highest courts of at least four other States. We reverse.

II

The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant. *Kulko v. Superior Court*. A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere. *Pennoyer v. Neff*. Due process requires that the defendant be given adequate notice of the suit, *Mullane v. Central Hanover Trust Co.*, and be subject to the personal jurisdiction of the court, *International Shoe Co. v. Washington*. In the present case, it is not contended that notice was inadequate; the only question is whether these particular petitioners were subject to the jurisdiction of the Oklahoma courts.

As has long been settled, and as we reaffirm today, a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist "minimum contacts" between the defendant and the forum State. *International*

Shoe Co. v. Washington. The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

The protection against inconvenient litigation is typically described in terms of "reasonableness" or "fairness." We have said that the defendant's contacts with the forum State must be such that maintenance of the suit "does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, quoting *Milliken v. Meyer*. The relationship between the defendant and the forum must be such that it is "reasonable … to require the corporation to defend the particular suit which is brought there." Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum, *cf. Shaffer v. Heitner*; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.

The limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years. As we noted in *McGee v. International Life Ins. Co.*, this trend is largely attributable to a fundamental transformation in the American economy. […] The historical developments noted in *McGee*, of course, have only accelerated in the generation since that case was decided.

Nevertheless, we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. The economic interdependence of the States was foreseen and desired by the Framers. In the Commerce Clause, they provided that the Nation was to be a common market, a "free trade unit" in which the States are debarred from acting as separable economic entities. But the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

Hence, even while abandoning the shibboleth that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established," *Pennoyer v. Neff*, we emphasized that the reasonableness of asserting jurisdiction over the defendant must be assessed "in the context of our federal system of government," *International Shoe Co. v. Washington*, and

stressed that the Due Process Clause ensures not only fairness, but also the "orderly administration of the laws." […]

Thus, the Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co. v. Washington*. Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment. *Hanson v. Denckla*.

III

Applying these principles to the case at hand, we find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. Petitioners carry on no activity whatsoever in Oklahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the State. Nor does the record show that they regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market. In short, respondents seek to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma.

It is argued, however, that because an automobile is mobile by its very design and purpose it was "foreseeable" that the Robinsons' Audi would cause injury in Oklahoma. Yet "foreseeability" alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause. In *Hanson v. Denckla*, it was no doubt foreseeable that the settlor of a Delaware trust would subsequently move to Florida and seek to exercise a power of appointment there; yet we held that Florida courts could not constitutionally exercise jurisdiction over a Delaware trustee that had no other contacts with the forum State. In *Kulko v. Superior Court*, it was surely "foreseeable" that a divorced wife would move to California from New York, the domicile of the marriage, and that a minor daughter would live with the mother. Yet we held that California could not exercise jurisdiction in a child-support action over the former husband who had remained in New York.

If foreseeability were the criterion, a local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there; a Wisconsin seller of a defective automobile jack could be haled before a distant court for damage caused in New Jersey; or a Florida soft drink concessionaire could be summoned to Alaska to account for injuries happening there. Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel. We recently abandoned the

outworn rule of *Harris v. Balk*, that the interest of a creditor in a debt could be extinguished or otherwise affected by any State having transitory jurisdiction over the debtor. *Shaffer v. Heitner*. Having interred the mechanical rule that a creditor's amenability to a quasi *in rem* action travels with his debtor, we are unwilling to endorse an analogous principle in the present case.[11]

This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. The Due Process Clause, by ensuring the "orderly administration of the laws," gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

But there is no such or similar basis for Oklahoma jurisdiction over World-Wide or Seaway in this case. Seaway's sales are made in Massena, N.Y. World-Wide's market, although substantially larger, is limited to dealers in New York, New Jersey, and Connecticut. There is no evidence of record that any automobiles distributed by World-Wide are sold to retail customers outside this tri-State area. It is foreseeable that the purchasers of automobiles sold by World-Wide and Seaway may take them to Oklahoma. But the mere "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Hanson v. Denckla*.

In a variant on the previous argument it is contended that jurisdiction can be supported by the fact that petitioners earn substantial revenue from goods used in Oklahoma. The Oklahoma Supreme Court so found, drawing the inference that because one automobile sold by petitioners had been used in Oklahoma, others might have been used there also. While this inference seems less than compelling on the facts of the instant case, we need not question the Court's factual findings in order to reject its reasoning.

[11] Respondents' counsel, at oral argument, sought to limit the reach of the foreseeability standard by suggesting that there is something unique about automobiles. It is true that automobiles are uniquely mobile, that they did play a crucial role in the expansion of personal jurisdiction through the fiction of implied consent, e.g., *Hess v. Pawloski*, and that some of the cases have treated the automobile as a "dangerous instrumentality." But today, under the regime of International Shoe, we see no difference for jurisdictional purposes between an automobile and any other chattel. The "dangerous instrumentality" concept apparently was never used to support personal jurisdiction; and to the extent it has relevance today it bears not on jurisdiction but on the possible desirability of imposing substantive principles of tort law such as strict liability.

This argument seems to make the point that the purchase of automobiles in New York, from which the petitioners earn substantial revenue, would not occur but for the fact that the automobiles are capable of use in distant States like Oklahoma. Respondents observe that the very purpose of an automobile is to travel, and that travel of automobiles sold by petitioners is facilitated by an extensive chain of Volkswagen service centers throughout the Country, including some in Oklahoma.[12] However, financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State. In our view, whatever marginal revenues petitioners may receive by virtue of the fact that their products are capable of use in Oklahoma is far too attenuated a contact to justify that State's exercise of *in personam* jurisdiction over them.

[12] As we have noted, petitioners earn no direct revenues from these service centers.

Because we find that petitioners have no "contacts, ties, or relations" with the State of Oklahoma, the judgment of the Supreme Court of Oklahoma is

Reversed.

BRENNAN, J., dissenting.

[…] Because I believe that the Court reads *International Shoe* and its progeny too narrowly, and because I believe that the standards enunciated by those cases may already be obsolete as constitutional boundaries, I dissent.

[…]

The Court's opinions focus tightly on the existence of contacts between the forum and the defendant. In so doing, they accord too little weight to the strength of the forum State's interest in the case and fail to explore whether there would be any actual inconvenience to the defendant. […]

[…]

[T]he interest of the forum State and its connection to the litigation is strong. The automobile accident underlying the litigation occurred in Oklahoma. The plaintiffs were hospitalized in Oklahoma when they brought suit. Essential witnesses and evidence were in Oklahoma. *See Shaffer v. Heitner*. The State has a legitimate interest in enforcing its laws designed to keep its highway system safe, and the trial can proceed at least as efficiently in Oklahoma as anywhere else.

The petitioners are not unconnected with the forum. Although both sell automobiles within limited sales territories, each sold the automobile which in fact was driven to Oklahoma where it was involved in an accident. It may be true, as the Court suggests, that each sincerely intended to limit its commercial impact to the limited territory, and that each intended to accept the benefits and protection of the laws only of those States within the territory. But obviously these were unrealistic hopes that cannot be treated as an automatic constitutional shield.[9] An automobile simply is not a stationary item or one designed to be used in one place. An automobile is intended to be moved around. Someone in the business of selling large numbers of automobiles can hardly plead ignorance of their mobility or pretend that the automobiles stay put after they

[9] Moreover, imposing liability in this case would not so undermine certainty as to destroy an automobile dealer's ability to do business. According jurisdiction does not expand liability except in the marginal case where a plaintiff cannot afford to bring an action except in the plaintiff's own State. In addition, these petitioners are represented by insurance companies. They not only could, but did, purchase insurance to protect them should they stand trial and lose the case. The costs of the insurance no doubt are passed on to customers.

are sold. It is not merely that a dealer in automobiles foresees that they will move. The dealer actually intends that the purchasers will use the automobiles to travel to distant States where the dealer does not directly "do business." The sale of an automobile does purposefully inject the vehicle into the stream of interstate commerce so that it can travel to distant States.

[…]

The Court accepts that a State may exercise jurisdiction over a distributor which "serves" that State "indirectly" by "deliver[ing] its products into the stream of commerce with the expectation that they will [be] purchased by consumers in other States." It is difficult to see why the Constitution should distinguish between a case involving goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State because a consumer, using them as the dealer knew the customer would, took them there. In each case the seller purposefully injects the goods into the stream of commerce and those goods predictably are used in the forum State.

[…]

It may be that affirmance of the judgments in these cases would approach the outer limits of *International Shoe*'s jurisdictional principle. But that principle, with its almost exclusive focus on the rights of defendants, may be outdated.
[…]

[…]

The Court's opinion […] suggests that the defendant ought to be subject to a State's jurisdiction only if he has contacts with the State "such that he should reasonably anticipate being haled into court there."[18] There is nothing unreasonable or unfair, however, about recognizing commercial reality. Given the tremendous mobility of goods and people, and the inability of businessmen to control where goods are taken by customers (or retailers), I do not think that the defendant should be in complete control of the geographical stretch of his amenability to suit. Jurisdiction is no longer premised on the notion that nonresident defendants have somehow impliedly consented to suit. People should understand that they are held responsible for the consequences of their actions and that in our society most actions have consequences affecting many States. When an action in fact causes injury in another State, the actor should be prepared to answer for it there unless defending in that State would be unfair for some reason other than that a state boundary must be crossed.[19]

[18] The Court suggests that this is the critical foreseeability rather than the likelihood that the product will go to the forum State. But the reasoning begs the question. A defendant cannot know if his actions will subject him to jurisdiction in another State until we have declared what the law of jurisdiction is.

[19] One consideration that might create some unfairness would be if the choice of forum also imposed on the defendant an unfavorable substantive law which the defendant could justly have assumed would not apply.

[…]

[The dissenting opinions of Justice Marshall (joined by Justice Blackmun) and Justice Blackmun are omitted.]

Notes & Questions

1. The Court in *World-Wide Volkswagen* rests its rationale on the twin purposes of personal jurisdiction doctrine under the Fourteenth Amendment: 1. To ensure that the burdens of litigation do not fall unfairly on the defendant; and 2. To prevent states from projecting their courts' power too far beyond their borders. Are these two goals related to each another? Which would you associate more closely with *Pennoyer*? With *International Shoe*?

2. In addition to the minimum-contacts analysis required by *International Shoe*, *World-Wide Volkswagen* adds an additional step: a five-factor balancing test aimed at determining the overall fairness of requiring the defendant to litigate in the forum. The factors are: (1) "the burden on the defendant,"; (2) "the forum State's interest in adjudicating the dispute"; (3) "the plaintiff's interest in obtaining convenient and effective relief"; (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and (5) "the shared interest of the several States in furthering fundamental substantive social policies." This step in the analysis was later clarified in *Asahi*, *infra*.

Calder v. Jones

Justice REHNQUIST delivered the opinion of the Court.

465 U.S. 783 (1984)

Respondent Shirley Jones brought suit in California Superior Court claiming that she had been libeled in an article written and edited by petitioners in Florida. The article was published in a national magazine with a large circulation in California. Petitioners were served with process by mail in Florida and caused special appearances to be entered on their behalf, moving to quash the service of process for lack of personal jurisdiction. The superior court granted the motion on the ground that First Amendment concerns weighed against an assertion of jurisdiction otherwise proper under the Due Process Clause. The California Court of Appeal reversed, rejecting the suggestion that First Amendment considerations enter into the jurisdictional analysis. We now affirm.

Respondent lives and works in California. She and her husband brought this suit against the National Enquirer, Inc., its local distributing company, and petitioners for libel, invasion of privacy, and intentional infliction of emotional harm. The Enquirer is a Florida corporation with its principal place of business in Florida. It publishes a national weekly newspaper with a total circulation of over 5 million. About 600,000 of those copies, almost twice the level of the next highest State, are sold in California. Respondent's and her husband's claims were based on an article that appeared in the Enquirer's October 9, 1979 issue. […]

The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California.[9] The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California. *World-Wide Volkswagen Corp. v. Woodson*. […]

[9] The article alleged that respondent drank so heavily as to prevent her from fulfilling her professional obligations.

We hold that jurisdiction over petitioners in California is proper because of their intentional conduct in Florida calculated to cause injury to respondent in California. The judgment of the California Court of Appeal is

Affirmed.

Keeton v. Hustler Magazine, Inc.

465 U.S. 770 (1984)

Justice Rehnquist delivered the opinion of the Court.

Petitioner Kathy Keeton sued respondent Hustler Magazine, Inc., and other defendants in the United States District Court for the District of New Hampshire, alleging jurisdiction over her libel complaint by reason of diversity of citizenship. The District Court dismissed her suit because it believed that the Due Process Clause of the Fourteenth Amendment to the United States Constitution forbade the application of New Hampshire's long-arm statute in order to acquire personal jurisdiction over respondent. The Court of Appeals for the First Circuit affirmed […]. We granted certiorari, and we now reverse.

Petitioner Keeton is a resident of New York. Her only connection with New Hampshire is the circulation there of copies of a magazine that she assists in producing. The magazine bears petitioner's name in several places crediting her with editorial and other work. Respondent Hustler Magazine, Inc., is an Ohio corporation, with its principal place of business in California. Respondent's contacts with New Hampshire consist of the sale of some 10,000 to 15,000 copies of Hustler Magazine in that State each month. Petitioner claims to have been libeled in five separate issues of respondent's magazine published between September 1975 and May 1976. […] New Hampshire was the only State where petitioner's suit would not have been time-barred when it was filed. […]

We conclude that the Court of Appeals erred when it affirmed the dismissal of petitioner's suit for lack of personal jurisdiction. Respondent's regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine. […]

[R]egular monthly sales of thousands of magazines cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous. It is, therefore, unquestionable that New Hampshire jurisdiction over a complaint based

on those contacts would ordinarily satisfy the requirement of the Due Process Clause that a State's assertion of personal jurisdiction over a nonresident defendant be predicated on "minimum contacts" between the defendant and the State. *See World-Wide Volkswagen Corp. v. Woodson*; *International Shoe Co. v. Washington*. And, as the Court of Appeals acknowledged, New Hampshire has adopted a "long-arm" statute authorizing service of process on nonresident corporations whenever permitted by the Due Process Clause.[4] Thus, all the requisites for personal jurisdiction over Hustler Magazine, Inc., in New Hampshire are present.

[4] New Hampshire Rev. Stat. Ann. § 300:14 (1977) provides in relevant part: "If a foreign corporation … commits a tort in whole or in part in New Hampshire, such ac[t] shall be deemed to be doing business in New Hampshire by such foreign corporation and shall be deemed equivalent to the appointment by such foreign corporation of the secretary of the state of New Hampshire and his successors to be its true and lawful attorney upon whom may be served all lawful process in any actions or proceedings against such foreign corporation arising from or growing out of such … tort."
This statute has been construed in the New Hampshire courts to extend jurisdiction over nonresident corporations to the fullest extent permitted under the Federal Constitution.

[…]

[A]ny potential unfairness in applying New Hampshire's statute of limitations to all aspects of this nationwide suit has nothing to do with the jurisdiction of the court to adjudicate the claims. "The issue is personal jurisdiction, not choice of law." *Hanson v. Denckla*. The question of the applicability of New Hampshire's statute of limitations to claims for out-of-state damages presents itself in the course of litigation only after jurisdiction over respondent is established, and we do not think that such choice-of-law concerns should complicate or distort the jurisdictional inquiry.

[…]

The plaintiff's residence is not, of course, completely irrelevant to the jurisdictional inquiry. As noted, that inquiry focuses on the relations among the defendant, the forum, and the litigation. Plaintiff's residence may well play an important role in determining the propriety of entertaining a suit against the defendant in the forum. That is, plaintiff's residence in the forum may, because of defendant's relationship with the plaintiff, enhance defendant's contacts with the forum. Plaintiff's residence may be the focus of the activities of the defendant out of which the suit arises. *See Calder v. Jones*; *McGee v. International Life Ins. Co.* But plaintiff's residence in the forum State is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts.

It is undoubtedly true that the bulk of the harm done to petitioner occurred outside New Hampshire. But that will be true in almost every libel action brought somewhere other than the plaintiff's domicile. There is no justification for restricting libel actions to the plaintiff's home forum. The victim of a libel, like the victim of any other tort, may choose to bring suit in any forum with which the defendant has "certain minimum contacts … such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*.

Where, as in this case, respondent Hustler Magazine, Inc., has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine. *World-Wide Volkswagen Corp. v. Woodson*. […]

The judgment of the Court of Appeals is reversed, and the cause is remanded for proceedings consistent with this opinion.

It is so ordered.

Burger King Corp. v. Rudzewicz

471 U.S. 462 (1985)

JUSTICE BRENNAN delivered the opinion of the Court.

The State of Florida's long-arm statute extends jurisdiction to "[a]ny person, whether or not a citizen or resident of this state," who, *inter alia*, "[b]reach[es] a contract in this state by failing to perform acts required by the contract to be performed in this state," so long as the cause of action arises from the alleged contractual breach. The United States District Court for the Southern District of Florida, sitting in diversity, relied on this provision in exercising personal jurisdiction over a Michigan resident who allegedly had breached a franchise agreement with a Florida corporation by failing to make required payments in Florida. The question presented is whether this exercise of long-arm jurisdiction offended "traditional conception[s] of fair play and substantial justice" embodied in the Due Process Clause of the Fourteenth Amendment. *International Shoe Co. v. Washington*.

I

A

Burger King Corporation is a Florida corporation whose principal offices are in Miami. It is one of the world's largest restaurant organizations, with over 3,000 outlets in the 50 States, the Commonwealth of Puerto Rico, and 8 foreign nations. Burger King conducts approximately 80% of its business through a franchise operation that the company styles the "Burger King System"—"a comprehensive restaurant format and operating system for the sale of uniform and quality food products." Burger King licenses its franchisees to use its trademarks and service marks for a period of 20 years and leases standardized restaurant facilities to them for the same term. In addition, franchisees acquire a variety of proprietary information concerning the "standards, specifications, procedures and methods for operating a Burger King Restaurant." They also receive market research and advertising assistance; ongoing training in restaurant management; and accounting, cost-control, and inventory-control guidance. By permitting franchisees to tap into Burger King's established national reputation and to benefit from proven procedures for dispensing standardized fare, this system enables them to go into the restaurant business with significantly lowered barriers to entry.

In exchange for these benefits, franchisees pay Burger King an initial $40,000 franchise fee and commit themselves to payment of monthly royalties, advertising and sales promotion fees, and rent computed in part from monthly gross sales. Franchisees also agree to submit to the national organization's exacting regulation of virtually every conceivable aspect of their operations.[4] Burger

[4] Mandatory training seminars are conducted at Burger King University in Miami and at Whopper College Regional Training Centers around the country.

King imposes these standards and undertakes its rigid regulation out of conviction that "[u]niformity of service, appearance, and quality of product is essential to the preservation of the Burger King image and the benefits accruing therefrom to both Franchisee and Franchisor."

Burger King oversees its franchise system through a two-tiered administrative structure. The governing contracts provide that the franchise relationship is established in Miami and governed by Florida law, and call for payment of all required fees and forwarding of all relevant notices to the Miami headquarters. The Miami headquarters sets policy and works directly with its franchisees in attempting to resolve major problems. Day-to-day monitoring of franchisees, however, is conducted through a network of 10 district offices which in turn report to the Miami headquarters.

The instant litigation grows out of Burger King's termination of one of its franchisees, and is aptly described by the franchisee as "a divorce proceeding among commercial partners." […]

[Appellee John] Rudzewicz and [his business partner, Brian] MacShara jointly applied for a franchise to Burger King's Birmingham, Michigan, district office in the autumn of 1978. Their application was forwarded to Burger King's Miami headquarters, which entered into a preliminary agreement with them in February 1979. During the ensuing four months it was agreed that Rudzewicz and MacShara would assume operation of an existing facility in Drayton Plains, Michigan. MacShara attended the prescribed management courses in Miami during this period, and the franchisees purchased $165,000 worth of restaurant equipment from Burger King's Davmor Industries division in Miami. Even before the final agreements were signed, however, the parties began to disagree over site-development fees, building design, computation of monthly rent, and whether the franchisees would be able to assign their liabilities to a corporation they had formed. During these disputes Rudzewicz and MacShara negotiated both with the Birmingham district office and with the Miami headquarters. With some misgivings, Rudzewicz and MacShara finally obtained limited concessions from the Miami headquarters, signed the final agreements, and commenced operations in June 1979. By signing the final agreements, Rudzewicz obligated himself personally to payments exceeding $1 million over the 20-year franchise relationship.

The Drayton Plains facility apparently enjoyed steady business during the summer of 1979, but patronage declined after a recession began later that year. Rudzewicz and MacShara soon fell far behind in their monthly payments to Miami. Headquarters sent notices of default, and an extended period of negotiations began among the franchisees, the Birmingham district office, and the Miami headquarters. After several Burger King officials in Miami had engaged in prolonged but ultimately unsuccessful negotiations with the franchisees by mail and by telephone, headquarters terminated the franchise and ordered Rudzewicz and MacShara to vacate the premises. They refused and continued to occupy and operate the facility as a Burger King restaurant.

[…]

II

[…]

B

(1)

[…]

If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot. The Court long ago rejected the notion that personal jurisdiction might turn on "mechanical" tests, *International Shoe Co. v. Washington*, or on "conceptualistic … theories of the place of contracting or of performance." Instead, we have emphasized the need for a "highly realistic" approach that recognizes that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." It is these factors—prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing—that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

In this case, no physical ties to Florida can be attributed to Rudzewicz other than MacShara's brief training course in Miami. Rudzewicz did not maintain offices in Florida and, for all that appears from the record, has never even visited there. Yet this franchise dispute grew directly out of "a contract which had a *substantial* connection with that State." *McGee v. International Life Insurance Co.* (emphasis added). Eschewing the option of operating an independent local enterprise, Rudzewicz deliberately "reach[ed] out beyond" Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization. Upon approval, he entered into a carefully structured 20-year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida. In light of Rudzewicz' voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters, the "quality and nature" of his relationship to the company in Florida can in no sense be viewed as "random," "fortuitous," or "attenuated." *Hanson v. Denckla*; *Keeton v. Hustler Magazine, Inc.*; *World-Wide Volkswagen Corp. v. Woodson*. Rudzewicz' refusal to make the contractually required payments in Miami, and his continued use of Burger King's trademarks and confidential business information after his termination, caused foreseeable injuries to the corporation in Florida. For these reasons it was, at the very least, presumptively reasonable for Rudzewicz to be called to account there for such injuries.

[…] Rudzewicz most certainly knew that he was affiliating himself with an enterprise based primarily in Florida. The contract documents themselves emphasize that Burger King's operations are conducted and supervised from the Miami headquarters, that all relevant notices and payments must be sent there,

and that the agreements were made in and enforced from Miami. Moreover, the parties' actual course of dealing repeatedly confirmed that decisionmaking authority was vested in the Miami headquarters and that the district office served largely as an intermediate link between the headquarters and the franchisees. […]

Moreover, we believe the Court of Appeals gave insufficient weight to provisions in the various franchise documents providing that all disputes would be governed by Florida law. […] The Court in *Hanson* and subsequent cases has emphasized that choice-of-law *analysis*—which focuses on all elements of a transaction, and not simply on the defendant's conduct—is distinct from minimum-contracts jurisdictional analysis—which focuses at the threshold solely on the defendant's purposeful connection to the forum. Nothing in our cases, however, suggests that a choice-of-law *provision* should be ignored in considering whether a defendant has "purposefully invoked the benefits and protections of a State's laws" for jurisdictional purposes. Although such a provision standing alone would be insufficient to confer jurisdiction, we believe that, when combined with the 20-year interdependent relationship Rudzewicz established with Burger King's Miami headquarters, it reinforced his deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there. […]

(2)

Nor has Rudzewicz pointed to other factors that can be said persuasively to outweigh the considerations discussed above and to establish the *unconstitutionality* of Florida's assertion of jurisdiction. We cannot conclude that Florida had no "legitimate interest in holding [Rudzewicz] answerable on a claim related to" the contacts he had established in that State. *Keeton v. Hustler Magazine, Inc.*; *see also McGee v. International Life Insurance Co.* (noting that State frequently will have a "manifest interest in providing effective means of redress for its residents"). […] Although the Court has suggested that inconvenience may at some point become so substantial as to achieve *constitutional* magnitude, *McGee v. International Life Insurance Co.*, this is not such a case.

[…]

Because Rudzewicz established a substantial and continuing relationship with Burger King's Miami headquarters, received fair notice from the contract documents and the course of dealing that he might be subject to suit in Florida, and has failed to demonstrate how jurisdiction in that forum would otherwise be fundamentally unfair, we conclude that the District Court's exercise of jurisdiction […] did not offend due process. The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE WHITE joins, dissenting.

In my opinion there is a significant element of unfairness in requiring a franchisee to defend a case of this kind in the forum chosen by the franchisor. It

is undisputed that appellee maintained no place of business in Florida, that he had no employees in that State, and that he was not licensed to do business there. Appellee did not prepare his French fries, shakes, and hamburgers in Michigan, and then deliver them into the stream of commerce "with the expectation that they [would] be purchased by consumers in" Florida. To the contrary, appellee did business only in Michigan, his business, property, and payroll taxes were payable in that State, and he sold all of his products there.

Throughout the business relationship, appellee's principal contacts with appellant were with its Michigan office. Notwithstanding its disclaimer, the Court seems ultimately to rely on nothing more than standard boilerplate language contained in various documents to establish that appellee "purposefully availed himself of the benefits and protections of Florida's laws." Such superficial analysis creates a potential for unfairness not only in negotiations between franchisors and their franchisees but, more significantly, in the resolution of the disputes that inevitably arise from time to time in such relationships.

[…]

Accordingly, I respectfully dissent.

Asahi Metal Industry Co. v. Superior Court

480 U.S. 102 (1987)

JUSTICE O'CONNOR announced the judgment of the Court and delivered the unanimous opinion of the Court with respect to Part I, the opinion of the Court with respect to Part II-B, in which THE CHIEF JUSTICE, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE POWELL, and JUSTICE STEVENS join, and an opinion with respect to Parts II-A and III, in which THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE SCALIA join.

This case presents the question whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutes "minimum contacts" between the defendant and the forum State such that the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*.

I

On September 23, 1978, on Interstate Highway 80 in Solano County, California, Gary Zurcher lost control of his Honda motorcycle and collided with a tractor. Zurcher was severely injured, and his passenger and wife, Ruth Ann Moreno, was killed. In September 1979, Zurcher filed a product liability action in the Superior Court of the State of California in and for the County of Solano. Zurcher alleged that the 1978 accident was caused by a sudden loss of air and an explosion in the rear tire of the motorcycle, and alleged that the motorcycle tire, tube, and sealant were defective. Zurcher's complaint named, inter alia, Cheng Shin

Rubber Industrial Co., Ltd. (Cheng Shin), the Taiwanese manufacturer of the tube. Cheng Shin in turn filed a cross-complaint seeking indemnification from its codefendants and from petitioner, Asahi Metal Industry Co., Ltd. (Asahi), the manufacturer of the tube's valve assembly. Zurcher's claims against Cheng Shin and the other defendants were eventually settled and dismissed, leaving only Cheng Shin's indemnity action against Asahi.

California's long-arm statute authorizes the exercise of jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." Asahi moved to quash Cheng Shin's service of summons, arguing the State could not exert jurisdiction over it consistent with the Due Process Clause of the Fourteenth Amendment.

In relation to the motion, the following information was submitted by Asahi and Cheng Shin. Asahi is a Japanese corporation. It manufactures tire valve assemblies in Japan and sells the assemblies to Cheng Shin, and to several other tire manufacturers, for use as components in finished tire tubes. Asahi's sales to Cheng Shin took place in Taiwan. The shipments from Asahi to Cheng Shin were sent from Japan to Taiwan. Cheng Shin bought and incorporated into its tire tubes 150,000 Asahi valve assemblies in 1978; 500,000 in 1979; 500,000 in 1980; 100,000 in 1981; and 100,000 in 1982. Sales to Cheng Shin accounted for 1.24 percent of Asahi's income in 1981 and 0.44 percent in 1982. Cheng Shin alleged that approximately 20 percent of its sales in the United States are in California. Cheng Shin purchases valve assemblies from other suppliers as well, and sells finished tubes throughout the world.

In 1983 an attorney for Cheng Shin conducted an informal examination of the valve stems of the tire tubes sold in one cycle store in Solano County. The attorney declared that of the approximately 115 tire tubes in the store, 97 were purportedly manufactured in Japan or Taiwan, and of those 97, 21 valve stems were marked with the circled letter "A", apparently Asahi's trademark. Of the 21 Asahi valve stems, 12 were incorporated into Cheng Shin tire tubes. The store contained 41 other Cheng Shin tubes that incorporated the valve assemblies of other manufacturers. An affidavit of a manager of Cheng Shin whose duties included the purchasing of component parts stated: "'In discussions with Asahi regarding the purchase of valve stem assemblies the fact that my Company sells tubes throughout the world and specifically the United States has been discussed. I am informed and believe that Asahi was fully aware that valve stem assemblies sold to my Company and to others would end up throughout the United States and in California.'" An affidavit of the president of Asahi, on the other hand, declared that Asahi "'has never contemplated that its limited sales of tire valves to Cheng Shin in Taiwan would subject it to lawsuits in California.'" The record does not include any contract between Cheng Shin and Asahi.

Primarily on the basis of the above information, the Superior Court denied the motion to quash summons, stating: "Asahi obviously does business on an international scale. It is not unreasonable that they defend claims of defect in their product on an international scale." Order Denying Motion to Quash Summons.

The Court of Appeal of the State of California [disagreed,] conclud[ing] that "it would be unreasonable to require Asahi to respond in California solely on the basis of ultimately realized foreseeability that the product into which its component was embodied would be sold all over the world including California."

The Supreme Court of the State of California reversed […]. The court observed: "Asahi has no offices, property or agents in California. It solicits no business in California and has made no direct sales [in California]." Moreover, "Asahi did not design or control the system of distribution that carried its valve assemblies into California." Nevertheless, the court found the exercise of jurisdiction over Asahi to be consistent with the Due Process Clause. It concluded that Asahi knew that some of the valve assemblies sold to Cheng Shin would be incorporated into tire tubes sold in California, and that Asahi benefited indirectly from the sale in California of products incorporating its components. The court considered Asahi's intentional act of placing its components into the stream of commerce — that is, by delivering the components to Cheng Shin in Taiwan — coupled with Asahi's awareness that some of the components would eventually find their way into California, sufficient to form the basis for state court jurisdiction under the Due Process Clause.

We granted certiorari and now reverse.

II

A

[…]

Applying the principle that minimum contacts must be based on an act of the defendant, the Court in *World-Wide Volkswagen Corp. v. Woodson* rejected the assertion that a consumer's unilateral act of bringing the defendant's product into the forum State was a sufficient constitutional basis for personal jurisdiction over the defendant. It had been argued in *World-Wide Volkswagen* that because an automobile retailer and its wholesale distributor sold a product mobile by design and purpose, they could foresee being haled into court in the distant States into which their customers might drive. The Court rejected this concept of foreseeability as an insufficient basis for jurisdiction under the Due Process Clause. The Court disclaimed, however, the idea that "foreseeability is wholly irrelevant" to personal jurisdiction, concluding that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." […]

In *World-Wide Volkswagen* itself, the state court sought to base jurisdiction not on any act of the defendant, but on the foreseeable unilateral actions of the consumer. Since *World-Wide Volkswagen*, lower courts have been confronted with cases in which the defendant acted by placing a product in the stream of commerce, and the stream eventually swept defendant's product into the forum State, but the defendant did nothing else to purposefully avail itself of

the market in the forum State. Some courts have understood the Due Process Clause, as interpreted in *World-Wide Volkswagen*, to allow an exercise of personal jurisdiction to be based on no more than the defendant's act of placing the product in the stream of commerce. Other courts have understood the Due Process Clause and the above-quoted language in *World-Wide Volkswagen* to require the action of the defendant to be more purposefully directed at the forum State than the mere act of placing a product in the stream of commerce.

The reasoning of the Supreme Court of California in the present case illustrates the former interpretation of *World-Wide Volkswagen*. The Supreme Court of California held that, because the stream of commerce eventually brought some valves Asahi sold Cheng Shin into California, Asahi's awareness that its valves would be sold in California was sufficient to permit California to exercise jurisdiction over Asahi consistent with the requirements of the Due Process Clause. The Supreme Court of California's position was consistent with those courts that have held that mere foreseeability or awareness was a constitutionally sufficient basis for personal jurisdiction if the defendant's product made its way into the forum State while still in the stream of commerce.

Other courts, however, have understood the Due Process Clause to require something more than that the defendant was aware of its product's entry into the forum State through the stream of commerce in order for the State to exert jurisdiction over the defendant. […]

We now find this latter position to be consonant with the requirements of due process. The "substantial connection," *Burger King*; *McGee*, between the defendant and the forum State necessary for a finding of minimum contacts must come about *by an action of the defendant purposefully directed toward the forum State*. *Burger King*; *Keeton v. Hustler Magazine, Inc.* The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

Assuming, *arguendo*, that respondents have established Asahi's awareness that some of the valves sold to Cheng Shin would be incorporated into tire tubes sold in California, respondents have not demonstrated any action by Asahi to purposefully avail itself of the California market. Asahi does not do business in California. It has no office, agents, employees, or property in California. It does not advertise or otherwise solicit business in California. It did not create, control, or employ the distribution system that brought its valves to California. There is no evidence that Asahi designed its product in anticipation of sales in California. On the basis of these facts, the exertion of personal jurisdiction over Asahi by the Superior Court of California exceeds the limits of due process.

B

[…]

We have previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." *World-Wide Volkswagen*.

A consideration of these factors in the present case clearly reveals the unreasonableness of the assertion of jurisdiction over Asahi, even apart from the question of the placement of goods in the stream of commerce.

Certainly the burden on the defendant in this case is severe. Asahi has been commanded by the Supreme Court of California not only to traverse the distance between Asahi's headquarters in Japan and the Superior Court of California in and for the County of Solano, but also to submit its dispute with Cheng Shin to a foreign nation's judicial system. The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.

When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant. In the present case, however, the interests of the plaintiff and the forum in California's assertion of jurisdiction over Asahi are slight. All that remains is a claim for indemnification asserted by Cheng Shin, a Tawainese corporation, against Asahi. The transaction on which the indemnification claim is based took place in Taiwan; Asahi's components were shipped from Japan to Taiwan. Cheng Shin has not demonstrated that it is more convenient for it to litigate its indemnification claim against Asahi in California rather than in Taiwan or Japan.

Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished. The Supreme Court of California argued that the State had an interest in "protecting its consumers by ensuring that foreign manufacturers comply with the state's safety standards." The State Supreme Court's definition of California's interest, however, was overly broad. The dispute between Cheng Shin and Asahi is primarily about indemnification rather than safety standards. Moreover, it is not at all clear at this point that California law should govern the question whether a Japanese corporation should indemnify a Taiwanese corporation on the basis of a sale made in Taiwan and a shipment of goods from Japan to Taiwan. The possibility of being haled into a California court as a result of an accident involving Asahi's components undoubtedly creates an additional deterrent to the manufacture of unsafe components; however, similar pressures will be placed on

Asahi by the purchasers of its components as long as those who use Asahi components in their final products, and sell those products in California, are subject to the application of California tort law.

World-Wide Volkswagen also admonished courts to take into consideration the interests of the "several States," in addition to the forum State, in the efficient judicial resolution of the dispute and the advancement of substantive policies. In the present case, this advice calls for a court to consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the California court. The procedural and substantive interests of other *nations* in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal Government's interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."

Considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair.

III

Because the facts of this case do not establish minimum contacts such that the exercise of personal jurisdiction is consistent with fair play and substantial justice, the judgment of the Supreme Court of California is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, concurring in part and concurring in the judgment.

I do not agree with the interpretation in Part II-A of the stream-of-commerce theory, nor with the conclusion that Asahi did not "purposely avail itself of the California market." I do agree, however, with the Court's conclusion in Part II-B that the exercise of personal jurisdiction over Asahi in this case would not comport with "fair play and substantial justice," *International Shoe Co. v. Washington*. This is one of those rare cases in which "minimum requirements inherent in the concept of 'fair play and substantial justice' … defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities." *Burger King Corp. v. Rudzewicz*. I therefore join Parts I and II-B of the Court's opinion, and write separately to explain my disagreement with Part II-A.

Part II-A states that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere

act of placing the product into the stream into an act purposefully directed toward the forum State." Under this view, a plaintiff would be required to show "[a]dditional conduct" directed toward the forum before finding the exercise of jurisdiction over the defendant to be consistent with the Due Process Clause. I see no need for such a showing, however. The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State. Accordingly, most courts and commentators have found that jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduct.

[…]

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE BLACKMUN join, concurring in part and concurring in the judgment.

The judgment of the Supreme Court of California should be reversed for the reasons stated in Part II-B of the Court's opinion. While I join Parts I and II-B, I do not join Part II-A for two reasons. First, it is not necessary to the Court's decision. An examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional. *See Burger King Corp. v. Rudzewicz*. Part II-B establishes, after considering the factors set forth in *World-Wide Volkswagen Corp. v. Woodson*, that California's exercise of jurisdiction over Asahi in this case would be "unreasonable and unfair." This finding alone requires reversal; this case fits within the rule that "minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities." *Burger King* (quoting *International Shoe Co. v. Washington*). Accordingly, I see no reason in this case for the plurality to articulate "purposeful direction" or any other test as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts.

Second, even assuming that the test ought to be formulated here, Part II-A misapplies it to the facts of this case. The plurality seems to assume that an unwavering line can be drawn between "mere awareness" that a component will find its way into the forum State and "purposeful availment" of the forum's market. Over the course of its dealings with Cheng Shin, Asahi has arguably engaged in a higher quantum of conduct than "[t]he placement of a product into the stream of commerce, without more … ." Whether or not this conduct

rises to the level of purposeful availment requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components. In most circumstances I would be inclined to conclude that a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute "purposeful availment" even though the item delivered to the forum State was a standard product marketed throughout the world.

Notes & Questions

1. In *Asahi*, we can see more clearly the five fairness factors first introduced in *World-Wide Volkswagen*. Can you identify those five factors? How do the fairness factors fit together with the minimum-contacts analysis? Does the court need both? One or the other?
2. Like *Burnham* (decided one year later), *Asahi* is another personal jurisdiction case in which the Supreme Court failed to reach a majority. On which question(s) did the Court fall short of five votes? What is left unanswered in *Asahi*?
3. Note that the dispute at issue in *Asahi* concerned crossclaims: those brought by one defendant (Cheng Shin) for indemnification against another defendant (Asahi). Nevertheless, the court's personal jurisdiction over the relevant defendant is still necessary for any judgment to be valid and enforceable.
4. *Asahi* is what we might call a foreign-cubed suit. It involves a foreign plaintiff alleging claims against a foreign defendant for conduct that occurred primarily outside the United States. Does that make this case an unlikely one for personal jurisdiction in California? What theory did the plaintiff rely on to try to establish such jurisdiction?

J. McIntyre Machinery, Ltd. v. Nicastro

KENNEDY, J., announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, SCALIA, J., and THOMAS, J., join.

564 U.S. 873 (2011)

Whether a person or entity is subject to the jurisdiction of a state court despite not having been present in the State either at the time of suit or at the time of the alleged injury, and despite not having consented to the exercise of jurisdiction, is a question that arises with great frequency in the routine course of litigation. The rules and standards for determining when a State does or does not have jurisdiction over an absent party have been unclear because of decades-old questions left open in *Asahi Metal Industry Co. v. Superior Court*.

Here, the Supreme Court of New Jersey, relying in part on *Asahi*, held that New Jersey's courts can exercise jurisdiction over a foreign manufacturer of a product so long as the manufacturer "knows or reasonably should know that its

products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states." Applying that test, the court concluded that a British manufacturer of scrap metal machines was subject to jurisdiction in New Jersey, even though at no time had it advertised in, sent goods to, or in any relevant sense targeted the State.

That decision cannot be sustained. […] As a general rule, the exercise of judicial power is not lawful unless the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*. There may be exceptions, say, for instance, in cases involving an intentional tort. But the general rule is applicable in this products-liability case, and the so-called "stream-of-commerce" doctrine cannot displace it.

I

This case arises from a products-liability suit filed in New Jersey state court. Robert Nicastro seriously injured his hand while using a metal-shearing machine manufactured by J. McIntyre Machinery, Ltd. (J. McIntyre). The accident occurred in New Jersey, but the machine was manufactured in England, where J. McIntyre is incorporated and operates. The question here is whether the New Jersey courts have jurisdiction over J. McIntyre, notwithstanding the fact that the company at no time either marketed goods in the State or shipped them there.

At oral argument in this Court, Nicastro's counsel stressed three primary facts in defense of New Jersey's assertion of jurisdiction over J. McIntyre.

First, an independent company agreed to sell J. McIntyre's machines in the United States. J. McIntyre itself did not sell its machines to buyers in this country beyond the U.S. distributor, and there is no allegation that the distributor was under J. McIntyre's control.

Second, J. McIntyre officials attended annual conventions for the scrap recycling industry to advertise J. McIntyre's machines alongside the distributor. The conventions took place in various States, but never in New Jersey.

Third, no more than four machines, including the machine that caused the injuries that are the basis for this suit, ended up in New Jersey.

In addition to these facts emphasized by respondent, the New Jersey Supreme Court noted that […] the U.S. distributor "structured [its] advertising and sales efforts in accordance with" J. McIntyre's "direction and guidance whenever possible," and that "at least some of the machines were sold on consignment to" the distributor.

In light of these facts, the New Jersey Supreme Court concluded that New Jersey courts could exercise jurisdiction over petitioner. […]

[…] This Court's *Asahi* decision may be responsible in part for [the New Jersey] court's error regarding the stream of commerce, and this case presents an opportunity to provide greater clarity.

II

[…]

A court may subject a defendant to judgment only when the defendant has sufficient contacts with the sovereign "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington* (quoting *Milliken v. Meyer*). Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law. As a general rule, the sovereign's exercise of power requires some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hanson*, though in some cases, as with an intentional tort, the defendant might well fall within the State's authority by reason of his attempt to obstruct its laws. In products-liability cases like this one, it is the defendant's purposeful availment that makes jurisdiction consistent with "traditional notions of fair play and substantial justice."

A person may submit to a State's authority in a number of ways. There is, of course, explicit consent. Presence within a State at the time suit commences through service of process is another example. *See Burnham*. Citizenship or domicile—or, by analogy, incorporation or principal place of business for corporations—also indicates general submission to a State's powers. *Goodyear Dunlop Tires Operations, S.A. v. Brown*. Each of these examples reveals circumstances, or a course of conduct, from which it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State. *Cf. Burger King Corp. v. Rudzewicz*. These examples support exercise of the general jurisdiction of the State's courts and allow the State to resolve both matters that originate within the State and those based on activities and events elsewhere. By contrast, those who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter.

There is also a more limited form of submission to a State's authority for disputes that "arise out of or are connected with the activities within the state." *International Shoe Co.* Where a defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hanson*, it submits to the judicial power of an otherwise foreign sovereign to the extent that power is exercised in connection with the defendant's activities touching on the State. In other words, submission through contact with and activity directed at a sovereign may justify specific jurisdiction "in a suit arising out of or related to the defendant's contacts with the forum." *Helicopteros v. Hall*.

The imprecision arising from *Asahi*, for the most part, results from its statement of the relation between jurisdiction and the "stream of commerce." The stream of commerce, like other metaphors, has its deficiencies as well as its utility. It refers to the movement of goods from manufacturers through distributors to consumers, yet beyond that descriptive purpose its meaning is far from exact.

This Court has stated that a defendant's placing goods into the stream of commerce "with the expectation that they will be purchased by consumers within the forum State" may indicate purposeful availment. *World-Wide Volkswagen Corp. v. Woodson* (finding that expectation lacking). But that statement does not amend the general rule of personal jurisdiction. It merely observes that a defendant may in an appropriate case be subject to jurisdiction without entering the forum—itself an unexceptional proposition—as where manufacturers or distributors "seek to serve" a given State's market. The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign. In other words, the defendant must "purposefully avai[l] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson*. Sometimes a defendant does so by sending its goods rather than its agents. The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.

In *Asahi*, an opinion by Justice Brennan for four Justices outlined a different approach. It discarded the central concept of sovereign authority in favor of considerations of fairness and foreseeability. As that concurrence contended, "jurisdiction premised on the placement of a product into the stream of commerce [without more] is consistent with the Due Process Clause," for "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." It was the premise of the concurring opinion that the defendant's ability to anticipate suit renders the assertion of jurisdiction fair. In this way, the opinion made foreseeability the touchstone of jurisdiction.

The standard set forth in Justice Brennan's concurrence was rejected in an opinion written by Justice O'Connor; but the relevant part of that opinion, too, commanded the assent of only four Justices, not a majority of the Court. That opinion stated: "The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."

Since *Asahi* was decided, the courts have sought to reconcile the competing opinions. But Justice Brennan's concurrence, advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power. This Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment.

[…]

Two principles are implicit in the foregoing. First, personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis. The question

is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct. Personal jurisdiction, of course, restricts "judicial power not as a matter of sovereignty, but as a matter of individual liberty," for due process protects the individual's right to be subject only to lawful power. But whether a judicial judgment is lawful depends on whether the sovereign has authority to render it.

The second principle is a corollary of the first. Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State. This is consistent with the premises and unique genius of our Constitution. Ours is "a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." For jurisdiction, a litigant may have the requisite relationship with the United States Government but not with the government of any individual State. That would be an exceptional case, however. If the defendant is a domestic domiciliary, the courts of its home State are available and can exercise general jurisdiction. And if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States. Furthermore, foreign corporations will often target or concentrate on particular States, subjecting them to specific jurisdiction in those forums.

It must be remembered, however, that although this case and Asahi both involve foreign manufacturers, the undesirable consequences of Justice Brennan's approach are no less significant for domestic producers. The owner of a small Florida farm might sell crops to a large nearby distributor, for example, who might then distribute them to grocers across the country. If foreseeability were the controlling criterion, the farmer could be sued in Alaska or any number of other States' courts without ever leaving town. And the issue of foreseeability may itself be contested so that significant expenses are incurred just on the preliminary issue of jurisdiction. Jurisdictional rules should avoid these costs whenever possible.

The conclusion that the authority to subject a defendant to judgment depends on purposeful availment, consistent with Justice O'Connor's opinion in *Asahi*, does not by itself resolve many difficult questions of jurisdiction that will arise in particular cases. The defendant's conduct and the economic realities of the market the defendant seeks to serve will differ across cases, and judicial exposition will, in common-law fashion, clarify the contours of that principle.

III

In this case, petitioner directed marketing and sales efforts at the United States. It may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate

courts. That circumstance is not presented in this case, however, and it is neither necessary nor appropriate to address here any constitutional concerns that might be attendant to that exercise of power. Nor is it necessary to determine what substantive law might apply were Congress to authorize jurisdiction in a federal court in New Jersey. A sovereign's legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts. Here the question concerns the authority of a New Jersey state court to exercise jurisdiction, so it is petitioner's purposeful contacts with New Jersey, not with the United States, that alone are relevant.

Respondent has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey. Recall that respondent's claim of jurisdiction centers on three facts: The distributor agreed to sell J. McIntyre's machines in the United States; J. McIntyre officials attended trade shows in several States but not in New Jersey; and up to four machines ended up in New Jersey. The British manufacturer had no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employees to, the State. Indeed, after discovery the trial court found that the "defendant does not have a single contact with New Jersey short of the machine in question ending up in this state." These facts may reveal an intent to serve the U.S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market.

[…]

* * *

Due process protects petitioner's right to be subject only to lawful authority. At no time did petitioner engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws. New Jersey is without power to adjudge the rights and liabilities of J. McIntyre, and its exercise of jurisdiction would violate due process. The contrary judgment of the New Jersey Supreme Court is

Reversed.

BREYER, J., with whom ALITO, J., joins, concurring in the judgment.

The Supreme Court of New Jersey adopted a broad understanding of the scope of personal jurisdiction based on its view that "[t]he increasingly fast-paced globalization of the world economy has removed national borders as barriers to trade." I do not doubt that there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents. But this case does not present any of those issues. So I think it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences.

In my view, the outcome of this case is determined by our precedents. Based on the facts found by the New Jersey courts, respondent Robert Nicastro failed to meet his burden to demonstrate that it was constitutionally proper to exercise jurisdiction over petitioner J. McIntyre Machinery, Ltd. (British Manufacturer),

a British firm that manufactures scrap-metal machines in Great Britain and sells them through an independent distributor in the United States (American Distributor). On that basis, I agree with the plurality that the contrary judgment of the Supreme Court of New Jersey should be reversed.

I

[…]

None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient. Rather, this Court's previous holdings suggest the contrary. […]

There may well have been other facts that Mr. Nicastro could have demonstrated in support of jurisdiction. And the dissent considers some of those facts. But the plaintiff bears the burden of establishing jurisdiction, and here I would take the facts precisely as the New Jersey Supreme Court stated them.

Accordingly, on the record present here, resolving this case requires no more than adhering to our precedents.

II

I would not go further. Because the incident at issue in this case does not implicate modern concerns, and because the factual record leaves many open questions, this is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules.

A

The plurality seems to state strict rules that limit jurisdiction where a defendant does not "inten[d] to submit to the power of a sovereign" and cannot "be said to have targeted the forum." But what do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum? Those issues have serious commercial consequences but are totally absent in this case.

[…]

GINSBURG, J., with whom SOTOMAYOR, J., and KAGAN, J., join, dissenting.

A foreign industrialist seeks to develop a market in the United States for machines it manufactures. It hopes to derive substantial revenue from sales it makes to United States purchasers. Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines stateside. Has it succeeded in escaping personal jurisdiction in a

State where one of its products is sold and causes injury or even death to a local user?

Under this Court's pathmarking precedent in *International Shoe Co. v. Washington* and subsequent decisions, one would expect the answer to be unequivocally, "No." But instead, six Justices of this Court, in divergent opinions, tell us that the manufacturer has avoided the jurisdiction of our state courts, except perhaps in States where its products are sold in sizeable quantities. Inconceivable as it may have seemed yesterday, the splintered majority today "turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it."

I

On October 11, 2001, a three-ton metal shearing machine severed four fingers on Robert Nicastro's right hand. Alleging that the machine was a dangerous product defectively made, Nicastro sought compensation from the machine's manufacturer, J. McIntyre Machinery Ltd. (McIntyre UK). Established in 1872 as a United Kingdom corporation, and headquartered in Nottingham, England, McIntyre UK "designs, develops and manufactures a complete range of equipment for metal recycling." The company's product line, as advertised on McIntyre UK's Web site, includes "metal shears, balers, cable and can recycling equipment, furnaces, casting equipment and … the world's best aluminum dross processing and cooling system." McIntyre UK holds both United States and European patents on its technology.

The machine that injured Nicastro, a "McIntyre Model 640 Shear," sold in the United States for $24,900 in 1995, and features a "massive cutting capacity." According to McIntyre UK's product brochure, the machine is "use[d] throughout the [w]orld." McIntyre UK represented in the brochure that, by "incorporat[ing] off-the-shelf hydraulic parts from suppliers with international sales outlets," the 640 Shear's design guarantees serviceability "wherever [its customers] may be based." The instruction manual advises "owner[s] and operators of a 640 Shear [to] make themselves aware of [applicable health and safety regulations]," including "the American National Standards Institute Regulations (USA) for the use of Scrap Metal Processing Equipment."

Nicastro operated the 640 Shear in the course of his employment at Curcio Scrap Metal (CSM) in Saddle Brook, New Jersey. "New Jersey has long been a hotbed of scrap-metal businesses … ." In 2008, New Jersey recycling facilities processed 2,013,730 tons of scrap iron, steel, aluminum, and other metals—more than any other State—outpacing Kentucky, its nearest competitor, by nearly 30 percent.

CSM's owner, Frank Curcio, "first heard of [McIntyre UK's] machine while attending an Institute of Scrap Metal Industries [(ISRI)] convention in Las Vegas in 1994 or 1995, where [McIntyre UK] was an exhibitor." ISRI "presents the world's largest scrap recycling industry trade show each year." The event attracts "owners [and] managers of scrap processing companies" and others

"interested in seeing—and purchasing—new equipment." According to ISRI, more than 3,000 potential buyers of scrap processing and recycling equipment attend its annual conventions, "primarily because th[e] exposition provides them with the most comprehensive industry-related shopping experience concentrated in a single, convenient location."

McIntyre UK representatives attended every ISRI convention from 1990 through 2005. These annual expositions were held in diverse venues across the United States; in addition to Las Vegas, conventions were held 1990-2005 in New Orleans, Orlando, San Antonio, and San Francisco. McIntyre UK's president, Michael Pownall, regularly attended ISRI conventions. He attended ISRI's Las Vegas convention the year CSM's owner first learned of, and saw, the 640 Shear. McIntyre UK exhibited its products at ISRI trade shows, the company acknowledged, hoping to reach "anyone interested in the machine from anywhere in the United States."

Although McIntyre UK's U.S. sales figures are not in the record, it appears that for several years in the 1990's, earnings from sales of McIntyre UK products in the United States "ha[d] been good" in comparison to "the rest of the world." In response to interrogatories, McIntyre UK stated that its commissioning engineer had installed the company's equipment in several States—Illinois, Iowa, Kentucky, Virginia, and Washington.

From at least 1995 until 2001, McIntyre UK retained an Ohio-based company, McIntyre Machinery America, Ltd. (McIntyre America), "as its exclusive distributor for the entire United States." Though similarly named, the two companies were separate and independent entities with "no commonality of ownership or management." In invoices and other written communications, McIntyre America described itself as McIntyre UK's national distributor, "America's Link" to "Quality Metal Processing Equipment" from England.

In a November 23, 1999 letter to McIntyre America, McIntyre UK's president spoke plainly about the manufacturer's objective in authorizing the exclusive distributorship: "All we wish to do is sell our products in the [United] States—and get paid!" Notably, McIntyre America was concerned about U.S. litigation involving McIntyre UK products, in which the distributor had been named as a defendant. McIntyre UK counseled McIntyre America to respond personally to the litigation, but reassured its distributor that "the product was built and designed by McIntyre Machinery in the UK and the buck stops here—if there's something wrong with the machine."

Over the years, McIntyre America distributed several McIntyre UK products to U.S. customers, including, in addition to the 640 Shear, McIntyre UK's "Niagara" and "Tardis" systems, wire strippers, and can machines. In promoting McIntyre UK's products at conventions and demonstration sites and in trade journal advertisements, McIntyre America looked to McIntyre UK for direction and guidance. To achieve McIntyre UK's objective, *i.e.*, "to sell [its] machines to customers throughout the United States," "the two companies [were acting] closely in concert with each other." McIntyre UK never instructed its distributor to avoid certain States or regions of the country; rather, as just noted, the

manufacturer engaged McIntyre America to attract customers "from anywhere in the United States."

In sum, McIntyre UK's regular attendance and exhibitions at ISRI conventions was surely a purposeful step to reach customers for its products "anywhere in the United States." At least as purposeful was McIntyre UK's engagement of McIntyre America as the conduit for sales of McIntyre UK's machines to buyers "throughout the United States." Given McIntyre UK's endeavors to reach and profit from the United States market as a whole, Nicastro's suit, I would hold, has been brought in a forum entirely appropriate for the adjudication of his claim. He alleges that McIntyre UK's shear machine was defectively designed or manufactured and, as a result, caused injury to him at his workplace. The machine arrived in Nicastro's New Jersey workplace not randomly or fortuitously, but as a result of the U.S. connections and distribution system that McIntyre UK deliberately arranged.3 On what sensible view of the allocation of adjudicatory authority could the place of Nicastro's injury within the United States be deemed off limits for his products liability claim against a foreign manufacturer who targeted the United States (including all the States that constitute the Nation) as the territory it sought to develop?

II

[…]

[…] [I]n *International Shoe* itself, and decisions thereafter, the Court has made plain that legal fictions, notably "presence" and "implied consent," should be discarded, for they conceal the actual bases on which jurisdiction rests. "[T]he relationship among the defendant, the forum, and the litigation" determines whether due process permits the exercise of personal jurisdiction over a defendant, and "fictions of implied consent" or "corporate presence" do not advance the proper inquiry.

[…]

III

This case is illustrative of marketing arrangements for sales in the United States common in today's commercial world. A foreign-country manufacturer engages a U.S. company to promote and distribute the manufacturer's products, not in any particular State, but anywhere and everywhere in the United States the distributor can attract purchasers. The product proves defective and injures a user in the State where the user lives or works. […]

[…]

The modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*, gave prime place to reason and fairness. Is it not fair and reasonable, given the mode of trading of which this case is an example, to require the international seller to defend at the place its products cause injury? Do not litigational convenience and choice-of-law considerations point in that direction? On what measure of reason and fairness can it be considered undue to require McIntyre UK to defend in New Jersey as an incident

of its efforts to develop a market for its industrial machines anywhere and everywhere in the United States? Is not the burden on McIntyre UK to defend in New Jersey fair, *i.e.*, a reasonable cost of transacting business internationally, in comparison to the burden on Nicastro to go to Nottingham, England to gain recompense for an injury he sustained using McIntyre's product at his workplace in Saddle Brook, New Jersey?

McIntyre UK dealt with the United States as a single market. Like most foreign manufacturers, it was concerned not with the prospect of suit in State X as opposed to State Y, but rather with its subjection to suit anywhere in the United States. As a McIntyre UK officer wrote in an e-mail to McIntyre America: "American law—who needs it?!" If McIntyre UK is answerable in the United States at all, is it not "perfectly appropriate to permit the exercise of that jurisdiction … at the place of injury"? […]

* * *

For the reasons stated, I would hold McIntyre UK answerable in New Jersey for the harm Nicastro suffered at his workplace in that State using McIntyre UK's shearing machine. While I dissent from the Court's judgment, I take heart that the plurality opinion does not speak for the Court, for that opinion would take a giant step away from the "notions of fair play and substantial justice" underlying *International Shoe*.

Walden v. Fiore

Justice THOMAS delivered the opinion of the Court. 134 S. Ct. 1115 (2014)

This case asks us to decide whether a court in Nevada may exercise personal jurisdiction over a defendant on the basis that he knew his allegedly tortious conduct in Georgia would delay the return of funds to plaintiffs with connections to Nevada. […]

I

Petitioner Anthony Walden serves as a police officer for the city of Covington, Georgia. In August 2006, petitioner was working at the Atlanta Hartsfield-Jackson Airport as a deputized agent of the Drug Enforcement Administration (DEA). As part of a task force, petitioner conducted investigative stops and other law enforcement functions in support of the DEA's airport drug interdiction program.

On August 8, 2006, Transportation Security Administration agents searched respondents Gina Fiore and Keith Gipson and their carry-on bags at the San Juan airport in Puerto Rico. They found almost $97,000 in cash. Fiore explained to DEA agents in San Juan that she and Gipson had been gambling at a casino known as the El San Juan, and that they had residences in both California and Nevada (though they provided only California identification). After respondents were cleared for departure, a law enforcement official at the San Juan airport notified petitioner's task force in Atlanta that respondents had boarded

a plane for Atlanta, where they planned to catch a connecting flight to Las Vegas, Nevada.

When respondents arrived in Atlanta, petitioner and another DEA agent approached them at the departure gate for their flight to Las Vegas. In response to petitioner's questioning, Fiore explained that she and Gipson were professional gamblers. Respondents maintained that the cash they were carrying was their gambling "bank" and winnings. After using a drug-sniffing dog to perform a sniff test, petitioner seized the cash. Petitioner advised respondents that their funds would be returned if they later proved a legitimate source for the cash. Respondents then boarded their plane.

After respondents departed, petitioner moved the cash to a secure location and the matter was forwarded to DEA headquarters. The next day, petitioner received a phone call from respondents' attorney in Nevada seeking return of the funds. On two occasions over the next month, petitioner also received documentation from the attorney regarding the legitimacy of the funds.

[…]

Respondents filed suit against petitioner in the United States District Court for the District of Nevada, seeking money damages [to redress injuries allegedly caused by the seizure].

[…]

In Her Own Words

To hear Gina Fiore tell the story in her own words, listen to the audio clip below, which is taken from an episode of The Ringer podcast "The Gamblers."
fiore.mp4

II

A

[…] Nevada has authorized its courts to exercise jurisdiction over persons "on any basis not inconsistent with … the Constitution of the United States." Thus, in order to determine whether the Federal District Court in this case was authorized to exercise jurisdiction over petitioner, we ask whether the exercise of jurisdiction "comports with the limits imposed by federal due process" on the State of Nevada. […]

III

[…] [W]e conclude that petitioner lacks the "minimal contacts" with Nevada that are a prerequisite to the exercise of jurisdiction over him. *Hanson*. It is undisputed that no part of petitioner's course of conduct occurred in Nevada. Petitioner approached, questioned, and searched respondents, and seized the cash at issue, in the Atlanta airport. […] Petitioner never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada.

In short, when viewed through the proper lens—whether the *defendant's* actions connect him to the forum—petitioner formed no jurisdictionally relevant contacts with Nevada.

The Court of Appeals reached a contrary conclusion by shifting the analytical focus from petitioner's contacts with the forum to his contacts with respondents. Rather than assessing petitioner's own contacts with Nevada, the Court of Appeals looked to petitioner's knowledge of respondents' "strong forum connections." In the court's view, that knowledge, combined with its conclusion that respondents suffered foreseeable harm in Nevada, satisfied the "minimum contacts" inquiry.

This approach to the "minimum contacts" analysis impermissibly allows a plaintiff's contacts with the defendant and forum to drive the jurisdictional analysis. Petitioner's actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections. Such reasoning improperly attributes a plaintiff's forum connections to the defendant and makes those connections "decisive" in the jurisdictional analysis. It also obscures the reality that none of petitioner's challenged conduct had anything to do with Nevada itself.

[…] *Calder* made clear that mere injury to a forum resident is not a sufficient connection to the forum. Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State. The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way.

Respondents' claimed injury does not evince a connection between petitioner and Nevada. Even if we consider the continuation of the seizure in Georgia to be a distinct injury, it is not the sort of effect that is tethered to Nevada in any meaningful way. Respondents (and only respondents) lacked access to their funds in Nevada not because anything independently occurred there, but because Nevada is where respondents chose to be at a time when they desired to use the funds seized by petitioner. Respondents would have experienced this same lack of access in California, Mississippi, or wherever else they might have traveled and found themselves wanting more money than they had. Unlike the broad publication of the forum-focused story in *Calder*, the effects of petitioner's conduct on respondents are not connected to the forum State in a way that makes those effects a proper basis for jurisdiction.

[…]

* * *

Well-established principles of personal jurisdiction are sufficient to decide this case. The proper focus of the "minimum contacts" inquiry in intentional-tort cases is " 'the relationship among the defendant, the forum, and the litigation.' " *Calder*. And it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State. In this case, the application of those principles is clear: Petitioner's relevant conduct occurred entirely in Georgia, and

the mere fact that his conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction. We therefore reverse the judgment of the Court of Appeals.

It is so ordered.

[…]

Notes & Questions

1. There is at least some tension between the Court's holdings in *Calder* and *Keeton*, on the one hand, and *Walden*, on the other. All three cases involved allegedly tortious actions taken outside the forum state by defendants who knew that their conduct would have effects in the forum state. What explains why *Walden* came out differently from the other two? Two factors seem relevant. First, in *Walden*, the claims did not involve any allegation that the officer targeted the plaintiffs in particular with his allegedly tortious conduct; it was purely incidental who they were or where they lived. By contrast, in *Calder* and *Keeton*, the plaintiffs' identities were essential to the defendants' conduct. Second, drawing from *Hanson*, the fact that the plaintiffs' kept their bank accounts in Nevada is arguably the unilateral conduct of the plaintiffs, and therefore cannot support personal jurisdiction over the defendant.
2. What role, if any, should the fact that the underlying events occurred at an international airport play in the personal jurisdiction analysis? Note that this is not the only lawsuit challenging federal officials' behavior at Atlanta's Hartsfield-Jackson International Airport. *See, e.g.*, *André v. Clayton County*, No. 1:22-CV-4065-MHC (Sept. 5, 2023) (dismissing claims brought by comedian Eric André alleging racial profiling by officers at the Atlanta airport on qualified immunity grounds) (currently on appeal).

11.5. General Personal Jurisdiction

As you now know, specific jurisdiction considers the relationship between three separate factors: the defendant, the forum, and the subject matter of the suit. General jurisdiction is different: it looks only to the relationship between the defendant and the forum. In other words, it is not concerned only with those of the defendant's contacts that gave rise to, or relate to, the lawsuit at issue. In exchange for relaxing the requirement of "case-relatedness," however, general jurisdiction requires a much higher showing of minimum contacts before deeming due process satisfied.

The result is that, today, general jurisdiction exists over a defendant only if they can be said to be "essentially at home" in the forum. Paradigmatically, a person is "at home" in their state of domicile, and a business corporation is "at home" in state place of incorporation and the state where they are headquartered.

As the cases that follow demonstrate, the path of development of general jurisdiction has been roughly opposite from that of specific jurisdiction. While *International Shoe* ushered in a more expansive form of specific jurisdiction, recent Supreme Court cases have narrowed general jurisdiction considerably. As you work your way through the cases, ask yourself why the two prongs of personal jurisdiction have seemingly diverged so dramatically.

Perkins v. Benguet Consolidated Mining Co.

Mr. Justice Burton delivered the opinion of the Court.

342 U.S. 437 (1952)

This case calls for an answer to the question whether the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States precludes Ohio from subjecting a foreign corporation to the jurisdiction of its courts in this action *in personam*. The corporation has been carrying on in Ohio a continuous and systematic, but limited, part of its general business. Its president, while engaged in doing such business in Ohio, has been served with summons in this proceeding. The cause of action sued upon did not arise in Ohio and does not relate to the corporation's activities there. [W]e hold that the Fourteenth Amendment leaves Ohio free to take or decline jurisdiction over the corporation.

After extended litigation elsewhere petitioner, Idonah Slade Perkins, a nonresident of Ohio, filed two actions *in personam* in the Court of Common Pleas of Clermont County, Ohio, against the several respondents. Among those sued is the Benguet Consolidated Mining Company, here called the mining company. It is styled a "sociedad anónima" under the laws of the Philippine Islands, where it owns and has operated profitable gold and silver mines. In one action petitioner seeks approximately $68,400 in dividends claimed to be due her as a stockholder. In the other she claims $2,500,000 damages largely because of the company's failure to issue to her certificates for 120,000 shares of its stock.

[…]

The answer to the question of whether the state courts of Ohio are open to a proceeding *in personam*, against an amply notified foreign corporation, to enforce a cause of action not arising in Ohio and not related to the business or activities of the corporation in that State rests entirely upon the law of Ohio, unless the Due Process Clause of the Fourteenth Amendment compels a decision either way.

[Discussion of Ohio law omitted]

A more serious question is presented by the claim that the Due Process Clause of the Fourteenth Amendment *prohibits* Ohio from granting such relief against a foreign corporation. […]

Today if an authorized representative of a foreign corporation be physically present in the state of the forum and be there engaged in activities appropriate

to accepting service or receiving notice on its behalf, we recognize that there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state through such service of process upon that representative. This has been squarely held to be so in a proceeding *in personam* against such a corporation, at least in relation to a cause of action arising out of the corporation's activities within the state of the forum.

[…]

The instant case takes us one step further to a proceeding in personam to enforce a cause of action not arising out of the corporation's activities in the state of the forum. Using the tests mentioned above we find no requirement of federal due process that either prohibits Ohio from opening its courts to the cause of action here presented or compels Ohio to do so. This conforms to the realistic reasoning in *International Shoe Co. v. Washington*:

> … there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on cause's of action arising from dealings entirely distinct from those activities.
>
> … some of the decisions holding the corporation. amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents.
>
> … Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations. *Cf. Pennoyer v. Neff*.

It remains only to consider, in more detail, the issue of whether, as a matter of federal due process, the business done in Ohio by the respondent mining company was sufficiently substantial and of such a nature as to permit Ohio to entertain a cause of action against a foreign corporation, where the cause of action arose from activities entirely distinct from its activities in Ohio. *See International Shoe Co. v. Washington*.

[…] The company's mining properties were in the Philippine Islands. Its operations there were completely halted during the occupation of the Islands by the Japanese. During that interim the president, who was also the general manager and principal stockholder of the company, returned to his home in Clermont County, Ohio. There, he maintained an office in which he conducted his personal affairs and did many things on behalf of the company. He kept there office files of the company. He carried on there correspondence relating to the business of the company and to its employees. He drew and distributed there salary checks on behalf of the company, both in his own favor as president and in favor of two company secretaries who worked there with him.

He used and maintained in Clermont County, Ohio, two active bank accounts carrying substantial balances of company funds. A bank in Hamilton County, Ohio, acted as transfer agent for the stock of the company. Several directors' meetings were held at his office or home in Clermont County. From that office he supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines and he dispatched funds to cover purchases of machinery for such rehabilitation. Thus he carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company. He there discharged his duties as president and general manager, both during the occupation of the company's properties by the Japanese and immediately thereafter. While no mining properties in Ohio were owned or operated by the company, many of its wartime activities were directed from Ohio and were being given the personal attention of its president in that State at the time he was served with summons. Consideration of the circumstances which, under the law of Ohio, ultimately, will determine whether the courts of that State will choose to take jurisdiction over the corporation is reserved for the courts of that State. Without reaching that issue of state policy, we conclude that, under the circumstances above recited, it would not violate federal due process for Ohio either to take or decline jurisdiction of the corporation in this proceeding. This relieves the Ohio courts of the restriction relied upon in the opinion accompanying the syllabus below and which may have influenced the judgment of the court below.

Accordingly, the judgment of the Supreme Court of Ohio is vacated and the cause is remanded to that court for further proceedings in the light of this opinion.

It is so ordered.

Notes & Questions

1. Notice what is different about general jurisdiction: the Benguet Mining Company could be sued in Ohio even in a suit focused only on its activities elsewhere. In other words, the "nexus" requirement we saw in specific jurisdiction is entirely absent from general jurisdiction.
2. Did *Perkins* recognize that a corporation could be "at home" somewhere besides its place of incorporation and where it is headquartered?
3. Which contacts did the Court in Perkins rely on in holding that it could be subject to general jurisdiction in Ohio?

Helicopteros Nacionales de Colombia, S. A. v. Hall

Justice Blackmun delivered the opinion of the Court. 466 U.S. 408 (1984)

We granted certiorari in this case, 460 U.S. 1021 (1983), to decide whether the Supreme Court of Texas correctly ruled that the contacts of a foreign corporation with the State of Texas were sufficient to allow a Texas state court to assert jurisdiction over the corporation in a cause of action not arising out of or related to the corporation's activities within the State.

I

Petitioner Helicopteros Nacionales de Colombia, S. A. (Helicol), is a Colombian corporation with its principal place of business in the city of Bogota in that country. It is engaged in the business of providing helicopter transportation for oil and construction companies in South America. On January 26, 1976, a helicopter owned by Helicol crashed in Peru. Four United States citizens were among those who lost their lives in the accident. Respondents are the survivors and representatives of the four decedents.

At the time of the crash, respondents' decedents were employed by Consorcio, a Peruvian consortium, and were working on a pipeline in Peru. Consorcio is the alter ego of a joint venture named Williams-Sedco-Horn (WSH). The venture had its headquarters in Houston, Tex. Consorcio had been formed to enable the venturers to enter into a contract with Petro Peru, the Peruvian state-owned oil company. Consorcio was to construct a pipeline for Petro Peru running from the interior of Peru westward to the Pacific Ocean. Peruvian law forbade construction of the pipeline by any non-Peruvian entity.

Consorcio/WSH needed helicopters to move personnel, materials, and equipment into and out of the construction area. In 1974, upon request of Consorcio/WSH, the chief executive officer of Helicol, Francisco Restrepo, flew to the United States and conferred in Houston with representatives of the three joint venturers. At that meeting, there was a discussion of prices, availability, working conditions, fuel, supplies, and housing. Restrepo represented that Helicol could have the first helicopter on the job in 15 days. The Consorcio/WSH representatives decided to accept the contract proposed by Restrepo. Helicol began performing before the agreement was formally signed in Peru on November 11, 1974. The contract was written in Spanish on official government stationery and provided that the residence of all the parties would be Lima, Peru. It further stated that controversies arising out of the contract would be submitted to the jurisdiction of Peruvian courts. In addition, it provided that Consorcio/WSH would make payments to Helicol's account with the Bank of America in New York City.

Aside from the negotiation session in Houston between Restrepo and the representatives of Consorcio/WSH, Helicol had other contacts with Texas. During the years 1970-1977, it purchased helicopters (approximately 80% of its fleet), spare parts, and accessories for more than $4 million from Bell Helicopter Company in Fort Worth. In that period, Helicol sent prospective pilots to Fort Worth for training and to ferry the aircraft to South America. It also sent management and maintenance personnel to visit Bell Helicopter in Fort Worth during the same period in order to receive "plant familiarization" and for technical consultation. Helicol received into its New York City and Panama City, Fla., bank

accounts over $5 million in payments from Consorcio/WSH drawn upon First City National Bank of Houston.

Beyond the foregoing, there have been no other business contacts between Helicol and the State of Texas. Helicol never has been authorized to do business in Texas and never has had an agent for the service of process within the State. It never has performed helicopter operations in Texas or sold any product that reached Texas, never solicited business in Texas, never signed any contract in Texas, never had any employee based there, and never recruited an employee in Texas. In addition, Helicol never has owned real or personal property in Texas and never has maintained an office or establishment there. Helicol has maintained no records in Texas and has no shareholders in that State. None of the respondents or their decedents were domiciled in Texas, but all of the decedents were hired in Houston by Consorcio/WSH to work on the Petro Peru pipeline project.

Respondents instituted wrongful-death actions in the District Court of Harris County, Tex., against Consorcio/WSH, Bell Helicopter Company, and Helicol. Helicol filed special appearances and moved to dismiss the actions for lack of *in personam* jurisdiction over it. The motion was denied. After a consolidated jury trial, judgment was entered against Helicol on a jury verdict of $1,141,200 in favor of respondents.

The Texas Court of Civil Appeals, Houston, First District, reversed the judgment of the District Court, holding that *in personam* jurisdiction over Helicol was lacking. The Supreme Court of Texas, with three justices dissenting, initially affirmed the judgment of the Court of Civil Appeals. Seven months later, however, on motion for rehearing, the court withdrew its prior opinions and, again with three justices dissenting, reversed the judgment of the intermediate court. In ruling that the Texas courts had *in personam* jurisdiction, the Texas Supreme Court first held that the State's long-arm statute reaches as far as the Due Process Clause of the Fourteenth Amendment permits.[7] Thus, the only question remaining for the court to decide was whether it was consistent with the Due Process Clause for Texas courts to assert *in personam* jurisdiction over Helicol.

II

The Due Process Clause of the Fourteenth Amendment operates to limit the power of a State to assert *in personam* jurisdiction over a nonresident defendant. *Pennoyer v. Neff*. Due process requirements are satisfied when *in personam* jurisdiction is asserted over a nonresident corporate defendant that has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*. When a controversy is related to or "arises out of" a defendant's contacts with the forum, the Court has said that a "relationship among the defendant, the forum, and the litigation" is the essential foundation of *in personam* jurisdiction. *Shaffer v. Heitner*.[8]

Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State,[9] due process is not offended by a State's

[7] The State's long-arm statute […] reads in relevant part:

Sec. 3. Any foreign corporation … that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such foreign corporation … of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such corporation … is a party or is to be made a party.

Sec. 4. For the purpose of this Act, and without including other acts that may constitute doing business, any foreign corporation … shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State. The act of recruiting Texas residents, directly or through an intermediary located in Texas, for employment inside or outside of Texas shall be deemed doing business in this State." […]

[8] It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising

subjecting the corporation to its in personam jurisdiction when there are sufficient contacts between the State and the foreign corporation. *Perkins v. Benguet Consolidated Mining Co.* In *Perkins*, the Court addressed a situation in which state courts had asserted general jurisdiction over a defendant foreign corporation. During the Japanese occupation of the Philippine Islands, the president and general manager of a Philippine mining corporation maintained an office in Ohio from which he conducted activities on behalf of the company. He kept company files and held directors' meetings in the office, carried on correspondence relating to the business, distributed salary checks drawn on two active Ohio bank accounts, engaged an Ohio bank to act as transfer agent, and supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines. In short, the foreign corporation, through its president, "ha[d] been carrying on in Ohio a continuous and systematic, but limited, part of its general business," and the exercise of general jurisdiction over the Philippine corporation by an Ohio court was "reasonable and just."

[9] When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising "general jurisdiction" over the defendant.

All parties to the present case concede that respondents' claims against Helicol did not "arise out of," and are not related to, Helicol's activities within Texas. We thus must explore the nature of Helicol's contacts with the State of Texas to determine whether they constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*. We hold that they do not.

It is undisputed that Helicol does not have a place of business in Texas and never has been licensed to do business in the State. Basically, Helicol's contacts with Texas consisted of sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from Bell Helicopter for substantial sums; and sending personnel to Bell's facilities in Fort Worth for training.

The one trip to Houston by Helicol's chief executive officer for the purpose of negotiating the transportation-services contract with Consorcio/WSH cannot be described or regarded as a contact of a "continuous and systematic" nature, as *Perkins* described it, and thus cannot support an assertion of *in personam* jurisdiction over Helicol by a Texas court. Similarly, Helicol's acceptance from Consorcio/WSH of checks drawn on a Texas bank is of negligible significance for purposes of determining whether Helicol had sufficient contacts in Texas. There is no indication that Helicol ever requested that the checks be drawn on a Texas bank or that there was any negotiation between Helicol and Consorcio/WSH with respect to the location or identity of the bank on which checks would be drawn. Common sense and everyday experience suggest that, absent unusual circumstances, the bank on which a check is drawn is generally of little consequence to the payee and is a matter left to the discretion of the drawer. Such unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction. *See Kulko v. California Superior Court* (arbitrary to subject one parent to suit in any State where other

parent chooses to spend time while having custody of child pursuant to separation agreement); *Hanson v. Denckla* ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State").

[…]

III

We hold that Helicol's contacts with the State of Texas were insufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment. Accordingly, we reverse the judgment of the Supreme Court of Texas.

It is so ordered.

Justice Brennan, dissenting.

[…]

I believe that the undisputed contacts in this case between petitioner Helicol and the State of Texas are sufficiently important, and sufficiently related to the underlying cause of action, to make it fair and reasonable for the State to assert personal jurisdiction over Helicol for the wrongful-death actions filed by the respondents. Given that Helicol has purposefully availed itself of the benefits and obligations of the forum, and given the direct relationship between the underlying cause of action and Helicol's contacts with the forum, maintenance of this suit in the Texas courts "does not offend [the] traditional notions of fair play and substantial justice," *International Shoe Co. v. Washington*, that are the touchstone of jurisdictional analysis under the Due Process Clause. I therefore dissent.

I

The Court expressly limits its decision in this case to "an assertion of general jurisdiction over a foreign defendant." Having framed the question in this way, the Court is obliged to address our prior holding[] in *Perkins v. Benguet Consolidated Mining Co.* […]. In *Perkins*, the Court considered a State's assertion of general jurisdiction over a foreign corporation that "ha[d] been carrying on … a continuous and systematic, but limited, part of its general business" in the forum. Under the circumstances of that case, we held that such contacts were constitutionally sufficient "to make it reasonable and just to subject the corporation to the jurisdiction" of that State. Nothing in *Perkins* suggests, however, that such "continuous and systematic" contacts are a necessary minimum before a State may constitutionally assert general jurisdiction over a foreign corporation.

[…]

The vast expansion of our national economy during the past several decades has provided the primary rationale for expanding the permissible reach of a State's jurisdiction under the Due Process Clause. By broadening the type and amount of business opportunities available to participants in interstate and foreign commerce, our economy has increased the frequency with which foreign

corporations actively pursue commercial transactions throughout the various States. In turn, it has become both necessary and, in my view, desirable to allow the States more leeway in bringing the activities of these nonresident corporations within the scope of their respective jurisdictions.

This is neither a unique nor a novel idea. As the Court first noted in 1957:

> [M]any commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

McGee. *See also World-Wide Volkswagen* (reaffirming that "[t]he historical developments noted in *McGee* … have only accelerated in the generation since that case was decided"); *Hanson v. Denckla*.

Moreover, this "trend … toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents," *McGee*, is entirely consistent with the "traditional notions of fair play and substantial justice" that control our inquiry under the Due Process Clause. As active participants in interstate and foreign commerce take advantage of the economic benefits and opportunities offered by the various States, it is only fair and reasonable to subject them to the obligations that may be imposed by those jurisdictions. And chief among the obligations that a nonresident corporation should expect to fulfill is amenability to suit in any forum that is significantly affected by the corporation's commercial activities.

As a foreign corporation that has actively and purposefully engaged in numerous and frequent commercial transactions in the State of Texas, Helicol clearly falls within the category of nonresident defendants that may be subject to that forum's general jurisdiction. Helicol not only purchased helicopters and other equipment in the State for many years, but also sent pilots and management personnel into Texas to be trained in the use of this equipment and to consult with the seller on technical matters. Moreover, negotiations for the contract under which Helicol provided transportation services to the joint venture that employed the respondents' decedents also took place in the State of Texas. Taken together, these contacts demonstrate that Helicol obtained numerous benefits from its transaction of business in Texas. In turn, it is eminently fair and reasonable to expect Helicol to face the obligations that attach to its participation in such commercial transactions. Accordingly, on the basis of continuous commercial contacts with the forum, I would conclude that the Due Process Clause allows the State of Texas to assert general jurisdiction over petitioner Helicol.

II

The Court also fails to distinguish the legal principles that controlled our prior decisions […]. In particular, the contacts between petitioner Helicol and the State of Texas, unlike the contacts between the defendant and the forum in

[*Perkins*], are significantly related to the cause of action alleged in the original suit filed by the respondents. Accordingly, in my view, it is both fair and reasonable for the Texas courts to assert specific jurisdiction over Helicol in this case.

By asserting that the present case does not implicate the specific jurisdiction of the Texas courts, the Court necessarily removes its decision from the reality of the actual facts presented for our consideration. Moreover, the Court refuses to consider any distinction between contacts that are "related to" the underlying cause of action and contacts that "give rise" to the underlying cause of action. In my view, however, there is a substantial difference between these two standards for asserting specific jurisdiction. Thus, although I agree that the respondents' cause of action did not formally "arise out of" specific activities initiated by Helicol in the State of Texas, I believe that the wrongful-death claim filed by the respondents is significantly related to the undisputed contacts between Helicol and the forum. On that basis, I would conclude that the Due Process Clause allows the Texas courts to assert specific jurisdiction over this particular action.

The wrongful-death actions filed by the respondents were premised on a fatal helicopter crash that occurred in Peru. Helicol was joined as a defendant in the lawsuits because it provided transportation services, including the particular helicopter and pilot involved in the crash, to the joint venture that employed the decedents. Specifically, the respondent Hall claimed in her original complaint that "Helicol is … legally responsible for its own negligence through its pilot employee." Viewed in light of these allegations, the contacts between Helicol and the State of Texas are directly and significantly related to the underlying claim filed by the respondents. The negotiations that took place in Texas led to the contract in which Helicol agreed to provide the precise transportation services that were being used at the time of the crash. Moreover, the helicopter involved in the crash was purchased by Helicol in Texas, and the pilot whose negligence was alleged to have caused the crash was actually trained in Texas. This is simply not a case, therefore, in which a state court has asserted jurisdiction over a nonresident defendant on the basis of wholly unrelated contacts with the forum. Rather, the contacts between Helicol and the forum are directly related to the negligence that was alleged in the respondent Hall's original complaint. Because Helicol should have expected to be amenable to suit in the Texas courts for claims directly related to these contacts, it is fair and reasonable to allow the assertion of jurisdiction in this case.

Despite this substantial relationship between the contacts and the cause of action, the Court declines to consider whether the courts of Texas may assert specific jurisdiction over this suit. Apparently, this simply reflects a narrow interpretation of the question presented for review. It is nonetheless possible that the Court's opinion may be read to imply that the specific jurisdiction of the Texas courts is inapplicable because the cause of action did not formally "arise out of" the contacts between Helicol and the forum. In my view, however, such a rule would place unjustifiable limits on the bases under which Texas may assert its jurisdictional power.

Limiting the specific jurisdiction of a forum to cases in which the cause of action formally arose out of the defendant's contacts with the State would subject constitutional standards under the Due Process Clause to the vagaries of the substantive law or pleading requirements of each State. For example, the complaint filed against Helicol in this case alleged negligence based on pilot error. Even though the pilot was trained in Texas, the Court assumes that the Texas courts may not assert jurisdiction over the suit because the cause of action "did not 'arise out of,' and [is] not related to," that training. If, however, the applicable substantive law required that negligent training of the pilot was a necessary element of a cause of action for pilot error, or if the respondents had simply added an allegation of negligence in the training provided for the Helicol pilot, then presumably the Court would concede that the specific jurisdiction of the Texas courts was applicable.

Our interpretation of the Due Process Clause has never been so dependent upon the applicable substantive law or the State's formal pleading requirements. At least since *International Shoe Co. v. Washington*, the principal focus when determining whether a forum may constitutionally assert jurisdiction over a nonresident defendant has been on fairness and reasonableness to the defendant. To this extent, a court's specific jurisdiction should be applicable whenever the cause of action arises out of or relates to the contacts between the defendant and the forum. It is eminently fair and reasonable, in my view, to subject a defendant to suit in a forum with which it has significant contacts directly related to the underlying cause of action. Because Helicol's contacts with the State of Texas meet this standard, I would affirm the judgment of the Supreme Court of Texas.

[…]

Notes & Questions

1. *Helicopteros* is one of our best chances to see how the Supreme Court distinguishes between contacts that are relevant to both general and specific jurisdiction and those that are only relevant to general jurisdiction. Which of the defendant's contacts with Texas were not "case-linked" and therefore not relevant to any potential specific jurisdiction inquiry?
2. Justice Brennan's dissent suggests that he was skeptical of the sharp line dividing specific and general personal jurisdiction. How would you articulate his alternative way of thinking about the two strands of personal jurisdiction doctrine?

Goodyear Dunlop Tires Operations, S.A. v. Brown

564 U.S. 915 (2011)

GINSBURG, J., delivered the opinion for a unanimous Court.

This case concerns the jurisdiction of state courts over corporations organized and operating abroad. We address, in particular, this question: Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State?

A bus accident outside Paris that took the lives of two 13-year-old boys from North Carolina gave rise to the litigation we here consider. Attributing the accident to a defective tire manufactured in Turkey at the plant of a foreign subsidiary of The Goodyear Tire and Rubber Company (Goodyear USA), the boys' parents commenced an action for damages in a North Carolina state court; they named as defendants Goodyear USA, an Ohio corporation, and three of its subsidiaries, organized and operating, respectively, in Turkey, France, and Luxembourg. Goodyear USA, which had plants in North Carolina and regularly engaged in commercial activity there, did not contest the North Carolina court's jurisdiction over it; Goodyear USA's foreign subsidiaries, however, maintained that North Carolina lacked adjudicatory authority over them.

A state court's assertion of jurisdiction exposes defendants to the State's coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment's Due Process Clause. *International Shoe Co. v. Washington* (assertion of jurisdiction over out-of-state corporation must comply with "'traditional notions of fair play and substantial justice'" (quoting *Milliken v. Meyer*)). Opinions in the wake of the pathmarking *International Shoe* decision have differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction. *Helicopteros Nacionales de Colombia, S.A. v. Hall*.

A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so "continuous and systematic" as to render them essentially at home in the forum State. *See International Shoe*. Specific jurisdiction, on the other hand, depends on an "affiliatio[n] between the forum and the underlying controversy," principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation. von Mehren & Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1136 (1966) (hereinafter von Mehren & Trautman); *see* Brilmayer et al., *A General Look at General Jurisdiction*, 66 Texas L. Rev. 721, 782 (1988) (hereinafter Brilmayer). In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of "issues deriving from, or connected with, the very controversy that establishes jurisdiction." von Mehren & Trautman 1136.

Because the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy. The North Carolina Court of Appeals so acknowledged. Were the foreign subsidiaries nonetheless amenable to general jurisdiction in North Carolina courts? Confusing or blending general and specific jurisdictional inquiries, the North Carolina courts answered yes. Some of the tires made abroad by Goodyear's foreign subsidiaries, the North Carolina Court of Appeals stressed, had reached North Carolina through "the stream of commerce";

that connection, the Court of Appeals believed, gave North Carolina courts the handle needed for the exercise of general jurisdiction over the foreign corporations.

A connection so limited between the forum and the foreign corporation, we hold, is an inadequate basis for the exercise of general jurisdiction. Such a connection does not establish the "continuous and systematic" affiliation necessary to empower North Carolina courts to entertain claims unrelated to the foreign corporation's contacts with the State.

I

On April 18, 2004, a bus destined for Charles de Gaulle Airport overturned on a road outside Paris, France. Passengers on the bus were young soccer players from North Carolina beginning their journey home. Two 13-year-olds, Julian Brown and Matthew Helms, sustained fatal injuries. The boys' parents, respondents in this Court, filed a suit for wrongful-death damages in the Superior Court of Onslow County, North Carolina, in their capacity as administrators of the boys' estates. Attributing the accident to a tire that failed when its plies separated, the parents alleged negligence in the "design, construction, testing, and inspection" of the tire.

Goodyear Luxembourg Tires, SA (Goodyear Luxembourg), Goodyear Lastikleri T.A.S. (Goodyear Turkey), and Goodyear Dunlop Tires France, SA (Goodyear France), petitioners here, were named as defendants. Incorporated in Luxembourg, Turkey, and France, respectively, petitioners are indirect subsidiaries of Goodyear USA, an Ohio corporation also named as a defendant in the suit. Petitioners manufacture tires primarily for sale in European and Asian markets. Their tires differ in size and construction from tires ordinarily sold in the United States. They are designed to carry significantly heavier loads, and to serve under road conditions and speed limits in the manufacturers' primary markets.

In contrast to the parent company, Goodyear USA, which does not contest the North Carolina courts' personal jurisdiction over it, petitioners are not registered to do business in North Carolina. They have no place of business, employees, or bank accounts in North Carolina. They do not design, manufacture, or advertise their products in North Carolina. And they do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers. Even so, a small percentage of petitioners' tires (tens of thousands out of tens of millions manufactured between 2004 and 2007) were distributed within North Carolina by other Goodyear USA affiliates. These tires were typically custom ordered to equip specialized vehicles such as cement mixers, waste haulers, and boat and horse trailers. Petitioners state, and respondents do not here deny, that the type of tire involved in the accident, a Goodyear Regional RHS tire manufactured by Goodyear Turkey, was never distributed in North Carolina.

Petitioners moved to dismiss the claims against them for want of personal jurisdiction. The trial court denied the motion, and the North Carolina Court of Appeals affirmed. […]

[…]

We granted certiorari to decide whether the general jurisdiction the North Carolina courts asserted over petitioners is consistent with the Due Process Clause of the Fourteenth Amendment.

II

A

The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant. *Shaffer v. Heitner*. The canonical opinion in this area remains *International Shoe*, in which we held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

Endeavoring to give specific content to the "fair play and substantial justice" concept, the Court in *International Shoe* classified cases involving out-of-state corporate defendants. First, as in *International Shoe* itself, jurisdiction unquestionably could be asserted where the corporation's in-state activity is "continuous and systematic" *and that activity gave rise to the episode-in-suit*. Further, the Court observed, the commission of certain "single or occasional acts" in a State may be sufficient to render a corporation answerable in that State with respect to those acts, though not with respect to matters unrelated to the forum connections. The heading courts today use to encompass these two *International Shoe* categories is "specific jurisdiction." *See* von Mehren & Trautman 1144-1163. Adjudicatory authority is "specific" when the suit "aris[es] out of or relate[s] to the defendant's contacts with the forum." *Helicopteros*.

International Shoe distinguished from cases that fit within the "specific jurisdiction" categories, "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." Adjudicatory authority so grounded is today called "general jurisdiction." *Helicopteros*. For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home. *See* Brilmayer 728 (identifying domicile, place of incorporation, and principal place of business as "paradig[m]" bases for the exercise of general jurisdiction).

[…]

In only two decisions postdating *International Shoe*, has this Court considered whether an out-of-state corporate defendant's in-state contacts were sufficiently "continuous and systematic" to justify the exercise of general jurisdiction over claims unrelated to those contacts: *Perkins v. Benguet Consol. Mining Co.* (general jurisdiction appropriately exercised over Philippine corporation sued in Ohio, where the company's affairs were overseen during World War II); and *Helicopteros* (helicopter owned by Colombian corporation crashed in Peru; survivors of U.S. citizens who died in the crash, the Court held, could

not maintain wrongful-death actions against the Colombian corporation in Texas, for the corporation's helicopter purchases and purchase-linked activity in Texas were insufficient to subject it to Texas court's general jurisdiction).

B

To justify the exercise of general jurisdiction over petitioners, the North Carolina courts relied on the petitioners' placement of their tires in the "stream of commerce." The stream-of-commerce metaphor has been invoked frequently in lower court decisions permitting "jurisdiction in products liability cases in which the product has traveled through an extensive chain of distribution before reaching the ultimate consumer." 18 W. Fletcher, Cyclopedia of the Law of Corporations § 8640.40, p. 133 (rev. ed. 2007). Typically, in such cases, a nonresident defendant, acting *outside* the forum, places in the stream of commerce a product that ultimately causes harm *inside* the forum.

[…]

The North Carolina court's stream-of-commerce analysis elided the essential difference between case-specific and all-purpose (general) jurisdiction. Flow of a manufacturer's products into the forum, we have explained, may bolster an affiliation germane to *specific* jurisdiction. *See, e.g., World-Wide Volkswagen* (where "the sale of a product … is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve … the market for its product in [several] States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise *has there been the source of injury to its owner or to others*" (emphasis added)). But ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant.

A corporation's "continuous activity of some sorts within a state," *International Shoe* instructed, "is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." Our 1952 decision in *Perkins v. Benguet Consol. Mining Co.* remains "[t]he textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum."

Sued in Ohio, the defendant in *Perkins* was a Philippine mining corporation that had ceased activities in the Philippines during World War II. To the extent that the company was conducting any business during and immediately after the Japanese occupation of the Philippines, it was doing so in Ohio: The corporation's president maintained his office there, kept the company files in that office, and supervised from the Ohio office "the necessarily limited wartime activities of the company." Although the claim-in-suit did not arise in Ohio, this Court ruled that it would not violate due process for Ohio to adjudicate the controversy. *See Keeton v. Hustler Magazine, Inc.* (Ohio's exercise of general jurisdiction was permissible in *Perkins* because "Ohio was the corporation's principal, if temporary, place of business").

We next addressed the exercise of general jurisdiction over an out-of-state corporation over three decades later, in *Helicopteros*. In that case, survivors

of United States citizens who died in a helicopter crash in Peru instituted wrongful-death actions in a Texas state court against the owner and operator of the helicopter, a Colombian corporation. The Colombian corporation had no place of business in Texas and was not licensed to do business there. "Basically, [the company's] contacts with Texas consisted of sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from [a Texas enterprise] for substantial sums; and sending personnel to [Texas] for training." These links to Texas, we determined, did not "constitute the kind of continuous and systematic general business contacts … found to exist in *Perkins*," and were insufficient to support the exercise of jurisdiction over a claim that neither "ar[o]se out of … no[r] related to" the defendant's activities in Texas.

Helicopteros concluded that "mere purchases [made in the forum State], even if occurring at regular intervals, are not enough to warrant a State's assertion of [general] jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions." We see no reason to differentiate from the ties to Texas held insufficient in *Helicopteros*, the sales of petitioners' tires sporadically made in North Carolina through intermediaries. Under the sprawling view of general jurisdiction urged by respondents and embraced by the North Carolina Court of Appeals, any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed.

Measured against *Helicopteros* and *Perkins*, North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction. Unlike the defendant in *Perkins*, whose sole wartime business activity was conducted in Ohio, petitioners are in no sense at home in North Carolina. Their attenuated connections to the State fall far short of the "the continuous and systematic general business contacts" necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State. *Helicopteros*.

C

Respondents belatedly assert a "single enterprise" theory, asking us to consolidate petitioners' ties to North Carolina with those of Goodyear USA and other Goodyear entities. In effect, respondents would have us pierce Goodyear corporate veils, at least for jurisdictional purposes. Neither below nor in their brief in opposition to the petition for certiorari did respondents urge disregard of petitioners' discrete status as subsidiaries and treatment of all Goodyear entities as a "unitary business," so that jurisdiction over the parent would draw in the subsidiaries as well. Respondents have therefore forfeited this contention, and we do not address it.

* * *

For the reasons stated, the judgment of the North Carolina Court of Appeals is

Reversed.

Notes & Questions

1. Why wasn't specific personal jurisdiction available in this case? In exploring that question, remember that at least some of the defendants' products reached the forum state. Why wasn't that enough?
2. Why do you think the plaintiffs wanted to sue in the United States rather than in France? In this regard, it is helpful to know that France limits the availability of contingency fee agreements, caps the amount of damages available in a wrongful-death suit, makes the loser of a lawsuit pay the winner's attorney's fees, and makes it substantially harder to collect a judgment even if you win.

Daimler AG v. Bauman

571 U.S. 117 (2014)

Justice GINSBURG delivered the opinion of the Court.

This case concerns the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States. The litigation commenced in 2004, when 22 Argentinian residents filed a complaint in the United States District Court for the Northern District of California against DaimlerChrysler Aktiengesellschaft (Daimler), a German public stock company, headquartered in Stuttgart, that manufactures Mercedes-Benz vehicles in Germany. The complaint alleged that during Argentina's 1976–1983 "Dirty War," Daimler's Argentinian subsidiary, Mercedes-Benz Argentina (MB Argentina) collaborated with state security forces to kidnap, detain, torture, and kill certain MB Argentina workers, among them, plaintiffs or persons closely related to plaintiffs. Damages for the alleged human-rights violations were sought from Daimler under the laws of the United States, California, and Argentina. Jurisdiction over the lawsuit was predicated on the California contacts of Mercedes-Benz USA, LLC (MBUSA), a subsidiary of Daimler incorporated in Delaware with its principal place of business in New Jersey. MBUSA distributes Daimler-manufactured vehicles to independent dealerships throughout the United States, including California.

[…]

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, we addressed the distinction between general or all-purpose jurisdiction, and specific or conduct-linked jurisdiction. As to the former, we held that a court may assert jurisdiction over a foreign corporation "to hear any and all claims against [it]" only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive "as to render [it] essentially at home in the forum State." Instructed by *Goodyear*, we conclude Daimler is not "at home" in California, and

cannot be sued there for injuries plaintiffs attribute to MB Argentina's conduct in Argentina.

I

In 2004, plaintiffs (respondents here) filed suit in the United States District Court for the Northern District of California, alleging that MB Argentina collaborated with Argentinian state security forces to kidnap, detain, torture, and kill plaintiffs and their relatives during the military dictatorship in place there from 1976 through 1983, a period known as Argentina's "Dirty War." Based on those allegations, plaintiffs asserted claims under the Alien Tort Statute and the Torture Victim Protection Act of 1991, as well as claims for wrongful death and intentional infliction of emotional distress under the laws of California and Argentina. The incidents recounted in the complaint center on MB Argentina's plant in Gonzalez Catan, Argentina; no part of MB Argentina's alleged collaboration with Argentinian authorities took place in California or anywhere else in the United States.

Plaintiffs' operative complaint names only one corporate defendant: Daimler, the petitioner here. Plaintiffs seek to hold Daimler vicariously liable for MB Argentina's alleged malfeasance. Daimler is a German *Aktiengesellschaft* (public stock company) that manufactures Mercedes-Benz vehicles primarily in Germany and has its headquarters in Stuttgart. At times relevant to this case, MB Argentina was a subsidiary wholly owned by Daimler's predecessor in interest.

Daimler moved to dismiss the action for want of personal jurisdiction. Opposing the motion, plaintiffs submitted declarations and exhibits purporting to demonstrate the presence of Daimler itself in California. Alternatively, plaintiffs maintained that jurisdiction over Daimler could be founded on the California contacts of MBUSA, a distinct corporate entity that, according to plaintiffs, should be treated as Daimler's agent for jurisdictional purposes.

MBUSA, an indirect subsidiary of Daimler, is a Delaware limited liability corporation.[3] MBUSA serves as Daimler's exclusive importer and distributor in the United States, purchasing Mercedes-Benz automobiles from Daimler in Germany, then importing those vehicles, and ultimately distributing them to independent dealerships located throughout the Nation. Although MBUSA's principal place of business is in New Jersey, MBUSA has multiple California-based facilities, including a regional office in Costa Mesa, a Vehicle Preparation Center in Carson, and a Classic Center in Irvine. According to the record developed below, MBUSA is the largest supplier of luxury vehicles to the California market. In particular, over 10% of all sales of new vehicles in the United States take place in California, and MBUSA's California sales account for 2.4% of Daimler's worldwide sales.

[3] At times relevant to this suit, MBUSA was wholly owned by DaimlerChrysler North America Holding Corporation, a Daimler subsidiary.

The relationship between Daimler and MBUSA is delineated in a General Distributor Agreement, which sets forth requirements for MBUSA's distribution of Mercedes-Benz vehicles in the United States. That agreement established MBUSA as an "independent contracto[r]" that "buy[s] and sell[s] [vehicles] … as an independent business for [its] own account." App. 179a. The agreement

"does not make [MBUSA] … a general or special agent, partner, joint venturer or employee of DAIMLERCHRYSLER or any Daimler-Chrysler Group Company"; MBUSA "ha[s] no authority to make binding obligations for or act on behalf of DAIMLERCHRYSLER or any DaimlerChrysler Group Company."

After allowing jurisdictional discovery on plaintiffs' agency allegations, the District Court granted Daimler's motion to dismiss. Daimler's own affiliations with California, the court first determined, were insufficient to support the exercise of all-purpose jurisdiction over the corporation. Next, the court declined to attribute MBUSA's California contacts to Daimler on an agency theory, concluding that plaintiffs failed to demonstrate that MBUSA acted as Daimler's agent.

The Ninth Circuit [reversed, reasoning that] the agency test was satisfied and considerations of "reasonableness" did not bar the exercise of jurisdiction.

[…]

We granted certiorari to decide whether, consistent with the Due Process Clause of the Fourteenth Amendment, Daimler is amenable to suit in California courts for claims involving only foreign plaintiffs and conduct occurring entirely abroad.

[…]

III

[…]

As is evident from *Perkins*, *Helicopteros*, and *Goodyear*, general and specific jurisdiction have followed markedly different trajectories post-International Shoe. Specific jurisdiction has been cut loose from *Pennoyer*'s sway, but we have declined to stretch general jurisdiction beyond limits traditionally recognized. As this Court has increasingly trained on the "relationship among the defendant, the forum, and the litigation," *i.e.*, specific jurisdiction, general jurisdiction has come to occupy a less dominant place in the contemporary scheme.

IV

With this background, we turn directly to the question whether Daimler's affiliations with California are sufficient to subject it to the general (all-purpose) personal jurisdiction of that State's courts. In the proceedings below, the parties agreed on, or failed to contest, certain points we now take as given. Plaintiffs have never attempted to fit this case into the *specific* jurisdiction category. Nor did plaintiffs challenge on appeal the District Court's holding that Daimler's own contacts with California were, by themselves, too sporadic to justify the exercise of general jurisdiction. While plaintiffs ultimately persuaded the Ninth Circuit to impute MBUSA's California contacts to Daimler on an agency theory, at no point have they maintained that MBUSA is an alter ego of Daimler.

Daimler, on the other hand, failed to object below to plaintiffs' assertion that the California courts could exercise all-purpose jurisdiction over MBUSA.[12] We

[12] MBUSA is not a defendant in this case.

will assume then, for purposes of this decision only, that MBUSA qualifies as at home in California.

A

[…]

B

Even if we were to assume that MBUSA is at home in California, and further to assume MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there.

Goodyear made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." With respect to a corporation, the place of incorporation and principal place of business are "paradig[m] … bases for general jurisdiction." Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable. These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.

Goodyear did not hold that a corporation may be subject to general jurisdiction only in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums. Plaintiffs would have us look beyond the exemplar bases *Goodyear* identified, and approve the exercise of general jurisdiction in every State in which a corporation "engages in a substantial, continuous, and systematic course of business." That formulation, we hold, is unacceptably grasping.

[…] Accordingly, the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense "continuous and systematic," it is whether that corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State."[19]

Here, neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there. If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA's sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King*.

It was therefore error for the Ninth Circuit to conclude that Daimler, even with MBUSA's contacts attributed to it, was at home in California, and hence subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California.

[19] We do not foreclose the possibility that in an exceptional case, *see, e.g., Perkins*, a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State. But this case presents no occasion to explore that question, because Daimler's activities in California plainly do not approach that level. It is one thing to hold a corporation answerable for operations in the forum State, quite another to expose it to suit on claims having no connection whatever to the forum State.

C

Finally, the transnational context of this dispute bears attention. […]

The Ninth Circuit […] paid little heed to the risks to international comity its expansive view of general jurisdiction posed. Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case. In the European Union, for example, a corporation may generally be sued in the nation in which it is "domiciled," a term defined to refer only to the location of the corporation's "statutory seat," "central administration," or "principal place of business." The Solicitor General informs us, in this regard, that "foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the "fair play and substantial justice" due process demands. *International Shoe*.

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the Ninth Circuit is

Reversed.

Justice SOTOMAYOR, concurring in the judgment.

I agree with the Court's conclusion that the Due Process Clause prohibits the exercise of personal jurisdiction over Daimler in light of the unique circumstances of this case. I concur only in the judgment, however, because I cannot agree with the path the Court takes to arrive at that result.

The Court acknowledges that Mercedes-Benz USA, LLC (MBUSA), Daimler's wholly owned subsidiary, has considerable contacts with California. It has multiple facilities in the State, including a regional headquarters. Each year, it distributes in California tens of thousands of cars, the sale of which generated billions of dollars in the year this suit was brought. And it provides service and sales support to customers throughout the State. Daimler has conceded that California courts may exercise general jurisdiction over MBUSA on the basis of these contacts, and the Court assumes that MBUSA's contacts may be attributed to Daimler for the purpose of deciding whether Daimler is also subject to general jurisdiction.

Are these contacts sufficient to permit the exercise of general jurisdiction over Daimler? The Court holds that they are not, for a reason wholly foreign to our due process jurisprudence. The problem, the Court says, is not that Daimler's contacts with California are too few, but that its contacts with other forums are too many. In other words, the Court does not dispute that the presence of multiple offices, the direct distribution of thousands of products accounting for billions of dollars in sales, and continuous interaction with customers throughout a State would be enough to support the exercise of general jurisdiction

over some businesses. Daimler is just not one of those businesses, the Court concludes, because its California contacts must be viewed in the context of its extensive "nationwide and worldwide" operations. In recent years, Americans have grown accustomed to the concept of multinational corporations that are supposedly "too big to fail"; today the Court deems Daimler "too big for general jurisdiction."

The Court's conclusion is wrong as a matter of both process and substance. As to process, the Court decides this case on a ground that was neither argued nor passed on below, and that Daimler raised for the first time in a footnote to its brief. As to substance, the Court's focus on Daimler's operations outside of California ignores the lodestar of our personal jurisdiction jurisprudence: A State may subject a defendant to the burden of suit if the defendant has sufficiently taken advantage of the State's laws and protections through its contacts in the State; whether the defendant has contacts elsewhere is immaterial.

Regrettably, these errors are unforced. The Court can and should decide this case on the far simpler ground that, no matter how extensive Daimler's contacts with California, that State's exercise of jurisdiction would be unreasonable given that the case involves foreign plaintiffs suing a foreign defendant based on foreign conduct, and given that a more appropriate forum is available. Because I would reverse the judgment below on this ground, I concur in the judgment only.

[…]

Notes & Questions

1. In the wake of *Goodyear* and *Daimler*, is a corporate defendant ever "at home" someplace other than where it is headquartered or incorporated? If so, when? If not, what do you make of footnote 19 in the Court's opinion in *Daimler*?

2. The facts of *Goodyear* and *Daimler* made clear that the lawsuit did not "arise out of" or "relate to" the defendants' forum contacts. But what happens when the answer to that question isn't so clear? For example, what if a defendant manufactures a large volume of identical products, some of which were sold and caused injury in the forum state, but others of which were sold and/or caused injury elsewhere? Do they count for purposes of specific jurisdiction or not? The next section takes up these tricky questions.

11.6. The Future of Personal Jurisdiction

Bristol-Myers Squibb Co. v. Superior Court

137 S. Ct. 1773 (2017)

ALITO, J., delivered the opinion of the Court.

More than 600 plaintiffs, most of whom are not California residents, filed this civil action in a California state court against Bristol-Myers Squibb Company (BMS), asserting a variety of state-law claims based on injuries allegedly caused by a BMS drug called Plavix. The California Supreme Court held that the California courts have specific jurisdiction to entertain the nonresidents' claims. We now reverse.

I

A

BMS, a large pharmaceutical company, is incorporated in Delaware and headquartered in New York, and it maintains substantial operations in both New York and New Jersey. Over 50 percent of BMS's work force in the United States is employed in those two States.

BMS also engages in business activities in other jurisdictions, including California. Five of the company's research and laboratory facilities, which employ a total of around 160 employees, are located there. BMS also employs about 250 sales representatives in California and maintains a small state-government advocacy office in Sacramento.

One of the pharmaceuticals that BMS manufactures and sells is Plavix, a prescription drug that thins the blood and inhibits blood clotting. BMS did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California. BMS instead engaged in all of these activities in either New York or New Jersey. But BMS does sell Plavix in California. Between 2006 and 2012, it sold almost 187 million Plavix pills in the State and took in more than $900 million from those sales. This amounts to a little over one percent of the company's nationwide sales revenue.

B

A group of plaintiffs—consisting of 86 California residents and 592 residents from 33 other States—filed eight separate complaints in California Superior Court, alleging that Plavix had damaged their health. All the complaints asserted 13 claims under California law, including products liability, negligent misrepresentation, and misleading advertising claims. The nonresident plaintiffs did not allege that they obtained Plavix through California physicians or from any other California source; nor did they claim that they were injured by Plavix or were treated for their injuries in California.

Asserting lack of personal jurisdiction, BMS moved to quash service of summons on the nonresidents' claims, but the California Superior Court denied

this motion, finding that the California courts had general jurisdiction over BMS "[b]ecause [it] engages in extensive activities in California." BMS unsuccessfully petitioned the State Court of Appeal for a writ of mandate, but after our decision on general jurisdiction in *Daimler AG v. Bauman*, the California Supreme Court instructed the Court of Appeal "to vacate its order denying mandate and to issue an order to show cause why relief sought in the petition should not be granted."

The Court of Appeal then changed its decision on the question of general jurisdiction. Under *Daimler*, it held, general jurisdiction was clearly lacking, but it went on to find that the California courts had specific jurisdiction over the nonresidents' claims against BMS.

The California Supreme Court affirmed. The court unanimously agreed with the Court of Appeal on the issue of general jurisdiction, but the court was divided on the question of specific jurisdiction. The majority applied a "sliding scale approach to specific jurisdiction." Under this approach, "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." Applying this test, the majority concluded that "BMS's extensive contacts with California" permitted the exercise of specific jurisdiction "based on a less direct connection between BMS's forum activities and plaintiffs' claims than might otherwise be required." This attenuated requirement was met, the majority found, because the claims of the nonresidents were similar in several ways to the claims of the California residents (as to which specific jurisdiction was uncontested). The court noted that "[b]oth the resident and nonresident plaintiffs' claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product." And while acknowledging that "there is no claim that Plavix itself was designed and developed in [BMS's California research facilities]," the court thought it significant that other research was done in the State.

Three justices dissented.

II

A

It has long been established that the Fourteenth Amendment limits the personal jurisdiction of state courts. […] The primary focus of our personal jurisdiction inquiry is the defendant's relationship to the forum State.

Since our seminal decision in *International Shoe*, our decisions have recognized two types of personal jurisdiction: "general" (sometimes called "all-purpose") jurisdiction and "specific" (sometimes called "case-linked") jurisdiction. *Goodyear*. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." *Id.* A court with general jurisdiction may hear any claim against that defendant, even if all the incidents underlying the claim occurred in a different State. But "only

a limited set of affiliations with a forum will render a defendant amenable to" general jurisdiction in that State. *Daimler*.

Specific jurisdiction is very different. In order for a state court to exercise specific jurisdiction, "the suit" must "aris[e] out of or relat[e] to the defendant's contacts with the forum." *Id.* In other words, there must be "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear*. For this reason, "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction."

B

In determining whether personal jurisdiction is present, a court must consider a variety of interests. These include "the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice." But the "primary concern" is "the burden on the defendant." Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question. As we have put it, restrictions on personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson*. "[T]he States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State … implie[s] a limitation on the sovereignty of all its sister States." *World-Wide Volkswagen*. And at times, this federalism interest may be decisive. As we explained in *World-Wide Volkswagen*, "[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."

III

Our settled principles regarding specific jurisdiction control this case. In order for a court to exercise specific jurisdiction over a claim, there must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." *Goodyear*. When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State.

For this reason, the California Supreme Court's "sliding scale approach" is difficult to square with our precedents. Under the California approach, the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction. For specific jurisdiction,

a defendant's general connections with the forum are not enough. As we have said, "[a] corporation's 'continuous activity of some sorts within a state … is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.' "

The present case illustrates the danger of the California approach. The State Supreme Court found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents' claims. As noted, the nonresidents were not prescribed Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. The mere fact that other plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the non-residents—does not allow the State to assert specific jurisdiction over the nonresidents' claims. As we have explained, "a defendant's relationship with a … third party, standing alone, is an insufficient basis for jurisdiction." *Walden*. This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents. Nor is it sufficient—or even relevant—that BMS conducted research in California on matters unrelated to Plavix. What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.

[…]

In a last ditch contention, respondents contend that BMS's "decision to contract with a California company [McKesson] to distribute [Plavix] nationally" provides a sufficient basis for personal jurisdiction. But as we have explained, "[t]he requirements of *International Shoe* … must be met as to each defendant over whom a state court exercises jurisdiction." In this case, it is not alleged that BMS engaged in relevant acts together with McKesson in California. Nor is it alleged that BMS is derivatively liable for McKesson's conduct in California. And the nonresidents have adduced no evidence to show how or by whom the Plavix they took was distributed to the pharmacies that dispensed it to them. The bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State.

IV

Our straightforward application in this case of settled principles of personal jurisdiction will not result in the parade of horribles that respondents conjure up. Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. BMS concedes that such suits could be brought in either New York or Delaware. Alternatively, the plaintiffs who are residents of a particular State—for example, the 92 plaintiffs from Texas and the 71 from Ohio—could probably sue together in their home States. In addition, since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.

* * *

The judgment of the California Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SOTOMAYOR, J., dissenting.

Three years ago, the Court imposed substantial curbs on the exercise of general jurisdiction in its decision in *Daimler AG v. Bauman*. Today, the Court takes its first step toward a similar contraction of specific jurisdiction by holding that a corporation that engages in a nationwide course of conduct cannot be held accountable in a state court by a group of injured people unless all of those people were injured in the forum State.

I fear the consequences of the Court's decision today will be substantial. The majority's rule will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone. It will make it impossible to bring a nationwide mass action in state court against defendants who are "at home" in different States. And it will result in piecemeal litigation and the bifurcation of claims. None of this is necessary. A core concern in this Court's personal jurisdiction cases is fairness. And there is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike.

I

Bristol-Myers Squibb is a Fortune 500 pharmaceutical company incorporated in Delaware and headquartered in New York. It employs approximately 25,000 people worldwide and earns annual revenues of over $15 billion. In the late 1990's, Bristol-Myers began to market and sell a prescription blood thinner called Plavix. Plavix was advertised as an effective tool for reducing the risk of blood clotting for those vulnerable to heart attacks and to strokes. The ads worked: At the height of its popularity, Plavix was a blockbuster, earning Bristol-Myers billions of dollars in annual revenues.

Bristol-Myers' advertising and distribution efforts were national in scope. It conducted a single nationwide advertising campaign for Plavix, using television, magazine, and Internet ads to broadcast its message. A consumer in California heard the same advertisement as a consumer in Maine about the benefits of Plavix. Bristol-Myers' distribution of Plavix also proceeded through nationwide channels: Consistent with its usual practice, it relied on a small number of wholesalers to distribute Plavix throughout the country. One of those distributors, McKesson Corporation, was named as a defendant below; during the relevant time period, McKesson was responsible for almost a quarter of Bristol-Myers' revenue worldwide.

[…]

II

[…]

[T]he California courts appropriately exercised specific jurisdiction over respondents' claims.

First, there is no dispute that Bristol-Myers "purposefully avail[ed] itself" of California and its substantial pharmaceutical market. Bristol-Myers employs over 400 people in California and maintains half a dozen facilities in the State engaged in research, development, and policymaking. It contracts with a California-based distributor, McKesson, whose sales account for a significant portion of its revenue. And it markets and sells its drugs, including Plavix, in California, resulting in total Plavix sales in that State of nearly $1 billion during the period relevant to this suit.

Second, respondents' claims "relate to" Bristol-Myers' in-state conduct. A claim "relates to" a defendant's forum conduct if it has a "connect[ion] with" that conduct. So respondents could not, for instance, hale Bristol-Myers into court in California for negligently maintaining the sidewalk outside its New York headquarters—a claim that has no connection to acts Bristol-Myers took in California. But respondents' claims against Bristol-Myers look nothing like such a claim. Respondents' claims against Bristol-Myers concern conduct materially identical to acts the company took in California: its marketing and distribution of Plavix, which it undertook on a nationwide basis in all 50 States. That respondents were allegedly injured by this nationwide course of conduct in Indiana, Oklahoma, and Texas, and not California, does not mean that their claims do not "relate to" the advertising and distribution efforts that Bristol-Myers undertook in that State. All of the plaintiffs—residents and nonresidents alike—allege that they were injured by the same essential acts. Our cases require no connection more direct than that.

Finally, and importantly, there is no serious doubt that the exercise of jurisdiction over the nonresidents' claims is reasonable. Because Bristol-Myers already faces claims that are identical to the nonresidents' claims in this suit, it will not be harmed by having to defend against respondents' claims: Indeed, the alternative approach—litigating those claims in separate suits in as many as 34 different States—would prove far more burdensome. By contrast, the plaintiffs' "interest in obtaining convenient and effective relief" is obviously furthered by participation in a consolidated proceeding in one State under shared counsel, which allows them to minimize costs, share discovery, and maximize recoveries on claims that may be too small to bring on their own. California, too, has an interest in providing a forum for mass actions like this one: Permitting the non-residents to bring suit in California alongside the residents facilitates the efficient adjudication of the residents' claims and allows it to regulate more effectively the conduct of both nonresident corporations like Bristol-Myers and resident ones like McKesson.

Nothing in the Due Process Clause prohibits a California court from hearing respondents' claims—at least not in a case where they are joined to identical claims brought by California residents.

III

[…]

I fear the consequences of the majority's decision today will be substantial. Even absent a rigid requirement that a defendant's in-state conduct must actually cause a plaintiff's claim,[3] the upshot of today's opinion is that plaintiffs cannot join their claims together and sue a defendant in a State in which only some of them have been injured. That rule is likely to have consequences far beyond this case.

[3] Bristol-Myers urges such a rule upon us, but its adoption would have consequences far beyond those that follow from today's factbound opinion. Among other things, it might call into question whether even a plaintiff *injured* in a State by an item identical to those sold by a defendant in that State could avail himself of that State's courts to redress his injuries—a result specifically contemplated by *World-Wide Volkswagen*.

First, and most prominently, the Court's opinion in this case will make it profoundly difficult for plaintiffs who are injured in different States by a defendant's nationwide course of conduct to sue that defendant in a single, consolidated action. The holding of today's opinion is that such an action cannot be brought in a State in which only some plaintiffs were injured. Not to worry, says the majority: The plaintiffs here could have sued Bristol-Myers in New York or Delaware; could "probably" have subdivided their separate claims into 34 lawsuits in the States in which they were injured; and might have been able to bring a single suit in federal court (an "open … question"). Even setting aside the majority's caveats, what is the purpose of such limitations? What interests are served by preventing the consolidation of claims and limiting the forums in which they can be consolidated? The effect of the Court's opinion today is to eliminate nationwide mass actions in any State other than those in which a defendant is " 'essentially at home.' "[4] *See Daimler*. Such a rule hands one more tool to corporate defendants determined to prevent the aggregation of individual claims, and forces injured plaintiffs to bear the burden of bringing suit in what will often be far flung jurisdictions.

[4] The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there. *Cf. Devlin v. Scardelletti* ("Nonnamed class members … may be parties for some purposes and not for others").

Second, the Court's opinion today may make it impossible to bring certain mass actions at all. After this case, it is difficult to imagine where it might be possible to bring a nationwide mass action against two or more defendants headquartered and incorporated in different States. There will be no State where both defendants are "at home," and so no State in which the suit can proceed. What about a nationwide mass action brought against a defendant not headquartered or incorporated in the United States? Such a defendant is not "at home" in any State. Especially in a world in which defendants are subject to general jurisdiction in only a handful of States, the effect of today's opinion will be to curtail—and in some cases eliminate—plaintiffs' ability to hold corporations fully accountable for their nationwide conduct.

The majority chides respondents for conjuring a "parade of horribles," but says nothing about how suits like those described here will survive its opinion in this case. The answer is simple: They will not.

* * *

It "does not offend 'traditional notions of fair play and substantial justice' " to permit plaintiffs to aggregate claims arising out of a single nationwide course of conduct in a single suit in a single State where some, but not all, were injured. But that is exactly what the Court holds today is barred by the Due Process Clause.

This is not a rule the Constitution has required before. I respectfully dissent.

Notes & Questions

1. Why wasn't there general jurisdiction in *Bristol-Myers*?
2. Note that *Bristol-Myers* concerned a "mass action," a type of case in which there are many individual plaintiffs, but, critically, they are not part of a certified class. Rather, each plaintiff is a party present before the Court. How did that procedural posture affect the Court's personal jurisdiction analysis? In answering that question, consider footnote 4 of Justice Sotomayor's dissenting opinion.
3. Is Justice Sotomayor right to be concerned about the potential consequences of the Court's opinion in *Bristol-Myers*? Should the Court consider practical consequences when interpreting the constitutional limits imposed by due process?

Ford Motor Co. v. Montana Eighth Judicial District

Justice KAGAN, delivered the opinion of the Court. 592 U.S. __ (Mar. 25, 2021)

In each of these two cases, a state court held that it had jurisdiction over Ford Motor Company in a products-liability suit stemming from a car accident. The accident happened in the State where suit was brought. The victim was one of the State's residents. And Ford did substantial business in the State—among other things, advertising, selling, and servicing the model of vehicle the suit claims is defective. Still, Ford contends that jurisdiction is improper because the particular car involved in the crash was not first sold in the forum State, nor was it designed or manufactured there. We reject that argument. When a company like Ford serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit.

I

Ford is a global auto company. It is incorporated in Delaware and headquartered in Michigan. But its business is everywhere. Ford markets, sells, and services its products across the United States and overseas. In this country alone, the company annually distributes over 2.5 million new cars, trucks, and SUVs to over 3,200 licensed dealerships. Ford also encourages a resale market for its products: Almost all its dealerships buy and sell used Fords, as well as selling new ones. To enhance its brand and increase its sales, Ford engages in wide-ranging promotional activities, including television, print, online, and direct-mail advertisements. No matter where you live, you've seen them: "Have you driven a Ford lately?" or "Built Ford Tough." Ford also ensures that consumers can keep their vehicles running long past the date of sale. The company provides original parts to auto supply stores and repair shops across the country. (Goes another slogan: "Keep your Ford a Ford.") And Ford's own network of dealers offers an array of maintenance and repair services, thus fostering an ongoing relationship between Ford and its customers.

Accidents involving two of Ford's vehicles—a 1996 Explorer and a 1994 Crown Victoria—are at the heart of the suits before us. One case comes from Montana. Markkaya Gullett was driving her Explorer near her home in the State when the tread separated from a rear tire. The vehicle spun out, rolled into a ditch, and came to rest upside down. Gullett died at the scene of the crash. The representative of her estate sued Ford in Montana state court, bringing claims for a design defect, failure to warn, and negligence. The second case comes from Minnesota. Adam Bandemer was a passenger in his friend's Crown Victoria, traveling on a rural road in the State to a favorite ice-fishing spot. When his friend rear-ended a snowplow, this car too landed in a ditch. Bandemer's air bag failed to deploy, and he suffered serious brain damage. He sued Ford in Minnesota state court, asserting products-liability, negligence, and breach-of-warranty claims.

Ford moved to dismiss the two suits for lack of personal jurisdiction, on basically identical grounds. According to Ford, the state court (whether in Montana or Minnesota) had jurisdiction only if the company's conduct in the State had given rise to the plaintiff's claims. And that causal link existed, Ford continued, only if the company had designed, manufactured, or—most likely—sold in the State the particular vehicle involved in the accident. In neither suit could the plaintiff make that showing. Ford had designed the Explorer and Crown Victoria in Michigan, and it had manufactured the cars in (respectively) Kentucky and Canada. Still more, the company had originally sold the cars at issue outside the forum States—the Explorer in Washington, the Crown Victoria in North Dakota. Only later resales and relocations by consumers had brought the vehicles to Montana and Minnesota. That meant, in Ford's view, that the courts of those States could not decide the suits.

Both the Montana and the Minnesota Supreme Courts (affirming lower court decisions) rejected Ford's argument.

[…]

We granted certiorari to consider if Ford is subject to jurisdiction in these cases. We hold that it is.

II

A

The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant. The canonical decision in this area remains *International Shoe Co. v. Washington*. There, the Court held that a tribunal's authority depends on the defendant's having such "contacts" with the forum State that "the maintenance of the suit" is "reasonable, in the context of our federal system of government," and "does not offend traditional notions of fair play and substantial justice." In giving content to that formulation, the Court has long focused on the nature and extent of "the defendant's relationship to the forum State." *Bristol-Myers Squibb Co. v. Superior Court of*

Cal. That focus led to our recognizing two kinds of personal jurisdiction: general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction. *See Goodyear Dunlop Tires Operations, S. A. v. Brown*.

A state court may exercise general jurisdiction only when a defendant is "essentially at home" in the State. General jurisdiction, as its name implies, extends to "any and all claims" brought against a defendant. Those claims need not relate to the forum State or the defendant's activity there; they may concern events and conduct anywhere in the world. But that breadth imposes a correlative limit: Only a select "set of affiliations with a forum" will expose a defendant to such sweeping jurisdiction. *Daimler AG v. Bauman*. In what we have called the "paradigm" case, an individual is subject to general jurisdiction in her place of domicile. And the "equivalent" forums for a corporation are its place of incorporation and principal place of business. [*But cf.*] *id.* at 139 n.19 (leaving open "the possibility that in an exceptional case" a corporation might also be "at home" elsewhere). So general jurisdiction over Ford (as all parties agree) attaches in Delaware and Michigan—not in Montana and Minnesota.

Specific jurisdiction is different: It covers defendants less intimately connected with a State, but only as to a narrower class of claims. The contacts needed for this kind of jurisdiction often go by the name "purposeful availment." *Burger King Corp. v. Rudzewicz*. The defendant, we have said, must take "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*. The contacts must be the defendant's own choice and not "random, isolated, or fortuitous." *Keeton v. Hustler Magazine, Inc.* They must show that the defendant deliberately "reached out beyond" its home—by, for example, "exploi[ting] a market" in the forum State or entering a contractual relationship centered there. *Walden v. Fiore*. Yet even then—because the defendant is not "at home"—the forum State may exercise jurisdiction in only certain cases. The plaintiff's claims, we have often stated, "must arise out of or relate to the defendant's contacts" with the forum. *Bristol-Myers*. Or put just a bit differently, "there must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.' " *Bristol-Myers*.

These rules derive from and reflect two sets of values—treating defendants fairly and protecting "interstate federalism." *World-Wide Volkswagen Corp. v. Woodson*. Our decision in *International Shoe* founded specific jurisdiction on an idea of reciprocity between a defendant and a State: When (but only when) a company "exercises the privilege of conducting activities within a state"—thus "enjoy[ing] the benefits and protection of [its] laws"—the State may hold the company to account for related misconduct. Later decisions have added that our doctrine similarly provides defendants with "fair warning"—knowledge that "a particular activity may subject [it] to the jurisdiction of a foreign sovereign." *Burger King*. A defendant can thus "structure [its] primary conduct" to lessen or avoid exposure to a given State's courts. And this Court has considered alongside defendants' interests those of the States in relation to each other. One State's "sovereign power to try" a suit, we have

[2] One of the concurrences here expresses a worry that our *International Shoe*-based body of law is not "well suited for the way in which business is now conducted," and tentatively suggests a 21st-century rethinking. Post (Alito, J., concurring in judgment). Fair enough perhaps, *see infra* n.4, but the concurrence then acknowledges that these cases have no distinctively modern features, and it decides them on grounds that (as it agrees) are much the same as ours. The other concurrence proposes instead a return to the mid-19th century—a replacement of our current doctrine with the Fourteenth Amendment's original meaning respecting personal jurisdiction. Post (GORSUCH, J., concurring in judgment). But that opinion never reveals just what the Due Process Clause as understood at its ratification required, and its ground for deciding these cases is correspondingly spare. This opinion, by contrast, resolves these cases by proceeding as the Court has done for the last 75 years—applying the

recognized, may prevent "sister States" from exercising their like authority. The law of specific jurisdiction thus seeks to ensure that States with "little legitimate interest" in a suit do not encroach on States more affected by the controversy.[2]

B

Ford contends that our jurisdictional rules prevent Montana's and Minnesota's courts from deciding these two suits. In making that argument, Ford does not contest that it does substantial business in Montana and Minnesota—that it actively seeks to serve the market for automobiles and related products in those States. Or to put that concession in more doctrinal terms, Ford agrees that it has "purposefully avail[ed] itself of the privilege of conducting activities" in both places. Ford's claim is instead that those activities do not sufficiently connect to the suits, even though the resident-plaintiffs allege that Ford cars malfunctioned in the forum States. In Ford's view, the needed link must be causal in nature: Jurisdiction attaches "only if the defendant's forum conduct gave rise to the plaintiff's claims." And that rule reduces, Ford thinks, to locating specific jurisdiction in the State where Ford sold the car in question, or else the States where Ford designed and manufactured the vehicle. On that view, the place of accident and injury is immaterial. So (Ford says) Montana's and Minnesota's courts have no power over these cases.

But Ford's causation-only approach finds no support in this Court's requirement of a "connection" between a plaintiff's suit and a defendant's activities. *Bristol-Myers*. That rule indeed serves to narrow the class of claims over which a state court may exercise specific jurisdiction. But not quite so far as Ford wants. None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do. As just noted, our most common formulation of the rule demands that the suit "arise out of or relate to the defendant's contacts with the forum." The first half of that standard asks about causation; but the back half, after the "or," contemplates that some relationships will support jurisdiction without a causal showing. That does not mean anything goes. In the sphere of specific jurisdiction, the phrase "relate to" incorporates real limits, as it must to adequately protect defendants foreign to a forum. But again, we have never framed the specific jurisdiction inquiry as always requiring proof of causation—*i.e.*, proof that the plaintiff's claim came about because of the defendant's in-state conduct. […]

And indeed, this Court has stated that specific jurisdiction attaches in cases identical to the ones here—when a company like Ford serves a market for a product in the forum State and the product malfunctions there. In *World-Wide Volkswagen*, the Court held that an Oklahoma court could not assert jurisdiction over a New York car dealer just because a car it sold later caught fire in Oklahoma. But in so doing, we contrasted the dealer's position to that of two other defendants—Audi, the car's manufacturer, and Volkswagen, the car's nationwide importer (neither of which contested jurisdiction):

> [I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises

> from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in [several or all] other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.

Or said another way, if Audi and Volkswagen's business deliberately extended into Oklahoma (among other States), then Oklahoma's courts could hold the companies accountable for a car's catching fire there—even though the vehicle had been designed and made overseas and sold in New York. For, the Court explained, a company thus "purposefully avail[ing] itself" of the Oklahoma auto market "has clear notice" of its exposure in that State to suits arising from local accidents involving its cars. And the company could do something about that exposure: It could "act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are [still] too great, severing its connection with the State."

[…]

To see why Ford is subject to jurisdiction in these cases (as Audi, Volkswagen, and Daimler were in their analogues), consider first the business that the company regularly conducts in Montana and Minnesota. Small wonder that Ford has here conceded "purposeful availment" of the two States' markets. By every means imaginable—among them, billboards, TV and radio spots, print ads, and direct mail—Ford urges Montanans and Minnesotans to buy its vehicles, including (at all relevant times) Explorers and Crown Victorias. Ford cars—again including those two models—are available for sale, whether new or used, throughout the States, at 36 dealerships in Montana and 84 in Minnesota. And apart from sales, Ford works hard to foster ongoing connections to its cars' owners. The company's dealers in Montana and Minnesota (as elsewhere) regularly maintain and repair Ford cars, including those whose warranties have long since expired. And the company distributes replacement parts both to its own dealers and to independent auto shops in the two States. Those activities, too, make Ford money. And by making it easier to own a Ford, they encourage Montanans and Minnesotans to become lifelong Ford drivers.

Now turn to how all this Montana- and Minnesota-based conduct relates to the claims in these cases, brought by state residents in Montana's and Minnesota's courts. Each plaintiff's suit, of course, arises from a car accident in one of those States. In each complaint, the resident-plaintiff alleges that a defective Ford vehicle—an Explorer in one, a Crown Victoria in the other—caused the crash and resulting harm. And as just described, Ford had advertised, sold, and serviced those two car models in both States for many years. (Contrast a case, which we do not address, in which Ford marketed the models in only a different State or region.) In other words, Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States. So there is a strong "relationship among the defendant, the forum, and the litigation"—the "essential foundation" of specific jurisdiction. Helicopteros. […] [4]

[4] None of this is to say that any person using any means to sell any good in a State is subject to jurisdiction there if the product malfunctions after arrival. We have long treated isolated or sporadic transactions differently from continuous ones. *See, e.g., World-Wide Volkswagen*. And we do not here consider internet transactions, which may raise doctrinal questions of their own. So consider, for example, a hypothetical offered at oral argument. "[A] retired guy in a small town" in Maine "carves decoys" and

The only complication here, pressed by Ford, is that the company sold the specific cars involved in these crashes outside the forum States, with consumers later selling them to the States' residents. Because that is so, Ford argues, the plaintiffs' claims "would be precisely the same if Ford had never done anything in Montana and Minnesota." Of course, that argument merely restates Ford's demand for an exclusively causal test of connection—which we have already shown is inconsistent with our caselaw. And indeed, a similar assertion could have been made in *World-Wide Volkswagen*—yet the Court made clear that systematic contacts in Oklahoma rendered Audi accountable there for an in-state accident, even though it involved a car sold in New York. So too here, and for the same reasons, even supposing (as Ford does) that without the company's Montana or Minnesota contacts the plaintiffs' claims would be just the same.

But in any event, that assumption is far from clear. For the owners of these cars might never have bought them, and so these suits might never have arisen, except for Ford's contacts with their home States. Those contacts might turn any resident of Montana or Minnesota into a Ford owner—even when he buys his car from out of state. He may make that purchase because he saw ads for the car in local media. And he may take into account a raft of Ford's in-state activities designed to make driving a Ford convenient there: that Ford dealers stand ready to service the car; that other auto shops have ample supplies of Ford parts; and that Ford fosters an active resale market for its old models. The plaintiffs here did not in fact establish, or even allege, such causal links. Nor should jurisdiction in cases like these ride on the exact reasons for an individual plaintiff's purchase, or on his ability to present persuasive evidence about them. But the possibilities listed above—created by the reach of Ford's Montana and Minnesota contacts—underscore the aptness of finding jurisdiction here, even though the cars at issue were first sold out of state.

For related reasons, allowing jurisdiction in these cases treats Ford fairly, as this Court's precedents explain. In conducting so much business in Montana and Minnesota, Ford "enjoys the benefits and protection of [their] laws"—the enforcement of contracts, the defense of property, the resulting formation of effective markets. *International Shoe*. All that assistance to Ford's instate business creates reciprocal obligations—most relevant here, that the car models Ford so extensively markets in Montana and Minnesota be safe for their citizens to use there. Thus our repeated conclusion: A state court's enforcement of that commitment, enmeshed as it is with Ford's government-protected in-state business, can "hardly be said to be undue." And as World-Wide Volkswagen described, it cannot be thought surprising either. An automaker regularly marketing a vehicle in a State, the Court said, has "clear notice" that it will be subject to jurisdiction in the State's courts when the product malfunctions there (regardless where it was first sold). Precisely because that exercise of jurisdiction is so reasonable, it is also predictable—and thus allows Ford to "structure [its] primary conduct" to lessen or even avoid the costs of state-court litigation. *World-Wide Volkswagen*.

Finally, principles of "interstate federalism" support jurisdiction over these suits in Montana and Minnesota. Those States have significant interests at

stake— "providing [their] residents with a convenient forum for redressing injuries inflicted by out-of-state actors," as well as enforcing their own safety regulations. Burger King. Consider, next to those, the interests of the States of first sale (Washington and North Dakota)—which Ford's proposed rule would make the most likely forums. For each of those States, the suit involves all out-of-state parties, an out-of-state accident, and out-of-state injuries; the suit's only connection with the State is that a former owner once (many years earlier) bought the car there. In other words, there is a less significant "relationship among the defendant, the forum, and the litigation." *Walden*. So by channeling these suits to Washington and North Dakota, Ford's regime would undermine, rather than promote, what the company calls the Due Process Clause's "jurisdiction-allocating function."

C

Ford mainly relies for its rule on two of our recent decisions—*Bristol-Myers* and *Walden*. But those precedents stand for nothing like the principle Ford derives from them. If anything, they reinforce all we have said about why Montana's and Minnesota's courts can decide these cases.

Ford says of *Bristol-Myers* that it "squarely foreclose[s]" jurisdiction. In that case, non-resident plaintiffs brought claims in California state court against Bristol-Myers Squibb, the manufacturer of a nationally marketed prescription drug called Plavix. The plaintiffs had not bought Plavix in California; neither had they used or suffered any harm from the drug there. Still, the California Supreme Court thought it could exercise jurisdiction because Bristol-Myers Squibb sold Plavix in California and was defending there against identical claims brought by the State's residents. This Court disagreed, holding that the exercise of jurisdiction violated the Fourteenth Amendment. In Ford's view, the same must be true here. Each of these plaintiffs, like the plaintiffs in Bristol-Myers, alleged injury from a particular item (a car, a pill) that the defendant had sold outside the forum State. Ford reads *Bristol-Myers* to preclude jurisdiction when that is true, even if the defendant regularly sold "the same kind of product" in the State.

But that reading misses the point of our decision. We found jurisdiction improper in *Bristol-Myers* because the forum State, and the defendant's activities there, lacked any connection to the plaintiffs' claims. The plaintiffs, the Court explained, were not residents of California. They had not been prescribed Plavix in California. They had not ingested Plavix in California. And they had not sustained their injuries in California. In short, the plaintiffs were engaged in forum-shopping—suing in California because it was thought plaintiff-friendly, even though their cases had no tie to the State. That is not at all true of the cases before us. Yes, Ford sold the specific products in other States, as Bristol-Myers Squibb had. But here, the plaintiffs are residents of the forum States. They used the allegedly defective products in the forum States. And they suffered injuries when those products malfunctioned in the forum States. In sum, each of the plaintiffs brought suit in the most natural State […]. So *Bristol-Myers* does not bar jurisdiction.

[The Court also rejected Ford's argument that *Walden v. Fiore* foreclosed jurisdiction.] In *Walden*, only the plaintiffs had any contacts with the State of Nevada […]. The officer had "never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada." So to use the language of our doctrinal test: He had not "purposefully availed himself of the privilege of conducting activities" in the forum State. *Hanson*. Because that was true, the Court had no occasion to address the necessary connection between a defendant's in-state activity and the plaintiff's claims. But here, Ford has a veritable truckload of contacts with Montana and Minnesota, as it admits. The only issue is whether those contacts are related enough to the plaintiffs' suits. As to that issue, so what if (as *Walden* held) the place of a plaintiff's injury and residence cannot create a defendant's contact with the forum State? Those places still may be relevant in assessing the link between the defendant's forum contacts and the plaintiff's suit—including its assertions of who was injured where. […]

* * *

Here, resident-plaintiffs allege that they suffered in-state injury because of defective products that Ford extensively promoted, sold, and serviced in Montana and Minnesota. For all the reasons we have given, the connection between the plaintiffs' claims and Ford's activities in those States— or otherwise said, the "relationship among the defendant, the forum[s], and the litigation"—is close enough to support specific jurisdiction. *Walden*. The judgments of the Montana and Minnesota Supreme Courts are therefore affirmed.

It is so ordered.

JUSTICE ALITO, concurring in the judgment.

These cases can and should be decided without any alteration or refinement of our case law on specific personal jurisdiction. To be sure, for the reasons outlined in Justice Gorsuch's thoughtful opinion, there are grounds for questioning the standard that the Court adopted in *International Shoe Co. v. Washington*. And there are also reasons to wonder whether the case law we have developed since that time is well suited for the way in which business is now conducted. But there is nothing distinctively 21st century about the question in the cases now before us, and the answer to that question is settled by our case law.

Since *International Shoe*, the rule has been that a state court can exercise personal jurisdiction over a defendant if the defendant has "minimum contacts" with the forum— which means that the contacts must be "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

[…] Can anyone seriously argue that requiring Ford to litigate these cases in Minnesota and Montana would be fundamentally unfair?

Well, Ford makes that argument. It would send the plaintiffs packing to the jurisdictions where the vehicles in question were assembled (Kentucky and Canada), designed (Michigan), or first sold (Washington and North Dakota)

or where Ford is incorporated (Delaware) or has its principal place of business (Michigan).

[…]

The Court properly rejects that argument, and I agree with the main thrust of the Court's opinion. My only quibble is with the new gloss that the Court puts on our case law. Several of our opinions have said that a plaintiff's claims "must arise out of or relate to the defendant's contacts" with the forum. [Relying on this language,] the Court recognizes a new category of cases in which personal jurisdiction is permitted: those in which the claims do not "arise out of" (*i.e.*, are not caused by) the defendant's contacts but nevertheless sufficiently "relate to" those contacts in some undefined way.

This innovation is unnecessary and, in my view, unwise. […]

Recognizing "relate to" as an independent basis for specific jurisdiction risks needless complications. The "ordinary meaning" of the phrase "relate to" "is a broad one." Applying that phrase "according to its terms is a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else." To rein in this phrase, limits must be found, and the Court assures us that "relate to," as it now uses the concept, "incorporates real limits." But without any indication what those limits might be, I doubt that the lower courts will find that observation terribly helpful. Instead, what limits the potentially boundless reach of "relate to" is just the sort of rough causal connection I have described.

I would leave the law exactly where it stood before we took these cases, and for that reason, I concur in the judgment.

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring in the judgment.

Since *International Shoe Co. v. Washington*, this Court's cases have sought to divide the world of personal jurisdiction in two. A tribunal with "general jurisdiction" may entertain any claim against the defendant. But to trigger this power, a court usually must ensure the defendant is "at home" in the forum State. *Daimler AG v. Bauman*. Meanwhile, "specific jurisdiction" affords a narrower authority. It applies only when the defendant "purposefully avails" itself of the opportunity to do business in the forum State and the suit "arises out of or relates to" the defendant's contacts with the forum State. *Burger King Corp. v. Rudzewicz*.

While our cases have long admonished lower courts to keep these concepts distinct, some of the old guardrails have begun to look a little battered. Take general jurisdiction. If it made sense to speak of a corporation having one or two "homes" in 1945, it seems almost quaint in 2021 when corporations with global reach often have massive operations spread across multiple States. […]

Today's case tests the old boundaries from another direction. Until now, many lower courts have proceeded on the premise that specific jurisdiction requires two things. First, the defendant must "purposefully avail" itself of the chance

to do business in a State. Second, the plaintiff's suit must "arise out of or relate to" the defendant's in-state activities. Typically, courts have read this second phrase as a unit requiring at least a but-for causal link between the defendant's local activities and the plaintiff's injuries. As every first year law student learns, a but-for causation test isn't the most demanding. At a high level of abstraction, one might say any event in the world would not have happened "but for" events far and long removed.

Now, though, the Court pivots away from this understanding. Focusing on the phrase "arise out of or relate to" that so often appears in our cases, the majority asks us to parse those words "as though we were dealing with language of a statute." In particular, the majority zeros in on the disjunctive conjunction "or," and proceeds to build its entire opinion around that linguistic feature. The majority admits that "arise out of" may connote causation. But, it argues, "relate to" is an independent clause that does not.

Where this leaves us is far from clear. For a case to "relate to" the defendant's forum contacts, the majority says, it is enough if an "affiliation" or "relationship" or "connection" exists between them. But what does this assortment of nouns mean? Loosed from any causation standard, we are left to guess. The majority promises that its new test "does not mean anything goes," but that hardly tells us what does. In some cases, the new test may prove more forgiving than the old causation rule. But it's hard not to wonder whether it may also sometimes turn out to be more demanding. […]

For a glimpse at the complications invited by today's decision, consider its treatment of North Dakota and Washington. Those are the States where Ford first sold the allegedly defective cars at issue in the cases before us. The majority seems to suggest that, if the plaintiffs had sought to bring their suits in those States, they would have failed. The majority stresses that the "only connection" between the plaintiffs' claims and North Dakota and Washington is the fact that former owners once bought the allegedly defective cars there. But the majority never tells us why that "connection" isn't enough. Surely, North Dakota and Washington would contend they have a strong interest in ensuring they don't become marketplaces for unreasonably dangerous products. Nor is it clear why the majority casts doubt on the availability of specific jurisdiction in these States without bothering to consider whether the old causation test might allow it. After all, no one doubts Ford purposefully availed itself of those markets. The plaintiffs' injuries, at least arguably, "arose from" (or were caused by) the sale of defective cars in those places. Even if the majority's new affiliation test isn't satisfied, don't we still need to ask those causation questions, or are they now to be abandoned?

Consider, too, a hypothetical the majority offers in a footnote. The majority imagines a retiree in Maine who starts a one-man business, carving and selling wooden duck decoys. In time, the man sells a defective decoy over the Internet to a purchaser in another State who is injured. […] The majority says this hypothetical supplies a useful study in contrast with our cases. On the majority's telling, Ford's "continuous" contacts with Montana and Minnesota are enough to establish an "affiliation" with those States; by comparison, the decoy seller's

contacts may be too "isolated" and "sporadic" to entitle an injured buyer to sue in his home State. But if this comparison highlights anything, it is only the litigation sure to follow. For between the poles of "continuous" and "isolated" contacts lie a virtually infinite number of "affiliations" waiting to be explored. And when it comes to that vast terrain, the majority supplies no meaningful guidance about what kind or how much of an "affiliation" will suffice. Nor, once more, does the majority tell us whether its new affiliation test supplants or merely supplements the old causation inquiry.

[…]

* * *

With the old *International Shoe* dichotomy looking increasingly uncertain, it's hard not to ask how we got here and where we might be headed.

Before *International Shoe*, it seems due process was usually understood to guarantee that only a court of competent jurisdiction could deprive a defendant of his life, liberty, or property. In turn, a court's competency normally depended on the defendant's presence in, or consent to, the sovereign's jurisdiction. But once a plaintiff was able to "tag" the defendant with process in the jurisdiction, that State's courts were generally thought competent to render judgment on any claim against the defendant, whether it involved events inside or outside the State. *Pennoyer v. Neff*, *Burnham v. Superior Court of Cal.*[2]

International Shoe's emergence may be attributable to many influences, but at least part of the story seems to involve the rise of corporations and interstate trade. A corporation doing business in its State of incorporation is one thing; the old physical presence rules for individuals seem easily adaptable to them. But what happens when a corporation, created and able to operate thanks to the laws of one State, seeks the privilege of sending agents or products into another State?

Early on, many state courts held conduct like that renders an out-of-state corporation present in the second jurisdiction. And a present company could be sued for any claim, so long as the plaintiff served an employee doing corporate business within the second State. Other States sought to obviate any potential question about corporate jurisdiction by requiring an out-of-state corporation to incorporate under their laws too, or at least designate an agent for service of process. Either way, the idea was to secure the out-of-state company's presence or consent to suit.

Unsurprisingly, corporations soon looked for ways around rules like these. No one, after all, has ever liked greeting the process server. For centuries, individuals facing imminent suit sought to avoid it by fleeing the court's territorial jurisdiction. But this tactic proved "too crude for the American business genius," and it held some obvious disadvantages. Corporations wanted to retain the privilege of sending their personnel and products to other jurisdictions where they lacked a charter to do business. At the same time, when confronted with

[2] Some disagree that due process requires even this much. Recent scholarship, for example, contends *Pennoyer*'s territorial account of sovereign power is mostly right, but the rules it embodies are not "fixed in constitutional amber"—that is, Congress might be able to change them. Sachs, Pennoyer *Was Right*, 95 Texas L. Rev. 1249, 1255 (2017). Others suggest that fights over personal jurisdiction would be more sensibly waged under the Full Faith and Credit Clause. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 3 (1945). Whether these theories are right or wrong, they at least seek to answer the right question—what the Constitution as originally understood requires, not what nine judges consider "fair" and "just."

lawsuits in the second forum, they sought to hide behind their foreign charters and deny their presence. Really, their strategy was to do business without being seen to do business.

Initially and routinely, state courts rejected ploys like these. But, in a series of decisions at the turn of the last century, this Court eventually provided a more receptive audience. On the one hand, the Court held that an out-of-state corporation often has a right to do business in another State unencumbered by that State's registration rules, thanks to the so-called dormant Commerce Clause. On the other hand, the Court began invoking the Due Process Clause to restrict the circumstances in which an out-of-state corporation could be deemed present. So, for example, the Court ruled that even an Oklahoma corporation purchasing a large portion of its merchandise in New York was not "doing business" there. Perhaps advocates of this arrangement thought it promoted national economic growth. But critics questioned its fidelity to the Constitution and traditional jurisdictional principles, noting that it often left injured parties with no practical forum for their claims too.

In many ways, *International Shoe* sought to start over. The Court "cast … aside" the old concepts of territorial jurisdiction that its own earlier decisions had seemingly twisted in favor of out-of-state corporations. At the same time, the Court also cast doubt on the idea, once pursued by many state courts, that a company "consents" to suit when it is forced to incorporate or designate an agent for receipt of process in a jurisdiction other than its home State. In place of nearly everything that had come before, the Court sought to build a new test focused on "traditional notions of fair play and substantial justice." *International Shoe*.

It was a heady promise. But it is unclear how far it has really taken us. Even today, this Court usually considers corporations "at home" and thus subject to general jurisdiction in only one or two States. All in a world where global conglomerates boast of their many "headquarters." The Court has issued these restrictive rulings, too, even though individual defendants remain subject to the old "tag" rule, allowing them to be sued on any claim anywhere they can be found. Burnham. Nearly 80 years removed from International Shoe, it seems corporations continue to receive special jurisdictional protections in the name of the Constitution. Less clear is why.

Maybe, too, *International Shoe* just doesn't work quite as well as it once did. For a period, its specific jurisdiction test might have seemed a reasonable new substitute for assessing corporate "presence" a way to identify those out-of-state corporations that were simply pretending to be absent from jurisdictions where they were really transacting business. When a company "purposefully availed" itself of the benefits of another State's market in the 1940s, it often involved sending in agents, advertising in local media, or developing a network of on-the-ground dealers, much as Ford did in these cases. But, today, even an individual retiree carving wooden decoys in Maine can "purposefully avail" himself of the chance to do business across the continent after drawing online orders to his eBay "store" thanks to Internet advertising with global reach. A

test once aimed at keeping corporations honest about their out-of-state operations now seemingly risks hauling individuals to jurisdictions where they have never set foot.

Perhaps this is the real reason why the majority introduces us to the hypothetical decoy salesman. Yes, he arguably availed himself of a new market. Yes, the plaintiff's injuries arguably arose from (or were caused by) the product he sold there. Yes, *International Shoe*'s old causation test would seemingly allow for personal jurisdiction. But maybe the majority resists that conclusion because the old test no longer seems as reliable a proxy for determining corporate presence as it once did. Maybe that's the intuition lying behind the majority's introduction of its new "affiliation" rule and its comparison of the Maine retiree's "sporadic" and "isolated" sales in the plaintiff's State and Ford's deep "relationships" and "connections" with Montana and Minnesota.

If that is the logic at play here, I cannot help but wonder if we are destined to return where we began. Perhaps all of this Court's efforts since *International Shoe*, including those of today's majority, might be understood as seeking to recreate in new terms a jurisprudence about corporate jurisdiction that was developing before this Court's muscular interventions in the early 20th century. Perhaps it was, is, and in the end always will be about trying to assess fairly a corporate defendant's presence or consent. *International Shoe* may have sought to move past those questions. But maybe all we have done since is struggle for new words to express the old ideas. Perhaps, too, none of this should come as a surprise. New technologies and new schemes to evade the process server will always be with us. But if our concern is with "traditional notions of fair play and substantial justice," not just our personal and idiosyncratic impressions of those things, perhaps we will always wind up asking variations of the same questions.[5]

None of this is to cast doubt on the outcome of these cases. The parties have not pointed to anything in the Constitution's original meaning or its history that might allow Ford to evade answering the plaintiffs' claims in Montana or Minnesota courts. No one seriously questions that the company, seeking to do business, entered those jurisdictions through the front door. And I cannot see why, when faced with the process server, it should be allowed to escape out the back. The real struggle here isn't with settling on the right outcome in these cases, but with making sense of our personal jurisdiction jurisprudence and *International Shoe*'s increasingly doubtful dichotomy. On those scores, I readily admit that I finish these cases with even more questions than I had at the start. Hopefully, future litigants and lower courts will help us face these tangles and sort out a responsible way to address the challenges posed by our changing economy in light of the Constitution's text and the lessons of history.

[5] The majority worries that the thoughts expressed here threaten to "transfigure our specific jurisdiction standard as applied to corporations" and "return [us] to the mid-19th century." But it has become a tired trope to criticize any reference to the Constitution's original meaning as (somehow) both radical and antiquated. Seeking to understand the Constitution's original meaning is part of our job. What's the majority's real worry anyway—that corporations might lose special protections? The Constitution has always allowed suits against individuals on any issue in any State where they set foot. Yet the majority seems to recoil at even entertaining the possibility the Constitution might tolerate similar results for "nationwide corporation[s]," whose "business is everywhere."

Notes & Questions

1. In *Bristol-Myers*, out-of-state plaintiffs sued an out-of-state defendant alleging negligence in connection with products made outside the forum.

All that is identical in *Ford* as well. Arguably, the only difference is that, in *Ford*, the plaintiffs sued in their home forum. Why, then, do the cases come out in opposite ways (note that even Justice Alito, who authored the Court's opinion in *Bristol-Myers*, agreed that personal jurisdiction was proper in *Ford*)?

2. One possible answer to question 1 is that the plaintiffs' choice in *Ford* to sue in their home forum made all the difference. But consider that the plaintiffs' choice to take their Ford cars from the state where they were purchased to the eventual forum for suit was arguably a unilateral choice of a third party, as in *Hanson* and especially *World-Wide Volkswagen*. Does *Ford* mean that the requirements of personal jurisdiction are easier to satisfy when the plaintiff sues in her home forum? If that's the answer, how do you explain *Walden*, which rejected a similar argument?

11.7. Personal Jurisdiction by Consent

Personal jurisdiction is waivable, and defendants are free to consent to jurisdiction before a court that would otherwise not have power over them. (This is why, in many of the cases you have read, defendants entered "special appearances" for the sole purpose of contesting personal jurisdiction.) The next case explores what type of consent is sufficient to waive an objection to a court's personal jurisdiction. To what extent does the prevalence of form contracts render the niceties of personal jurisdiction doctrine irrelevant in the modern economy?

Carnival Cruise Lines, Inc. v. Shute

499 U.S. 585 (1991)

BLACKMUN, J., delivered the opinion of the Court.

In this admiralty case we primarily consider whether the United States Court of Appeals for the Ninth Circuit correctly refused to enforce a forum-selection clause contained in tickets issued by petitioner Carnival Cruise Lines, Inc., to respondents Eulala and Russel Shute.

I

The Shutes, through an Arlington, Wash., travel agent, purchased passage for a 7-day cruise on petitioner's ship, the Tropicale. Respondents paid the fare to the agent who forwarded the payment to petitioner's headquarters in Miami, Fla. Petitioner then prepared the tickets and sent them to respondents in the State of Washington. The face of each ticket, at its left-hand lower corner, contained this admonition: "SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES IMPORTANT! PLEASE READ CONTRACT—ON LAST PAGES 1, 2, 3." The following appeared on "contract page 1" of each ticket:

TERMS AND CONDITIONS OF PASSAGE CONTRACT TICKET

3. (a) The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract Ticket. …

4. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country.

The last quoted paragraph is the forum-selection clause at issue.

II

Respondents boarded the Tropicale in Los Angeles, Cal. The ship sailed to Puerto Vallarta, Mexico, and then returned to Los Angeles. While the ship was in international waters off the Mexican coast, respondent Eulala Shute was injured when she slipped on a deck mat during a guided tour of the ship's galley. Respondents filed suit against petitioner in the United States District Court for the Western District of Washington, claiming that Mrs. Shute's injuries had been caused by the negligence of Carnival Cruise Lines and its employees.

Petitioner moved for summary judgment, contending that the forum clause in respondents' tickets required the Shutes to bring their suit against petitioner in a court in the State of Florida. […]

III

We begin by noting the boundaries of our inquiry. First, this is a case in admiralty, and federal law governs the enforceability of the forum-selection clause we scrutinize. Second, we do not address the question whether respondents had sufficient notice of the forum clause before entering the contract for passage. Respondents essentially have conceded that they had notice of the forum-selection provision.

IV

A

[…]

[R]espondents' passage contract was purely routine and doubtless nearly identical to every commercial passage contract issued by petitioner and most other cruise lines. In this context, it would be entirely unreasonable for us to assume that respondents—or any other cruise passenger—would negotiate with petitioner the terms of a forum-selection clause in an ordinary commercial cruise ticket. Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line. […]

[…] Including a reasonable forum clause in a form contract of this kind well may be permissible for several reasons: First, a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora. Additionally, a clause establishing ex ante the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions. Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.

[…]

It bears emphasis that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness. In this case, there is no indication that petitioner set Florida as the forum in which disputes were to be resolved as a means of discouraging cruise passengers from pursuing legitimate claims. Any suggestion of such a bad-faith motive is belied by two facts: Petitioner has its principal place of business in Florida, and many of its cruises depart from and return to Florida ports. Similarly, there is no evidence that petitioner obtained respondents' accession to the forum clause by fraud or overreaching. Finally, respondents have conceded that they were given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity. In the case before us, therefore, we conclude that the Court of Appeals erred in refusing to enforce the forum-selection clause.

[…]

STEVENS, J., with whom MARSHALL, J., joins, dissenting.

The Court prefaces its legal analysis with a factual statement that implies that a purchaser of a Carnival Cruise Lines passenger ticket is fully and fairly notified about the existence of the choice of forum clause in the fine print on the back of the ticket. Even if this implication were accurate, I would disagree with the Court's analysis. But, given the Court's preface, I begin my dissent by noting that only the most meticulous passenger is likely to become aware of the forum-selection provision. I have therefore appended to this opinion a facsimile of the relevant text, using the type size that actually appears in the ticket itself. A careful reader will find the forum-selection clause in the 8th of the 25 numbered paragraphs.

[…]

Forum-selection clauses in passenger tickets involve the intersection of two strands of traditional contract law that qualify the general rule that courts will enforce the terms of a contract as written. Pursuant to the first strand, courts

traditionally have reviewed with heightened scrutiny the terms of contracts of adhesion, form contracts offered on a take-or-leave basis by a party with stronger bargaining power to a party with weaker power. Some commentators have questioned whether contracts of adhesion can justifiably be enforced at all under traditional contract theory because the adhering party generally enters into them without manifesting knowing and voluntary consent to all their terms.

[…]

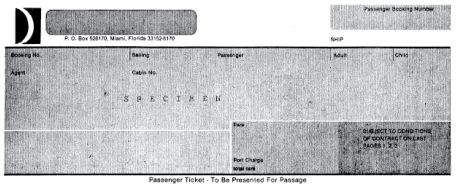
The second doctrinal principle implicated by forum-selection clauses is the traditional rule that "contractual provisions, which seek to limit the place or court in which an action may … be brought, are invalid as contrary to public policy." Although adherence to this general rule has declined in recent years, […] the prevailing rule is still that forum-selection clauses are not enforceable if they were not freely bargained for, create additional expense for one party, or deny one party a remedy. A forum-selection clause in a standardized passenger ticket would clearly have been unenforceable under the common law […] and, in my opinion, remains unenforceable under the prevailing rule today.

[…]

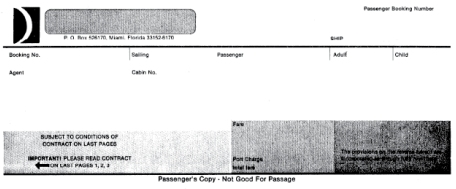
I respectfully dissent.

Figure 11.1.: Appendix to Justice Stevens's dissent

(a) Pages 1–3



Passenger Ticket - To Be Presented For Passage



Passenger's Copy - Not Good For Passage

(b) Pages 3–6

CONTRACT PAGE 1

CONTRACT PAGE 2

PASSENGER TICKET

Notes & Questions

1. *Carnival Cruise* stands for the proposition that consent waives any personal jurisdiction argument, and that such consent can be found according to ordinary contract principles. In other words, the bar for finding consent to jurisdiction is low.

2. Recall Justice Kennedy's opinion in *McIntyre*, which sought to reorient personal jurisdiction around the concept of consent. Even if that effort was not successful, doesn't *Carnival Cruise* suggest another way in which he was correct?

3. If consent is easily found, can a state condition permission to do business in the state on a corporation's consent to personal jurisdiction there? The next case takes up that question—and answers it in a way that may signal dramatic changes in this area in the years to come.

Mallory v. Norfolk Southern Railway Co.

600 U.S. 122 (2023)

Justice GORSUCH announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and III-B, and an opinion with respect to Parts II, III-A, and IV, in which Justice THOMAS, Justice SOTOMAYOR, and Justice JACKSON join.

Imagine a lawsuit based on recent events. A few months ago, a Norfolk Southern train derailed in Ohio near the Pennsylvania border. Its cargo? Hazardous chemicals. Some poured into a nearby creek; some burst into flames. In the aftermath, many residents reported unusual symptoms. Suppose an Ohio resident sued the train conductor seeking compensation for an illness attributed to the accident. Suppose, too, that the plaintiff served his complaint on the conductor across the border in Pennsylvania. Everyone before us agrees a Pennsylvania court could hear that lawsuit consistent with the Due Process Clause of the Fourteenth Amendment. The court could do so even if the conductor was a Virginia resident who just happened to be passing through Pennsylvania when the process server caught up with him.

Now, change the hypothetical slightly. Imagine the same Ohio resident brought the same suit in the same Pennsylvania state court, but this time against Norfolk Southern. Assume, too, the company has filed paperwork consenting to appear in Pennsylvania courts as a condition of registering to do business in the Commonwealth. Could a Pennsylvania court hear that case too? You might think so. But today, Norfolk Southern argues that the Due Process Clause entitles it to a more favorable rule, one shielding it from suits even its employees must answer. We reject the company's argument. Nothing in the Due Process Clause requires such an incongruous result.

I

Robert Mallory worked for Norfolk Southern as a freight-car mechanic for nearly 20 years, first in Ohio, then in Virginia. During his time with the company, Mr. Mallory contends, he was responsible for spraying boxcar pipes with asbestos and handling chemicals in the railroad's paint shop. He also demolished car interiors that, he alleges, contained carcinogens.

After Mr. Mallory left the company, he moved to Pennsylvania for a period before returning to Virginia. Along the way, he was diagnosed with cancer. Attributing his illness to his work for Norfolk Southern, Mr. Mallory hired Pennsylvania lawyers and sued his former employer in Pennsylvania state court under the Federal Employers' Liability Act. That law creates a workers' compensation scheme permitting railroad employees to recover damages for their employers' negligence.

Norfolk Southern resisted Mr. Mallory's suit on constitutional grounds. By the time he filed his complaint, the company observed, Mr. Mallory resided in Virginia. His complaint alleged that he was exposed to carcinogens in Ohio and Virginia. Meanwhile, the company itself was incorporated in Virginia and had its headquarters there too. On these facts, Norfolk Southern submitted, any effort by a Pennsylvania court to exercise personal jurisdiction over it would offend the Due Process Clause of the Fourteenth Amendment.

Mr. Mallory saw things differently. He noted that Norfolk Southern manages over 2,000 miles of track, operates 11 rail yards, and runs 3 locomotive repair shops in Pennsylvania. He also pointed out that Norfolk Southern has registered to do business in Pennsylvania in light of its " 'regular, systematic, [and] extensive' " operations there. That is significant, Mr. Mallory argued, because Pennsylvania requires out-of-state companies that register to do business in the Commonwealth to agree to appear in its courts on "any cause of action" against them. 42 Pa. Cons. Stat. § 5301(a)(2)(i), (b) (2019). By complying with this statutory scheme, Mr. Mallory contended, Norfolk Southern had consented to suit in Pennsylvania on claims just like his.

Ultimately, the Pennsylvania Supreme Court sided with Norfolk Southern. Yes, Mr. Mallory correctly read Pennsylvania law. It requires an out-of-state firm to answer any suits against it in exchange for status as a registered foreign corporation and the benefits that entails. But, no, the court held, Mr. Mallory could not invoke that law because it violates the Due Process Clause. In reaching this conclusion, the Pennsylvania Supreme Court acknowledged its disagreement with the Georgia Supreme Court, which had recently rejected a similar due process argument from a corporate defendant.

In light of this split of authority, we agreed to hear this case and decide whether the Due Process Clause of the Fourteenth Amendment prohibits a State from requiring an out-of-state corporation to consent to personal jurisdiction to do business there.

II

The question before us is not a new one. In truth, it is a very old question—and one this Court resolved in *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold*

Issue Mining & Milling Co., 243 U.S. 93 (1917). There, the Court unanimously held that laws like Pennsylvania's comport with the Due Process Clause. Some background helps explain why the Court reached the result it did.

As the use of the corporate form proliferated in the 19th century, the question arose how to adapt the traditional rule about [tag jurisdiction] for individuals to artificial persons created by law. Unsurprisingly, corporations did not relish the prospect of being haled into court for any claim anywhere they conducted business. "No one, after all, has ever liked greeting the process server." *Ford Motor Co. v. Montana Eighth Judicial Dist. Court* (Gorsuch, J., concurring in judgment). Corporations chartered in one State sought the right to send their sales agents and products freely into other States. At the same time, when confronted with lawsuits in those other States, some firms sought to hide behind their foreign character and deny their presence to defeat the court's jurisdiction.

Lawmakers across the country soon responded to these stratagems. Relevant here, both before and after the Fourteenth Amendment's ratification, they adopted statutes requiring out-of-state corporations to consent to in-state suits in exchange for the rights to exploit the local market and to receive the full range of benefits enjoyed by in-state corporations. These statutes varied. In some States, out-of-state corporate defendants were required to agree to answer suits brought by in-state plaintiffs. In other States, corporations were required to consent to suit if the plaintiff's cause of action arose within the State, even if the plaintiff happened to reside elsewhere. Still other States (and the federal government) omitted both of these limitations. They required all out-of-state corporations that registered to do business in the forum to agree to defend themselves there against any manner of suit. Yet another group of States applied this all-purpose-jurisdiction rule to a subset of corporate defendants, like railroads and insurance companies.

III

A

Unsurprisingly, some corporations challenged statutes like these on various grounds, due process included. And, ultimately, one of these disputes reached this Court in *Pennsylvania Fire*.

[…]

[In *Pennsylvania Fire*, a Missouri statute required foreign corporations to consent to personal jurisdiction of the state's courts in order to register to do business in the state. Sued for events that occurred outside Missouri, the defendant argued to the Supreme Court that this consent-by-registration scheme violated its due process rights.] Writing for a unanimous Court, Justice Holmes had little trouble dispatching the company's due process argument. Under this Court's precedents, there was "no doubt" Pennsylvania Fire could be sued in Missouri by an out-of-state plaintiff on an out-of-state contract because it had

agreed to accept service of process in Missouri on any suit as a condition of doing business there. Indeed, the Court thought the matter so settled by existing law that the case "hardly" presented an "open" question.

[…]

[…] Other leading judges, including Learned Hand and Benjamin Cardozo, had reached similar conclusions in similar cases in the years leading up to *Pennsylvania Fire*. In the years following *Pennsylvania Fire*, too, this Court reaffirmed its holding as often as the issue arose.

B

Pennsylvania Fire controls this case. Much like the Missouri law at issue there, the Pennsylvania law at issue here provides that an out-of-state corporation "may not do business in this Commonwealth until it registers with" the Department of State. 15 Pa. Cons. Stat. § 411(a). As part of the registration process, a corporation must identify an "office" it will "continuously maintain" in the Commonwealth. § 411(f); *see also* § 412(a)(5). Upon completing these requirements, the corporation "shall enjoy the same rights and privileges as a domestic entity and shall be subject to the same liabilities, restrictions, duties and penalties … imposed on domestic entities." § 402(d). Among other things, Pennsylvania law is explicit that "qualification as a foreign corporation" shall permit state courts to "exercise general personal jurisdiction" over a registered foreign corporation, just as they can over domestic corporations. 42 Pa. Cons. Stat. § 5301(a)(2)(i).

Norfolk Southern has complied with this law for many years. In 1998, the company registered to do business in Pennsylvania. Acting through its Corporate Secretary as a "duly authorized officer," the company completed an "Application for Certificate of Authority" from the Commonwealth "[i]n compliance with" state law. As part of that process, the company named a "Commercial Registered Office Provider" in Philadelphia County, agreeing that this was where it "shall be deemed … located." The Secretary of the Commonwealth approved the application, conferring on Norfolk Southern both the benefits and burdens shared by domestic corporations—including amenability to suit in state court on any claim. Since 1998, Norfolk Southern has regularly updated its information on file with the Secretary. In 2009, for example, the company advised that it had changed its Registered Office Provider and would now be deemed located in Dauphin County. All told, then, Norfolk Southern has agreed to be found in Pennsylvania and answer any suit there for more than 20 years.

Pennsylvania Fire held that suits premised on these grounds do not deny a defendant due process of law. Even Norfolk Southern does not seriously dispute that much. It concedes that it registered to do business in Pennsylvania, that it established an office there to receive service of process, and that in doing so it understood it would be amenable to suit on any claim. Of course, Mr. Mallory no longer lives in Pennsylvania and his cause of action did not accrue there. But none of that makes any more difference than [it did in *Pennsylvania Fire*.] To decide this case, we need not speculate whether any other statutory scheme and

set of facts would suffice to establish consent to suit. It is enough to acknowledge that the state law and facts before us fall squarely within *Pennsylvania Fire*'s rule.

[…]

IV

Now before us, Norfolk Southern candidly asks us to do what the Pennsylvania Supreme Court could not—overrule *Pennsylvania Fire*. To smooth the way, Norfolk Southern suggests that this Court's decision in *International Shoe Co. v. Washington* has already done much of the hard work for us. That decision, the company insists, seriously undermined *Pennsylvania Fire*'s foundations. We disagree. The two precedents sit comfortably side by side.

A

Start with how Norfolk Southern sees things. On the company's telling, echoed by the dissent, *International Shoe* held that the Due Process Clause tolerates two (and only two) types of personal jurisdiction over a corporate defendant. First, "specific jurisdiction" permits suits that "'arise out of or relate to"' a corporate defendant's activities in the forum State. Second, "general jurisdiction" allows all kinds of suits against a corporation, but only in States where the corporation is incorporated or has its "principal place of business." After *International Shoe*, Norfolk Southern insists, no other bases for personal jurisdiction over a corporate defendant are permissible.

But if this account might seem a plausible summary of some of our *International Shoe* jurisprudence, it oversimplifies matters. Here is what really happened in *International Shoe*. The State of Washington sued a corporate defendant in state court for claims based on its in-state activities even though the defendant had not registered to do business in Washington and had not agreed to be present and accept service of process there. Despite this, the Court held that the suit against the company comported with due process. In doing so, the Court reasoned that the Fourteenth Amendment "permit[s]" suits against a corporate defendant that has not agreed to be "presen[t] within the territorial jurisdiction of a court," so long as "the quality and nature of the [company's] activity" in the State "make it reasonable and just" to maintain suit there. Put simply, even without agreeing to be present, the out-of-state corporation was still amenable to suit in Washington consistent with "'fair play and substantial justice'"—terms the Court borrowed from Justice Holmes, the author of *Pennsylvania Fire*.

In reality, then, all *International Shoe* did was stake out an additional road to jurisdiction over out-of-state corporations. *Pennsylvania Fire* held that an out-of-state corporation that has consented to in-state suits in order to do business in the forum is susceptible to suit there. *International Shoe* held that an out-of-state corporation that has not consented to in-state suits may also be susceptible to claims in the forum State based on "the quality and nature of [its] activity" in the forum. Consistent with all this, our precedents applying *International Shoe* have long spoken of the decision as asking whether a state court may exercise

jurisdiction over a corporate defendant " 'that *has not consented* to suit in the forum.' " *Goodyear* (emphasis added); *see also Daimler*. Our precedents have recognized, too, that "express or implied consent" can continue to ground personal jurisdiction—and consent may be manifested in various ways by word or deed.

[…]

Given all this, it is no wonder that we have already turned aside arguments very much like Norfolk Southern's. In *Burnham*, the defendant contended that *International Shoe* implicitly overruled the traditional tag rule holding that individuals physically served in a State are subject to suit there for claims of any kind. This Court rejected that submission. Instead, as Justice Scalia explained, *International Shoe* simply provided a "novel" way to secure personal jurisdiction that did nothing to displace other "traditional ones." What held true there must hold true here. Indeed, seven years after deciding *International Shoe*, the Court cited *Pennsylvania Fire* approvingly. *Perkins v. Benguet Consol. Mining Co.*

[…]

Next, Norfolk Southern appeals to the spirit of our age. After *International Shoe*, it says, the "primary concern" of the personal jurisdiction analysis is "[t]reating defendants fairly." And on the company's telling, it would be "unfair" to allow Mr. Mallory's suit to proceed in Pennsylvania because doing so would risk unleashing " 'local prejudice' " against a company that is "not 'local' in the eyes of the community."

But if fairness is what Norfolk Southern seeks, pause for a moment to measure this suit against that standard. When Mr. Mallory brought his claim in 2017, Norfolk Southern had registered to do business in Pennsylvania for many years. It had established an office for receiving service of process. It had done so pursuant to a statute that gave the company the right to do business in-state in return for agreeing to answer any suit against it. And the company had taken full advantage of its opportunity to do business in the Commonwealth […].

All told, when Mr. Mallory sued, Norfolk Southern employed nearly 5,000 people in Pennsylvania. It maintained more than 2,400 miles of track across the Commonwealth. Its 70-acre locomotive shop there was the largest in North America. Contrary to what it says in its brief here, the company even proclaimed itself a proud part of "the Pennsylvania Community." By 2020, too, Norfolk Southern managed more miles of track in Pennsylvania than in any other State. And it employed more people in Pennsylvania than it did in Virginia, where its headquarters was located. Nor are we conjuring these statistics out of thin air. The company *itself* highlighted its "intrastate activities" in the proceedings below. […] Given all this, on what plausible account could *International Shoe*'s concerns with "fair play and substantial justice" require a Pennsylvania court to turn aside Mr. Mallory's suit?

Perhaps sensing its arguments from fairness meet a dead end, Norfolk Southern ultimately heads in another direction altogether. It suggests the Due Pro-

cess Clause separately prohibits one State from infringing on the sovereignty of another State through exorbitant claims of personal jurisdiction. And, in candor, the company is half right. Some of our personal jurisdiction cases have discussed the federalism implications of one State's assertion of jurisdiction over the corporate residents of another. *See, e.g., Bristol-Myers Squibb*. But that neglects an important part of the story. To date, our personal jurisdiction cases have never found a Due Process Clause problem sounding in federalism when an out-of-state defendant submits to suit in the forum State. After all, personal jurisdiction is a personal defense that may be waived or forfeited.

That leaves Norfolk Southern one final stand. It argues that it has not really submitted to proceedings in Pennsylvania. The company does not dispute that it has filed paperwork with Pennsylvania seeking the right to do business there. It does not dispute that it has established an office in the Commonwealth to receive service of process on any claim. It does not dispute that it appreciated the jurisdictional consequences attending these actions and proceeded anyway, presumably because it thought the benefits outweighed the costs. But, in the name of the Due Process Clause, Norfolk Southern insists we should dismiss all that as a raft of meaningless formalities.

Taken seriously, this argument would have us undo not just *Pennsylvania Fire* but a legion of precedents that attach jurisdictional consequences to what some might dismiss as mere formalities. Consider some examples we have already encountered. In a typical general jurisdiction case under *International Shoe*, a company is subject to suit on any claim in a forum State only because of its decision to file a piece of paper there (a certificate of incorporation). The firm is amenable to suit even if all of its operations are located elsewhere and even if its certificate only sits collecting dust on an office shelf for years thereafter. Then there is the tag rule. The invisible state line might seem a trivial thing. But when an individual takes one step off a plane after flying from New Jersey to California, the jurisdictional consequences are immediate and serious. *See Burnham*.

[…]

Not every case poses a new question. This case poses a very old question indeed —one this Court resolved more than a century ago in *Pennsylvania Fire*. Because that decision remains the law, the judgment of the Supreme Court of Pennsylvania is vacated, and the case is remanded.

It is so ordered.

[The concurring opinion of Jackson, J., is omitted.]

Justice ALITO, concurring in part and concurring in the judgment.

The sole question before us is whether the Due Process Clause of the Fourteenth Amendment is violated when a large out-of-state corporation with substantial operations in a State complies with a registration requirement that conditions the right to do business in that State on the registrant's submission to personal jurisdiction in any suits that are brought there. I agree with the Court that the answer to this question is no. Assuming that the Constitution allows a State

to impose such a registration requirement, I see no reason to conclude that such suits violate the corporation's right to " 'fair play and substantial justice.' " *International Shoe Co. v. Washington*.

I am not convinced, however, that the Constitution permits a State to impose such a submission-to-jurisdiction requirement. A State's assertion of jurisdiction over lawsuits with no real connection to the State may violate fundamental principles that are protected by one or more constitutional provisions or by the very structure of the federal system that the Constitution created. At this point in the development of our constitutional case law, the most appropriate home for these principles is the so-called dormant Commerce Clause. Norfolk Southern appears to have asserted a Commerce Clause claim below, but the Pennsylvania Supreme Court did not address it. Presumably, Norfolk Southern can renew the challenge on remand. I therefore agree that we should vacate the Pennsylvania Supreme Court's judgment and remand the case for further proceedings.

Justice BARRETT, with whom THE CHIEF JUSTICE, Justice KAGAN, and Justice Kavanaugh join, dissenting.

For 75 years, we have held that the Due Process Clause does not allow state courts to assert general jurisdiction over foreign defendants merely because they do business in the State. *International Shoe Co. v. Washington*. Pennsylvania nevertheless claims general jurisdiction over all corporations that lawfully do business within its borders. As the Commonwealth's own courts recognized, that flies in the face of our precedent. *See Daimler*.

The Court finds a way around this settled rule. All a State must do is compel a corporation to register to conduct business there (as every State does) and enact a law making registration sufficient for suit on any cause (as every State could do). Then, every company doing business in the State is subject to general jurisdiction based on implied "consent"—not contacts. That includes suits, like this one, with no connection whatsoever to the forum.

Such an approach does not formally overrule our traditional contacts-based approach to jurisdiction, but it might as well. By relabeling their long-arm statutes, States may now manufacture "consent" to personal jurisdiction. Because I would not permit state governments to circumvent constitutional limits so easily, I respectfully dissent.

[…]

Notes & Questions

1. Just when one might have thought *Pennoyer* was dead and buried, it appeared to rise again in *Mallory*. Justice Gorsuch's opinion relied heavily not just on *Pennsylvania Fire* but also *Pennoyer* and *Burnham*. Together with his separate opinion in *Ford*, does this point to a comeback for *Pennoyer* in its decades-long battle with *International Shoe*?

2. Not so fast. Justice Alito, who provided the necessary fifth vote to hold that personal jurisdiction over Norfolk Southern was proper, did not join the key parts of Justice Gorsuch's opinion discussing *Pennoyer* and broader principles of personal jurisdiction. Instead, he joined only so much of Justice Gorsuch's opinion as relied on the existing precedent of *Pennsylvania Fire*. And he introduced a separate reason to doubt that Pennsylvania could exercise personal jurisdiction over Norfolk Southern: the so-called "dormant commerce clause," which you may learn more about in a class in constitutional law.

3. Meanwhile, Justice Barrett, writing in dissent on behalf of four justices, objected that allowing consent by registration to defeat a personal jurisdiction argument undermines the Court's key general jurisdiction precedents: *Goodyear* and *Daimler*. Isn't she right about that? So far, no states have successfully enacted consent-by-registration statutes like the one in *Mallory*. But some have tried, and Justice Barrett's predictions may yet come to pass.

4. At this point, first-year law students may rightly scream bloody murder. Throughout this chapter, time and again, we have seen the Supreme Court vacillate between alternate approaches to personal jurisdiction doctrine, often failing to form a majority opinion in the process. Why do you think personal jurisdiction doctrine has proven so divisive? Why has it eluded clarification for so long? And where will it go in the future?

11.8. Personal Jurisdiction of Federal Courts

As you know, Federal Rule of Civil Procedure 4 governs service of process. But what may have escaped your notice until now is that it also contains the long-arm statute governing federal courts. In particular, Rule 4(k) defines the "territorial limits of effective service." Read Rule 4(k) carefully.

Note that Rule 4(k) limits the personal jurisdiction of a federal district court in the typical case to the same extent as "a court of general jurisdiction in the state where the district court is located." This limitation is not constitutionally compelled. After all, unlike state courts, federal courts are organs of a *national* sovereign; for that reason, the contacts relevant to their personal jurisdiction are those that the defendant has with the *entire nation*. The principal exception to Rule 4(k)'s equation of the personal jurisdiction of state and federal courts is "when authorized by a federal statute." When do you think it would be appropriate to authorize federal courts to exercise nationwide personal jurisdiction? Consider the following provocative proposal, made by one member of the Advisory Committee on Civil Rules.

Letter from Prof. A. Benjamin Spencer to Hon. John D. Bates, Chair, Advisory Committee on Civil Rules

Dear Judge Bates: March 9, 2018

I hope all is well. In 2010, I penned a brief article proposing that Rule 4(k)(1)(A) be amended to permit federal courts to exercise personal jurisdiction to the constitutional limit— which would require a defendant to have minimum contacts with the United States rather than with any particular state—leaving to the federal venue statutes the task of ensuring that cases are litigated in districts that are connected with the litigants and/or the claims involved in the action. I write now to request that you put these views before the Committee.

[…]

In my view, the [best] approach would be to eliminate entirely the artificial tether of a federal court's territorial jurisdiction to that of their respective host states. I would amend Rule 4(k) as follows:

(k) Territorial Limits of Effective Service.

[~~(1) In general.~~] Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: **when exercising jurisdiction is consistent with the United States Constitution and laws**.

~~(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;~~

~~(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or~~

~~(C) when authorized by a federal statute.~~

~~(2) Federal Claim Outside State-Court Jurisdiction. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:~~

~~(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and~~

~~(B) exercising jurisdiction is consistent with the United States Constitution and laws.~~

In the absence of any linkage between personal jurisdiction in the federal district courts and the scope of such jurisdiction in their respective hosts' state courts, the determination of which among the several district courts would hear a case would be based on an application of the federal statutes governing venue. *See, e.g.*, 28 U.S.C. § 1391. In the ordinary case, that would limit a plaintiff's choice to (1) a defendant's district within the state in which all defendants reside, (2) a district in which a significant portion of the events or omissions giving rise to the action occurred, (3) the district in which property involved in the action is located, or (4) districts in which defendants could be subjected

to personal jurisdiction if none of the other possibilities were available. Ultimately, then, the district chosen would be one that had some connection to the situs of the events giving rise to the dispute, if not to the location of one or more of the defendants.

[…]

Thank you for your consideration of these views. I look forward to discussing them with you and other members of the Committee.

Best regards, A. Benjamin Spencer Professor of Law

12. Subject-Matter Jurisdiction

12.1. Federal Question

Subject-matter jurisdiction refers to the power of a court to entertain certain types of disputes. Compare that with personal jurisdiction, which regulates when courts have power over certain parties. This difference gives rise to one of the most important distinctions between subject-matter and personal jurisdiction: the latter, as a personal right held by the defendant, can be waived. Subject-matter jurisdiction, by contrast, is a hard limit on court power, and so it cannot be consented to, waived, or ignored. Indeed, even when the parties do not raise the issue of subject-matter jurisdiction, courts have an independent obligation to investigate it for themselves.

Subject-matter jurisdiction does, however, share several key features with personal jurisdiction: both are threshold issues that must be addressed before the merits of a case, and defects in either type of jurisdiction can render an otherwise-final judgment unenforceable in a subsequent action. Similarly, like personal jurisdiction, subject-matter jurisdiction requires both a statutory and a constitutional grounding.

We will begin our study of subject-matter jurisdiction with one of the chief categories of cases federal courts are empowered to hear: those "arising under" federal law. The next case lays out the constitutional limits on this jurisdictional grant, which derive from Article III, § 2 of the Constitution. That provision states: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

Osborn v. Bank of the United States

Mr. Chief Justice MARSHALL delivered the opinion of the Court: 22 U.S. (9 Wheat.) 738 (1824)

[…]

[The Bank of the United States sued Ohio tax officials in federal court seeking to enjoin the state from collecting tax from the Bank. The lower court granted a temporary injunction. Ohio ignored the injunction and seized the tax allegedly owed by force. The federal court ordered the state officials to return the money. The state officials appealed on the grounds that the federal court lacked subject-matter jurisdiction. The statute creating the Bank authorized it "to sue and be

sued … in any Circuit Court of the United States." A key question on appeal was whether this statutory grant of subject-matter jurisdiction exceeded the jurisdictional limits of Article III, § 2 of the Constitution. In particular, the Court analyzed whether a suit in which the Bank is a party automatically "aris[es] under" federal law.]

When [the] Bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this Court particularly, but into any Court? This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The right to sue, if decided once, is decided for ever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue, cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.

The appellants say, that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is compelled, in every case, to show its validity. The case arises emphatically under the law. The act of Congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in the case, is its origin, is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by, that charter.

[…]

Notes & Questions

1. *Osborn* held that the Article III test for federal question jurisdiction is satisfied whenever federal law forms an "original ingredient" in the cause of action. This test does not require that the federal issue be litigated or even disputed. This is a very broad test.

2. Before the Civil War, Congress did not often exercise its power to give federal courts subject-matter jurisdiction over federal questions. But in the late 19th century, such statutory grants proliferated. Today, the key statute is 28 U.S.C. § 1331, which provides that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Note that the language of § 1331 is quite similar to the relevant language of Article III, § 2. Yet as the following cases show, courts have interpreted the statutory grant under § 1331 much more narrowly than the broad interpretation the Osborn Court gave to Article III.

Louisville & Nashville Railroad v. Mottley

MOODY, J., delivered the opinion of the Court. 211 U.S. 149 (1908)

[Erasmus and Annie Mottley were injured in a railroad accident. They sued the railroad, which agreed to settle the suit by giving the Mottleys free lifetime travel passes. Decades later, out of concern that free passes for railroad travel were a vector for political bribery and corruption, Congress banned them. That prompted the railroad to tell the Mottleys that they could not use the passes any longer. The Mottleys sued for breach of contract in federal court and requested specific performance as a remedy. The lower court denied the motion to dismiss, and the railroad appealed.]

Two questions of law were raised by the demurrer to the bill, were brought here by appeal, and have been argued before us. They are, first, whether that part of the act of Congress of June 29, 1906 (34 Stat. 584), which forbids the giving of free passes or the collection of any different compensation for transportation of passengers than that specified in the tariff filed, makes it unlawful to perform a contract for transportation of persons, who in good faith, before the passage of the act, had accepted such contract in satisfaction of a valid cause of action against the railroad; and, second, whether the statute, if it should be construed to render such a contract unlawful, is in violation of the Fifth Amendment of the Constitution of the United States. We do not deem it necessary, however, to consider either of these questions, because, in our opinion, the court below was without jurisdiction of the cause. Neither party has questioned that jurisdiction, but it is the duty of this court to see to it that the jurisdiction of the Circuit Court, which is defined and limited by statute, is not exceeded. This duty we have frequently performed of our own motion.

There was no diversity of citizenship and it is not and cannot be suggested that there was any ground of jurisdiction, except that the case was a "suit … arising under the Constitution and laws of the United States." [The Court cited the then-current version of the "arising under" jurisdiction statute.] It is the settled interpretation of these words, as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff

alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution. In *Tennessee v. Union & Planters' Bank*, 152 U.S. 454, the plaintiff, the State of Tennessee, brought suit in the Circuit Court of the United States to recover from the defendant certain taxes alleged to be due under the laws of the State. The plaintiff alleged that the defendant claimed an immunity from the taxation by virtue of its charter, and that therefore the tax was void, because in violation of the provision of the Constitution of the United States, which forbids any State from passing a law impairing the obligation of contracts. The cause was held to be beyond the jurisdiction of the Circuit Court, the court saying, by Mr. Justice Gray, "a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws." Again, in *Boston & Montana Consolidated Copper & Silver Mining Company v. Montana Ore Purchasing Company*, 188 U.S. 632, the […] cause was held to be beyond the jurisdiction of the Circuit Court, the court saying, by Mr. Justice Peckham:

> It would be wholly unnecessary and improper in order to prove complainant's cause of action to go into any matters of defence which the defendants might possibly set up and then attempt to reply to such defence, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case. To allege such defence and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defence is inconsistent with any known rule of pleading so far as we are aware, and is improper.
>
> The rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of its cause of action, leaving to the defendant to set up in his answer what his defence is and, if anything more than a denial of complainant's cause of action, imposing upon the defendant the burden of proving such defence.
>
> Conforming itself to that rule the complainant would not, in the assertion or proof of its cause of action, bring up a single Federal question. The presentation of its cause of action would not show that it was one arising under the Constitution or laws of the United States.
>
> The only way in which it might be claimed that a Federal question was presented would be in the complainant's statement of what the defence of defendants would be and complainant's answer to such defence. Under these circumstances the case is brought within the rule laid down in *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 [holding that such cases do not arise under federal law].

[…] The application of this rule to the case at bar is decisive against the jurisdiction of the circuit court.

It is ordered that the judgment be reversed and the case remitted to the circuit court with instructions to dismiss for want of jurisdiction.

Notes & Questions

1. *Mottley* held that, in determining whether a suit arises under federal law for purposes of § 1331, courts must look only at the plaintiff's complaint, and not any defenses that the defendant might raise in response. This rule, known as the "well-pleaded complaint rule," applies only under § 1331 and not under Article III.
2. A corollary, known as the "artful pleading" rule, says that plaintiffs may not plead the denial of an anticipated federal defense and thereby render their claim one that arises under federal law. Instead, courts must look to the elements of the plaintiff's cause of action to determine whether it raises a federal question.
3. Does it make sense to ignore likely federal defenses in determining whether a case "arises under" federal law? What theory might support allowing federal questions embedded in a complaint to be filed in federal court, but relegating significant federal questions raised only in defense to state court?
4. Does it make sense to read the language of § 1331 so differently from that of Art. III, given that they are so textually similar? Even if not, do you think Congress implicitly blessed the divergence between statute and constitution by refusing to expand federal-question jurisdiction to encompass federal defenses, despite many other amendments to § 1331 and its predecessors over the years?
5. While *Mottley* rules out federal question jurisdiction based only on a federal defense, it leaves open the question of when a plaintiff's complaint "arises under" federal law. Does it require that the plaintiff's cause of action be a creation of federal law, or can the test be satisfied if the plaintiff pleads a state-law claim that necessarily involves federal law? The following cases seek to work out the answer to this question.

American Well Works Co. v. Layne & Bowler Co.

Mr. Justice Holmes delivered the opinion of the court. 241 U.S. 257 (1916)

This is a suit begun in a state court, removed to the United States Court, and then, on motion to remand by the plaintiff, dismissed by the latter court, on the ground that the cause of action arose under the patent laws of the United States, that the state court had no jurisdiction, and that therefore the one to which it was removed had none. […]

[…] The plaintiff alleges that it owns, manufactures and sells a certain pump, has or has applied for a patent for it, and that the pump is known as the best in the market. It then alleges that the defendants have falsely and maliciously libeled and slandered the plaintiff's title to the pump by stating that the pump and certain parts thereof are infringements upon the defendant's pump and certain parts thereof and that without probable cause they have brought suits against some parties who are using the plaintiff's pump and that they are threatening suits against all who use it. The allegation of the defendants' libel or slander is repeated in slightly varying form but it all comes to statements to various people that the plaintiff was infringing the defendants' patent and that the defendant would sue both seller and buyer if the plaintiff's pump was used. Actual damage to the plaintiff in its business is alleged to the extent of $50,000 and punitive damages to the same amount are asked.

[…]

A suit for damages to business caused by a threat to sue under the patent law is not itself a suit under the patent law. And the same is true when the damage is caused by a statement of fact—that the defendant has a patent which is infringed. What makes the defendants' act a wrong is its manifest tendency to injure the plaintiff's business and the wrong is the same whatever the means by which it is accomplished. But whether it is a wrong or not depends upon the law of the State where the act is done, not upon the patent law, and therefore the suit arises under the law of the State. A suit arises under the law that creates the cause of action. The fact that the justification may involve the validity and infringement of a patent is no more material to the question under what law the suit is brought than it would be in an action of contract. […] The State is master of the whole matter, and if it saw fit to do away with actions of this type altogether, no one, we imagine, would suppose that they still could be maintained under the patent laws of the United States.

Judgment reversed.

Notes & Questions

1. The rule of *American Well-Works* is that "[a] suit arises under the law that creates the cause of action." In other words, if a cause of action is created by federal law, it "arises under" federal law; if it is created by state law, it does not. This rule has an obvious strength: it is quite clear and easily applied. But does that advantage come at the cost of relegating some significant questions of federal law to the domain of state courts, at least in the first instance?
2. Justice Holmes's vision for a clear, bright-line rule faded quickly. As the legendary Second Circuit Judge Henry Friendly put it, "Mr. Justice Holmes' formula is more useful for inclusion than for the exclusion for which it was intended. Even though the claim is created by state law, a case may 'arise under' a law of the United States if the complaint discloses a need for determining the meaning or application of such a law."

TB Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964). The case that follows shows why.

Smith v. Kansas City Title & Trust Co.

MR. JUSTICE DAY delivered the opinion of the court. 255 U.S. 180 (1921)

A bill was filed in the United States District Court for the Western Division of the Western District of Missouri by a shareholder in the Kansas City Title & Trust Company to enjoin the Company, its officers, agents and employees from investing the funds of the Company in farm loan bonds issued by Federal Land Banks or Joint Stock Land Banks under authority of the Federal Farm Loan Act of July 17, 1916.

The relief was sought on the ground that these acts were beyond the constitutional power of Congress. The bill avers that the Board of Directors of the Company are about to invest its funds in the bonds to the amount of $10,000 in each of the classes described, and will do so unless enjoined by the court in this action. […]

As diversity of citizenship is lacking, the jurisdiction of the District Court depends upon whether the cause of action set forth arises under the Constitution or laws of the United States.

The general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under this provision.

[…]

In the instant case the averments of the bill show that the directors were proceeding to make the investments in view of the act authorizing the bonds about to be purchased, maintaining that the act authorizing them was constitutional and the bonds valid and desirable investments. The objecting shareholder avers in the bill that the securities were issued under an unconstitutional law, and hence of no validity. It is, therefore, apparent that the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question. The decision depends upon the determination of this issue.

[…] We are, therefore, of the opinion that the District Court had jurisdiction […].

MR. JUSTICE HOLMES, dissenting.

No doubt it is desirable that the question raised in this case should be set at rest, but that can be done by the Courts of the United States only within the limits of the jurisdiction conferred upon them by the Constitution and the laws of the United States. As this suit was brought by a citizen of Missouri against a Missouri corporation the single ground upon which the jurisdiction of the

District Court can be maintained is that the suit "arises under the Constitution or laws of the United States" within the meaning of § 24 of the Judicial Code. I am of opinion that this case does not arise in that way and therefore that the bill should have been dismissed.

[I]t seems to me that a suit cannot be said to arise under any other law than that which creates the cause of action. It may be enough that the law relied upon creates a part of the cause of action although not the whole, as held in *Osborn v. Bank of the United States* […], although the *Osborn Case* has been criticized and regretted. But the law must create at least a part of the cause of action by its own force, for it is the suit, not a question in the suit, that must arise under the law of the United States. The mere adoption by a state law of a United States law as a criterion or test, when the law of the United States has no force *proprio vigore*, does not cause a case under the state law to be also a case under the law of the United States […].

[…]

Merrell Dow Pharmaceuticals Inc. v. Thompson

478 U.S. 804 (1986)

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one "arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331.

I

The Thompson respondents are residents of Canada and the MacTavishes reside in Scotland. They filed virtually identical complaints against petitioner, a corporation, that manufactures and distributes the drug Bendectin. The complaints were filed in the Court of Common Pleas in Hamilton County, Ohio. Each complaint alleged that a child was born with multiple deformities as a result of the mother's ingestion of Bendectin during pregnancy. In five of the six counts, the recovery of substantial damages was requested on common-law theories of negligence, breach of warranty, strict liability, fraud, and gross negligence. In Count IV, respondents alleged that the drug Bendectin was "misbranded" in violation of the Federal Food, Drug, and Cosmetic Act (FDCA), because its labeling did not provide adequate warning that its use was potentially dangerous. Paragraph 26 alleged that the violation of the FDCA "in the promotion" of Bendectin "constitutes a rebuttable presumption of negligence." Paragraph 27 alleged that the "violation of said federal statutes directly and proximately caused the injuries suffered" by the two infants.

Petitioner filed a timely petition for removal from the state court to the Federal District Court alleging that the action was "founded, in part, on an alleged claim arising under the laws of the United States." After removal, the two cases

were consolidated. Respondents filed a motion to remand to the state forum on the ground that the federal court lacked subject-matter jurisdiction. Relying on our decision in *Smith v. Kansas City Title & Trust Co.*, the District Court held that Count IV of the complaint alleged a cause of action arising under federal law and denied the motion to remand. It then granted petitioner's motion to dismiss on *forum non conveniens* grounds.

The Court of Appeals for the Sixth Circuit reversed. After […] noting "that the FDCA does not create or imply a private right of action for individuals injured as a result of violations of the Act," it explained:

Federal question jurisdiction would, thus, exist only if plaintiffs' right to relief *depended necessarily* on a substantial question of federal law. Plaintiffs' causes of action referred to the FDCA merely as one available criterion for determining whether Merrell Dow was negligent. Because the jury could find negligence on the part of Merrell Dow without finding a violation of the FDCA, the plaintiffs' causes of action did not depend necessarily upon a question of federal law. Consequently, the causes of action did not arise under federal law and, therefore, were improperly removed to federal court.

We granted certiorari, and we now affirm.

II

Article III of the Constitution gives the federal courts power to hear cases "arising under" federal statutes. That grant of power, however, is not self-executing, and it was not until the Judiciary Act of 1875 that Congress gave the federal courts general federal-question jurisdiction. Although the constitutional meaning of "arising under" may extend to all cases in which a federal question is "an ingredient" of the action, *Osborn v. Bank of the United States*, we have long construed the statutory grant of federal-question jurisdiction as conferring a more limited power.

Under our longstanding interpretation of the current statutory scheme, the question whether a claim "arises under" federal law must be determined by reference to the "well-pleaded complaint." A defense that raises a federal question is inadequate to confer federal jurisdiction. *Louisville & Nashville R. Co. v. Mottley*. Since a defendant may remove a case only if the claim could have been brought in federal court, 28 U.S.C. § 1441(b), moreover, the question for removal jurisdiction must also be determined by reference to the "well-pleaded complaint."

[…]

The "vast majority" of cases that come within this grant of jurisdiction are covered by Justice Holmes' statement that a "suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.* Thus, the vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action.

We have, however, also noted that a case may arise under federal law "where the vindication of a right under state law necessarily turned on some construction of federal law." […]

This case does not pose a federal question of the first kind; respondents do not allege that federal law creates any of the causes of action that they have asserted. This case thus poses what Justice Frankfurter called the "litigation-provoking problem," the presence of a federal issue in a state-created cause of action.

[…] We have consistently emphasized that, in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system. […]

In this case, both parties agree with the Court of Appeals' conclusion that there is no federal cause of action for FDCA violations. For purposes of our decision, we assume that this is a correct interpretation of the FDCA. […] In short, Congress did not intend a private federal remedy for violations of the statute that it enacted.

[…]

The significance of the necessary assumption that there is no federal private cause of action thus cannot be overstated. For the ultimate import of such a conclusion, as we have repeatedly emphasized, is that it would flout congressional intent to provide a private federal remedy for the violation of the federal statute. We think it would similarly flout, or at least undermine, congressional intent to conclude that the federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation of the federal statute is said to be a "rebuttable presumption" or a "proximate cause" under state law, rather than a federal action under federal law.

III

Petitioner […] argues that, whatever the general rule, there are special circumstances that justify federal-question jurisdiction in this case. Petitioner emphasizes that it is unclear whether the FDCA applies to sales in Canada and Scotland; there is, therefore, a special reason for having a federal court answer the novel federal question relating to the extra-territorial meaning of the Act. We reject this argument. We do not believe the question whether a particular claim arises under federal law depends on the novelty of the federal issue. Although it is true that federal jurisdiction cannot be based on a frivolous or insubstantial federal question, "the interrelation of federal and state authority and the proper management of the federal judicial system" would be ill served by a rule that made the existence of federal-question jurisdiction depend on the district court's case-by-case appraisal of the novelty of the federal question asserted as an element of the state tort. The novelty of an FDCA issue is not sufficient to give it status as a federal cause of action; nor should it be sufficient to give a state-based FDCA claim status as a jurisdiction-triggering federal question.

IV

We conclude that a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.

JUSTICE SOUTER delivered the opinion of the Court. 545 U.S. 308 (2005)

The question is whether want of a federal cause of action to try claims of title to land obtained at a federal tax sale precludes removal to federal court of a state action with nondiverse parties raising a disputed issue of federal title law. We answer no, and hold that the national interest in providing a federal forum for federal tax litigation is sufficiently substantial to support the exercise of federal-question jurisdiction over the disputed issue on removal, which would not distort any division of labor between the state and federal courts, provided or assumed by Congress.

I

In 1994, the Internal Revenue Service seized Michigan real property belonging to petitioner Grable & Sons Metal Products, Inc., to satisfy Grable's federal tax delinquency. Title 26 U.S.C. § 6335 required the IRS to give notice of the seizure, and there is no dispute that Grable received actual notice by certified mail before the IRS sold the property to respondent Darue Engineering & Manufacturing. Although Grable also received notice of the sale itself, it did not exercise its statutory right to redeem the property within 180 days of the sale, and after that period had passed, the Government gave Darue a quitclaim deed.

Five years later, Grable brought a quiet title action in state court, claiming that Darue's record title was invalid because the IRS had failed to notify Grable of its seizure of the property in the exact manner required by § 6335(a), which provides that written notice must be "given by the Secretary to the owner of the property [or] left at his usual place of abode or business." Grable said that the statute required personal service, not service by certified mail.

Darue removed the case to Federal District Court as presenting a federal question, because the claim of title depended on the interpretation of the notice statute in the federal tax law. The District Court declined to remand the case at Grable's behest after finding that the "claim does pose a significant question of federal law" and ruling that Grable's lack of a federal right of action to enforce its claim against Darue did not bar the exercise of federal jurisdiction. […]

The Court of Appeals for the Sixth Circuit affirmed. On the jurisdictional question, the panel thought it sufficed that the title claim raised an issue of federal

law that had to be resolved, and implicated a substantial federal interest (in construing federal tax law). […] We granted certiorari […] to resolve a split within the Courts of Appeals on whether *Merrell Dow Pharmaceuticals Inc. v. Thompson*, always requires a federal cause of action as a condition for exercising federal-question jurisdiction. We now affirm.

II

Darue was entitled to remove the quiet title action if Grable could have brought it in federal district court originally, 28 U.S.C. § 1441(a), as a civil action "arising under the Constitution, laws, or treaties of the United States," § 1331. This provision for federal-question jurisdiction is invoked by and large by plaintiffs pleading a cause of action created by federal law (*e.g.*, claims under 42 U.S.C. § 1983). There is, however, another longstanding, if less frequently encountered, variety of federal "arising under" jurisdiction, this Court having recognized for nearly 100 years that in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues. The doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.

The classic example is *Smith v. Kansas City Title & Trust Co.*, a suit by a shareholder claiming that the defendant corporation could not lawfully buy certain bonds of the National Government because their issuance was unconstitutional. Although Missouri law provided the cause of action, the Court recognized federal-question jurisdiction because the principal issue in the case was the federal constitutionality of the bond issue. *Smith* thus held, in a somewhat generous statement of the scope of the doctrine, that a state-law claim could give rise to federal-question jurisdiction so long as it "appears from the [complaint] that the right to relief depends upon the construction or application of [federal law]."

The *Smith* statement has been subject to some trimming to fit earlier and later cases recognizing the vitality of the basic doctrine, but shying away from the expansive view that mere need to apply federal law in a state-law claim will suffice to open the "arising under" door. As early as 1912, this Court had confined federal-question jurisdiction over state-law claims to those that "really and substantially involv[e] a dispute or controversy respecting the validity, construction or effect of [federal] law." This limitation was the ancestor of Justice Cardozo's later explanation that a request to exercise federal-question jurisdiction over a state action calls for a "common-sense accommodation of judgment to [the] kaleidoscopic situations" that present a federal issue, in "a selective process which picks the substantial causes out of the web and lays the other ones aside." It has in fact become a constant refrain in such cases that federal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.

But even when the state action discloses a contested and substantial federal question, the exercise of federal jurisdiction is subject to a possible veto. For the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331. […] Because arising-under jurisdiction to hear a state-law claim always raises the possibility of upsetting the state-federal line drawn (or at least assumed) by Congress, the presence of a disputed federal issue and the ostensible importance of a federal forum are never necessarily dispositive; there must always be an assessment of any disruptive portent in exercising federal jurisdiction. *See also Merrell Dow*.

These considerations have kept us from stating a "single, precise, all-embracing" test for jurisdiction over federal issues embedded in state-law claims between nondiverse parties. We have not kept them out simply because they appeared in state raiment, as Justice Holmes would have done, *see Smith* (dissenting opinion), but neither have we treated "federal issue" as a password opening federal courts to any state action embracing a point of federal law. Instead, the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.

III

A

This case warrants federal jurisdiction. Grable's state complaint must specify "the facts establishing the superiority of [its] claim," Mich. Ct. Rule 3.411(B)(2)(c), and Grable has premised its superior title claim on a failure by the IRS to give it adequate notice, as defined by federal law. Whether Grable was given notice within the meaning of the federal statute is thus an essential element of its quiet title claim, and the meaning of the federal statute is actually in dispute; it appears to be the only legal or factual issue contested in the case. The meaning of the federal tax provision is an important issue of federal law that sensibly belongs in a federal court. The Government has a strong interest in the "prompt and certain collection of delinquent taxes," and the ability of the IRS to satisfy its claims from the property of delinquents requires clear terms of notice to allow buyers like Darue to satisfy themselves that the Service has touched the bases necessary for good title. The Government thus has a direct interest in the availability of a federal forum to vindicate its own administrative action, and buyers (as well as tax delinquents) may find it valuable to come before judges used to federal tax matters. Finally, because it will be the rare state title case that raises a contested matter of federal law, federal jurisdiction to resolve genuine disagreement over federal tax title provisions will portend only a microscopic effect on the federal-state division of labor.

[…]

B

Merrell Dow Pharmaceuticals Inc. v. Thompson, on which Grable rests its position, is not to the contrary. *Merrell Dow* considered a state tort claim resting in part on the allegation that the defendant drug company had violated a federal misbranding prohibition, and was thus presumptively negligent under Ohio law. The Court assumed that federal law would have to be applied to resolve the claim, but after closely examining the strength of the federal interest at stake and the implications of opening the federal forum, held federal jurisdiction unavailable. Congress had not provided a private federal cause of action for violation of the federal branding requirement, and the Court found "it would … flout, or at least undermine, congressional intent to conclude that federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation … is said to be a … 'proximate cause' under state law."

Because federal law provides for no quiet title action that could be brought against Darue, Grable argues that there can be no federal jurisdiction here, stressing some broad language in *Merrell Dow* (including the passage just quoted) that on its face supports Grable's position. But an opinion is to be read as a whole, and *Merrell Dow* cannot be read whole as overturning decades of precedent, as it would have done by effectively adopting the Holmes dissent in *Smith* and converting a federal cause of action from a sufficient condition for federal-question jurisdiction into a necessary one.

In the first place, *Merrell Dow* disclaimed the adoption of any bright-line rule, as when the Court reiterated that "in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." […] And as a final indication that it did not mean to make a federal right of action mandatory, it expressly approved the exercise of jurisdiction sustained in *Smith*, despite the want of any federal cause of action available to *Smith*'s shareholder plaintiff. *Merrell Dow* then, did not toss out, but specifically retained, the contextual enquiry that had been *Smith*'s hallmark for over 60 years. At the end of *Merrell Dow*, Justice Holmes was still dissenting.

Accordingly, *Merrell Dow* should be read in its entirety as treating the absence of a federal private right of action as evidence relevant to, but not dispositive of, the "sensitive judgments about congressional intent" that § 1331 requires. The absence of any federal cause of action affected *Merrell Dow*'s result two ways. The Court saw the fact as worth some consideration in the assessment of substantiality. But its primary importance emerged when the Court treated the combination of no federal cause of action and no preemption of state remedies for misbranding as an important clue to Congress's conception of the scope of jurisdiction to be exercised under § 1331. The Court saw the missing cause of action not as a missing federal door key, always required, but as a missing welcome mat, required in the circumstances, when exercising federal jurisdiction over a state misbranding action would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues. For if the federal labeling standard without a federal cause of action could get a state claim into federal court, so could any other federal standard without

a federal cause of action. And that would have meant a tremendous number of cases.

One only needed to consider the treatment of federal violations generally in garden variety state tort law. "The violation of federal statutes and regulations is commonly given negligence *per se* effect in state tort proceedings." Restatement (Third) of Torts § 14, Reporters' Note, Comment *a*, p. 195 (Tent. Draft No. 1, Mar. 28, 2001). A general rule of exercising federal jurisdiction over state claims resting on federal mislabeling and other statutory violations would thus have heralded a potentially enormous shift of traditionally state cases into federal courts. Expressing concern over the "increased volume of federal litigation," and noting the importance of adhering to "legislative intent," *Merrell Dow* thought it improbable that the Congress, having made no provision for a federal cause of action, would have meant to welcome any state-law tort case implicating federal law "solely because the violation of the federal statute is said to [create] a rebuttable presumption [of negligence] … under state law." In this situation, no welcome mat meant keep out. *Merrell Dow*'s analysis thus fits within the framework of examining the importance of having a federal forum for the issue, and the consistency of such a forum with Congress's intended division of labor between state and federal courts.

As already indicated, however, a comparable analysis yields a different jurisdictional conclusion in this case. Although Congress also indicated ambivalence in this case by providing no private right of action to Grable, it is the rare state quiet title action that involves contested issues of federal law_._ Consequently, jurisdiction over actions like Grable's would not materially affect, or threaten to affect, the normal currents of litigation. Given the absence of threatening structural consequences and the clear interest the Government, its buyers, and its delinquents have in the availability of a federal forum, there is no good reason to shirk from federal jurisdiction over the dispositive and contested federal issue at the heart of the state-law title claim.

IV

The judgment of the Court of Appeals, upholding federal jurisdiction over Grable's quiet title action, is affirmed.

It is so ordered.

JUSTICE THOMAS, concurring.

[…] In this case, no one has asked us to overrule those precedents and adopt the rule Justice Holmes set forth in *American Well Works Co. v. Layne & Bowler Co.*, limiting § 1331 jurisdiction to cases in which federal law creates the cause of action pleaded on the face of the plaintiff's complaint. In an appropriate case, and perhaps with the benefit of better evidence as to the original meaning of § 1331's text, I would be willing to consider that course.

Jurisdictional rules should be clear. Whatever the virtues of the *Smith* standard, it is anything but clear. *Ante* (the standard "calls for a 'common-sense accommodation of judgment to [the] kaleidoscopic situations' that present a federal issue, in 'a selective process which picks the substantial causes out of the web and

lays the other ones aside' "); *ante* ("[T]he question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities"); *ante* (" '[D]eterminations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system' "; "the absence of a federal private right of action [is] evidence relevant to, but not dispositive of, the 'sensitive judgments about congressional intent' that § 1331 requires").

Whatever the vices of the *American Well Works* rule, it is clear. Moreover, it accounts for the "vast majority" of cases that come within § 1331 under our current case law, further indication that trying to sort out which cases fall within the smaller *Smith* category may not be worth the effort it entails. Accordingly, I would be willing in appropriate circumstances to reconsider our interpretation of § 1331.

Gunn v. Minton

568 U.S. 251 (2013)

Chief Justice Roberts delivered the opinion of the Court.

Federal courts have exclusive jurisdiction over cases "arising under any Act of Congress relating to patents." 28 U.S.C. § 1338(a). The question presented is whether a state law claim alleging legal malpractice in the handling of a patent case must be brought in federal court.

I

[Vernon Minton created software to facilitate securities trading. He later patented his invention.]

Patent in hand, Minton filed a patent infringement suit in Federal District Court against the National Association of Securities Dealers, Inc. (NASD), and the NASDAQ Stock Market, Inc. He was represented by Jerry Gunn and the other petitioners. NASD and NASDAQ moved for summary judgment on the ground that Minton's patent was invalid […].[T]he District Court granted the summary judgment motion and declared Minton's patent invalid.

Minton then filed a motion for reconsideration in the District Court, arguing for the first time that […] the "experimental use" exception [under federal patent law applied and saved his patent from invalidity]. The District Court denied the motion.

Minton appealed to the U.S. Court of Appeals for the Federal Circuit. That court affirmed, concluding that the District Court had appropriately held Minton's experimental-use argument waived.

Minton, convinced that his attorneys' failure to raise the experimental-use argument earlier had cost him the lawsuit and led to invalidation of his patent,

brought this malpractice action in Texas state court. His former lawyers defended on the ground that […][the] experimental[-]use [exception did not apply] and that therefore Minton's patent infringement claims would have failed even if the experimental-use argument had been timely raised. The trial court agreed, […][and] accordingly granted summary judgment to Gunn and the other lawyer defendants.

On appeal, Minton raised a new argument: Because his legal malpractice claim was based on an alleged error in a patent case, it "aris[es] under" federal patent law for purposes of 28 U.S.C. § 1338(a). And because, under § 1338(a), "[n]o State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents," the Texas court—where Minton had originally brought his malpractice claim—lacked subject matter jurisdiction to decide the case. Accordingly, Minton argued, the trial court's order should be vacated and the case dismissed, leaving Minton free to start over in the Federal District Court.

A divided panel of the Court of Appeals of Texas rejected Minton's argument. Applying the test we articulated in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, it held that the federal interests implicated by Minton's state law claim were not sufficiently substantial to trigger § 1338 "arising under" jurisdiction. It also held that finding exclusive federal jurisdiction over state legal malpractice actions would, contrary to *Grable*'s commands, disturb the balance of federal and state judicial responsibilities. […]

The Supreme Court of Texas reversed […]. The court concluded that Minton's claim involved "a substantial federal issue" within the meaning of *Grable* "because the success of Minton's malpractice claim is reliant upon the viability of the experimental use exception […]."

[…]

II

[…]

Adhering to the demands of "[l]inguistic consistency," we have interpreted the phrase "arising under" in both [28 U.S.C. § 1331 and § 1338(a)] identically, applying our § 1331 and § 1338(a) precedents interchangeably. For cases falling within the patent specific arising under jurisdiction of § 1338(a), however, Congress has not only provided for federal jurisdiction but also eliminated state jurisdiction, decreeing that "[n]o State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents." § 1338(a). To determine whether jurisdiction was proper in the Texas courts, therefore, we must determine whether it would have been proper in a federal district court—whether, that is, the case "aris[es] under any Act of Congress relating to patents."

For statutory purposes, a case can "aris[e] under" federal law in two ways. Most directly, a case arises under federal law when federal law creates the cause of action asserted. *See American Well Works Co. v. Layne & Bowler Co.* ("A

suit arises under the law that creates the cause of action"). As a rule of inclusion, this "creation" test admits of only extremely rare exceptions and accounts for the vast bulk of suits that arise under federal law. […]

But even where a claim finds its origins in state rather than federal law—as Minton's legal malpractice claim indisputably does—we have identified a "special and small category" of cases in which arising under jurisdiction still lies. In outlining the contours of this slim category, we do not paint on a blank canvas. Unfortunately, the canvas looks like one that Jackson Pollock got to first.

In an effort to bring some order to this unruly doctrine several Terms ago, we condensed our prior cases into the following inquiry: Does the "state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities?" *Grable*. That is, federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Where all four of these requirements are met, we held, jurisdiction is proper because there is a "serious federal interest in claiming the advantages thought to be inherent in a federal forum," which can be vindicated without disrupting Congress's intended division of labor between state and federal courts.

III

Applying *Grable*'s inquiry here, it is clear that Minton's legal malpractice claim does not arise under federal patent law. Indeed, for the reasons we discuss, we are comfortable concluding that state legal malpractice claims based on underlying patent matters will rarely, if ever, arise under federal patent law for purposes of § 1338(a). Although such cases may necessarily raise disputed questions of patent law, those cases are by their nature unlikely to have the sort of significance for the federal system necessary to establish jurisdiction.

A

To begin, we acknowledge that resolution of a federal patent question is "necessary" to Minton's case. Under Texas law, a plaintiff alleging legal malpractice must establish four elements: (1) that the defendant attorney owed the plaintiff a duty; (2) that the attorney breached that duty; (3) that the breach was the proximate cause of the plaintiff's injury; and (4) that damages occurred. In cases like this one, in which the attorney's alleged error came in failing to make a particular argument, the causation element requires a "case within a case" analysis of whether, had the argument been made, the outcome of the earlier litigation would have been different. To prevail on his legal malpractice claim, therefore, Minton must show that he would have prevailed in his federal patent infringement case if only petitioners had timely made an experimental-use argument on his behalf. […]

B

The federal issue is also "actually disputed" here—indeed, on the merits, it is the central point of dispute. Minton argues that the experimental-use exception properly applied […], saving his patent from [invalidity]; petitioners argue that it did not. This is just the sort of " 'dispute … respecting the … effect of [federal] law' " that *Grable* envisioned.

C

Minton's argument founders on *Grable*'s next requirement, however, for the federal issue in this case is not substantial in the relevant sense. In reaching the opposite conclusion, the Supreme Court of Texas focused on the importance of the issue to the plaintiff's case and to the parties before it. As our past cases show, however, it is not enough that the federal issue be significant to the particular parties in the immediate suit; that will *always* be true when the state claim "necessarily raise[s]" a disputed federal issue, as *Grable* separately requires. The substantiality inquiry under *Grable* looks instead to the importance of the issue to the federal system as a whole.

[…]

Here, the federal issue carries no such significance. Because of the backward-looking nature of a legal malpractice claim, the question is posed in a merely hypothetical sense: If Minton's lawyers had raised a timely experimental-use argument, would the result in the patent infringement proceeding have been different? No matter how the state courts resolve that hypothetical "case within a case," it will not change the real-world result of the prior federal patent litigation. Minton's patent will remain invalid.

Nor will allowing state courts to resolve these cases undermine "the development of a uniform body of [patent] law." Congress ensured such uniformity by vesting exclusive jurisdiction over actual patent cases in the federal district courts and exclusive appellate jurisdiction in the Federal Circuit. *See* 28 U.S.C. §§ 1338(a), 1295(a)(1). In resolving the nonhypothetical patent questions those cases present, the federal courts are of course not bound by state court case-within-a-case patent rulings. In any event, the state court case-within-a-case inquiry asks what would have happened in the prior federal proceeding if a particular argument had been made. In answering that question, state courts can be expected to hew closely to the pertinent federal precedents. […]

As for more novel questions of patent law that may arise for the first time in a state court "case within a case," they will at some point be decided by a federal court in the context of an actual patent case, with review in the Federal Circuit. If the question arises frequently, it will soon be resolved within the federal system, laying to rest any contrary state court precedent; if it does not arise frequently, it is unlikely to implicate substantial federal interests. […]

Minton also suggests that state courts' answers to hypothetical patent questions can sometimes have real-world effect on other patents through issue preclusion. […] He argues that, in evaluating [a related patent] application [he filed], the patent examiner could be bound by the Texas trial court's interpretation of the scope of Minton's original patent. It is unclear whether

this is true. […] In fact, Minton has not identified any case finding such preclusive effect based on a state court decision. But even assuming that a state court's case-within-a-case adjudication may be preclusive under some circumstances, the result would be limited to the parties and patents that had been before the state court. Such "fact-bound and situation-specific" effects are not sufficient to establish federal arising under jurisdiction.

Nor can we accept the suggestion that the federal courts' greater familiarity with patent law means that legal malpractice cases like this one belong in federal court. […][T]he possibility that a state court will incorrectly resolve a state claim is not, by itself, enough to trigger the federal courts' exclusive patent jurisdiction, even if the potential error finds its root in a misunderstanding of patent law.

There is no doubt that resolution of a patent issue in the context of a state legal malpractice action can be vitally important to the particular parties in that case. But something more, demonstrating that the question is significant to the federal system as a whole, is needed. That is missing here.

D

It follows from the foregoing that *Grable*'s fourth requirement is also not met. That requirement is concerned with the appropriate "balance of federal and state judicial responsibilities." We have already explained the absence of a substantial federal issue within the meaning of *Grable.* The States, on the other hand, have "a special responsibility for maintaining standards among members of the licensed professions." […] We have no reason to suppose that Congress—in establishing exclusive federal jurisdiction over patent cases—meant to bar from state courts state legal malpractice claims simply because they require resolution of a hypothetical patent issue. […]

The judgment of the Supreme Court of Texas is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

12.2. Diversity of Citizenship

Article III extends the subject-matter jurisdiction of federal courts to "controversies … between citizens of different states." Why do you think the framers of Article III might have given that class of cases to federal as opposed to state courts? What might their concerns have been? These questions are especially pressing given that diversity jurisdiction was quite controversial, and provided one of the main points of attack for skeptics of the new federal constitution during the ratification debates.

Recall that subject-matter jurisdiction requires both constitutional and statutory authorization. Just as Osborn set the constitutional test for federal-question jurisdiction, the next case distinguishes between the statutory and

constitutional tests for subject-matter jurisdiction based on diversity of citizenship. And as with federal-question jurisdiction, the constitutional test for diversity jurisdiction is much more expansive than the statutory test, despite nearly identical text.

Strawbridge v. Curtiss

MARSHALL, Ch. J. delivered the opinion of the court. 7 U.S. (3 Cranch) 267

The court has considered this case, and is of opinion that the jurisdiction cannot be supported.

The words of the act of congress are, "where an alien is a party; or the suit is between a citizen of a state where the suit is brought, and a citizen of another state."

The court understands these expressions to mean that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.

But the court does not mean to give an opinion in the case where several parties represent several distinct interests, and some of those parties are, and others are not, competent to sue, or liable to be sued, in the courts of the United States.

[…]

Notes & Questions

(8) Article III, Section 2 of the Constitution extends the judicial power to all cases "between citizens of different states." Courts have interpreted this language to require "minimal diversity," meaning that the state citizenship of at least one plaintiff and defendant must be different. By contrast, courts have interpreted *Strawbridge v. Curtiss* as requiring "complete diversity," meaning that every plaintiff must be a citizen of a different state from every defendant.

(9) In a later case, the Supreme Court claimed that Chief Justice Marshall regretted how *Strawbridge* came to be understood:

> By no one was the correctness of [*Strawbridge*] more questioned than by the late chief justice who [wrote it]. It is within the knowledge of several of us, that he repeatedly expressed regret [about the decision in *Strawbridge*], adding, whenever the subject was mentioned, that if the point of jurisdiction was an original one, the conclusion would be different.

Louisville, Cincinnati & Charleston R.R. Co. v. Letson, 43 U.S. 497, 555 (1844).

(10) James Madison, an advocate for diversity jurisdiction's inclusion in Article III, defended it only weakly at the Constitutional Convention:

> As to its cognizance of disputes between citizens of different states, I will not say it is a matter of such importance. Perhaps it might be left to the state courts. But I sincerely believe this provision will be rather salutary, than otherwise. It may happen that a strong prejudice may arise in some states, against the citizens of others, who may have claims against them. We know what tardy, and even defective administration of justice, has happened in some states. A citizen of another state might not chance to get justice in a state court, and at all events he might think himself injured.

3 Elliot, Debates on the Federal Constitution 391 (1828). Subsequent commentators are skeptical of Madison's justifications. *See, e.g.*, Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 492–97 (1928). As you read the cases that follow, see whether you think that diversity jurisdiction is necessary, salutary, and effective at achieving its stated goals.

Mas v. Perry

489 F.2d 1396 (5th Cir. 1974)

AINSWORTH, Circuit Judge:

[…] Appellees Jean Paul Mas, a citizen of France, and Judy Mas were married at her home in Jackson, Mississippi. Prior to their marriage, Mr. and Mrs. Mas were graduate assistants, pursuing coursework as well as performing teaching duties, for approximately nine months and one year, respectively, at Louisiana State University in Baton Rouge, Louisiana. Shortly after their marriage, they returned to Baton Rouge to resume their duties as graduate assistants at LSU. They remained in Baton Rouge for approximately two more years, after which they moved to Park Ridge, Illinois. At the time of the trial in this case, it was their intention to return to Baton Rouge while Mr. Mas finished his studies for [a PhD]. Mr. and Mrs. Mas were undecided as to where they would reside after that.

Upon their return to Baton Rouge after their marriage, appellees rented an apartment from appellant Oliver H. Perry, a citizen of Louisiana. This appeal arises from a final judgment entered on a jury verdict awarding $5,000 to Mr. Mas and $15,000 to Mrs. Mas for damages incurred by them as a result of the discovery that their bedroom and bathroom contained "two-way" mirrors and that they had been watched through them by the appellant during three of the first four months of their marriage.

At the close of the appellees' case at trial, appellant made an oral motion to dismiss for lack of jurisdiction. The motion was denied by the district court. Before this Court, appellant challenges the final judgment below solely on jurisdictional grounds, contending that appellees failed to prove diversity of citizenship among the parties and that the requisite jurisdictional amount is lacking with respect to Mr. Mas. Finding no merit to these contentions, we affirm.

Under section 1332(a)(2), the federal judicial power extends to the claim of Mr. Mas, a citizen of France, against the appellant, a citizen of Louisiana. Since we conclude that Mrs. Mas is a citizen of Mississippi for diversity purposes, the district court also properly had jurisdiction under section 1332(a)(1) of her claim.

It has long been the general rule that complete diversity of parties is required in order that diversity jurisdiction obtain; that is, no party on one side may be a citizen of the same State as any party on the other side. *Strawbridge v. Curtiss*. This determination of one's State citizenship for diversity purposes is controlled by federal law, not by the law of any State. As is the case in other areas of federal jurisdiction, the diverse citizenship among adverse parties must be present at the time the complaint is filed. The burden of pleading the diverse citizenship is upon the party invoking federal jurisdiction, and if the diversity jurisdiction is properly challenged, that party also bears the burden of proof.

To be a citizen of a State within the meaning of section 1332, a natural person must be both a citizen of the United States and a domiciliary of that State. For diversity purposes, citizenship means domicile; mere residence in the State is not sufficient.

A person's domicile is the place of "his true, fixed, permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom." A change of domicile may be effected only by a combination of two elements: (a) taking up residence in a different domicile with (b) the intention to remain there.

It is clear that at the time of her marriage, Mrs. Mas was a domiciliary of the State of Mississippi. While it is generally the case that the domicile of the wife—and, consequently, her State citizenship for purposes of diversity jurisdiction—is deemed to be that of her husband, we find no precedent for extending this concept to the situation here, in which the husband is a citizen of a foreign state but resides in the United States. Indeed, such a fiction would work absurd results on the facts before us. If Mr. Mas were considered a domiciliary of France—as he would be since he had lived in Louisiana as a student-teaching assistant prior to filing this suit, then Mrs. Mas would also be deemed a domiciliary, and thus, fictionally at least, a citizen of France. She would not be a citizen of any State and could not sue in a federal court on that basis; nor could she invoke the alienage jurisdiction to bring her claim in federal court, since she is not an alien. On the other hand, if Mrs. Mas's domicile were Louisiana, she would become a Louisiana citizen for diversity purposes and could not bring suit with her husband against appellant, also a Louisiana citizen, on the basis of diversity jurisdiction. These are curious results under a rule arising from the theoretical identity of person and interest of the married couple.

An American woman is not deemed to have lost her United States citizenship solely by reason of her marriage to an alien. 8 U.S.C. § 1489. Similarly, we conclude that for diversity purposes a woman does not have her domicile or State citizenship changed solely by reason of her marriage to an alien.

Mrs. Mas's Mississippi domicile was disturbed neither by her year in Louisiana prior to her marriage nor as a result of the time she and her husband spent at LSU after their marriage, since for both periods she was a graduate assistant at LSU. Though she testified that after her marriage she had no intention of returning to her parents' home in Mississippi, Mrs. Mas did not effect a change of domicile since she and Mr. Mas were in Louisiana only as students and lacked the requisite intention to remain there. Until she acquires a new domicile, she remains a domiciliary, and thus a citizen, of Mississippi.

[The court's analysis of the amount-in-controversy requirement is omitted.]

Thus the power of the federal district court to entertain the claims of appellees in this case stands on two separate legs of diversity jurisdiction: a claim by an alien against a State citizen; and an action between citizens of different States. We also note, however, the propriety of having the federal district court entertain a spouse's action against a defendant, where the district court already has jurisdiction over a claim, arising from the same transaction, by the other spouse against the same defendant. In the case before us, such a result is particularly desirable. The claims of Mr. and Mrs. Mas arise from the same operative facts, and there was almost complete interdependence between their claims with respect to the proof required and the issues raised at trial. Thus, since the district court had jurisdiction of Mr. Mas's action, sound judicial administration militates strongly in favor of federal jurisdiction of Mrs. Mas's claim.

Affirmed.

Notes & Questions

1. The *Mas* case concerns not only diversity jurisdiction but also its cousin, alienage jurisdiction, which exists in a suit between a citizen and an alien (rather than a suit between citizens of different states).
2. Note that 28 U.S.C. § 1332, the diversity-jurisdiction statute, requires not only complete diversity but also that the amount in controversy exceed a specified dollar amount. Though Congress has increased that amount over the years to account for inflation, today the requirement is that the amount in controversy exceed $75,000. Typically the amount in controversy is determined by looking at the plaintiff's complaint, and it does not require any assessment of how likely the plaintiff is to prevail or to persuade a jury that her damages are as much as she alleges. Nevertheless, questions frequently arise about how to value non-monetary forms of relief like injunctions. At least three approaches exist for such valuations: 1. the cost to the defendant of complying; 2. the benefit to the plaintiff of defendant's compliance; or 3. some combination of both. Courts have divided on which is the right approach.
3. *Mas* turns heavily on the concept of domicile. A person is a citizen of state if they are domiciled there. What is the test for determining a person's domicile? What does it take for a person to establish a new domicile?

4. Where is a corporation domiciled for purposes of diversity jurisdiction? The test applied in Mas seems like a poor fit for a corporation. So what test should apply? The Supreme Court answered that question in the next case.

Hertz Corp. v. Friend

BREYER, J., delivered the unanimous opinion of the court. 559 U.S. 77 (2010)

The federal diversity jurisdiction statute provides that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated *and of the State where it has its principal place of business*." 28 U.S.C. §1332(c)(1) (emphasis added). We seek here to resolve different interpretations that the Circuits have given this phrase. In doing so, we place primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible. And we conclude that the phrase "principal place of business" refers to the place where the corporation's high level officers direct, control, and coordinate the corporation's activities. Lower federal courts have often metaphorically called that place the corporation's "nerve center." We believe that the "nerve center" will typically be found at a corporation's headquarters.

[…]

[The case grew from a class action. Hertz employees in California alleged that Hertz had failed to conform to California's wage and hour laws. Hertz sought to remove to federal court, invoking diversity jurisdiction. The employees resisted with the argument that California was a principal place of business for Hertz, since it derived more revenue from that state than any other and the plurality of its business activities also occurred there. Reasoning that, because of this business activity Hertz was, like them, a citizen of California, the plaintiffs resisted removal. The District Court found that Hertz was a citizen of California, relying on Ninth Circuit precedent instructing "courts to identify a corporation's 'principal place of business' by first determining the amount of a corporation's business activity State by State. If the amount of activity is 'significantly larger' or 'substantially predominates' in one State, then that State is the corporation's 'principal place of business.' " The Ninth Circuit affirmed. The Supreme Court reviewed the history of "principal place of business" and its judicial interpretations.]

V

A

In an effort to find a single, more uniform interpretation of the statutory phrase, we have reviewed the Courts of Appeals' divergent and increasingly complex interpretations. Having done so, we now return to, and expand, Judge Weinfeld's approach, as applied [in a case decided shortly after the 1958 amendment to §1332 created dual corporate citizenship]. We conclude that "principal place of business" is best read as referring to the place where a corpora-

tion's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's "nerve center." And in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, *i.e.*, the "nerve center," and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).

Three sets of considerations, taken together, convince us that this approach, while imperfect, is superior to other possibilities. First, the statute's language supports the approach. The statute's text deems a corporation a citizen of the "State where it has its principal place of business." 28 U.S.C. § 1332(c)(1). The word "place" is in the singular, not the plural. The word "principal" requires us to pick out the "main, prominent" or "leading" place. 12 Oxford English Dictionary 495 (2d ed. 1989) (def.(A)(I)(2)). And the fact that the word "place" follows the words "State where" means that the "place" is a place within a State. It is not the State itself.

A corporation's "nerve center," usually its main headquarters, is a single place. The public often (though not always) considers it the corporation's main place of business. And it is a place within a State. By contrast, the application of a more general business activities test has led some courts, as in the present case, to look, not at a particular place within a State, but incorrectly at the State itself, measuring the total amount of business activities that the corporation conducts there and determining whether they are "significantly larger" than in the next-ranking State.

[…]

Second, administrative simplicity is a major virtue in a jurisdictional statute. Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits. Judicial resources too are at stake. Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it. So courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case.

Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions. Predictability also benefits plaintiffs deciding whether to file suit in a state or federal court.

A "nerve center" approach, which ordinarily equates that "center" with a corporation's headquarters, is simple to apply comparatively speaking. The metaphor of a corporate "brain," while not precise, suggests a single location. By contrast, a corporation's general business activities more often lack a single principal place where they take place. That is to say, the corporation may have several plants, many sales locations, and employees located in many different

places. If so, it will not be as easy to determine which of these different business locales is the "principal" or most important "place."

Third, the statute's legislative history, for those who accept it, offers a simplicity-related interpretive benchmark. The Judicial Conference provided an initial version of its proposal that suggested a numerical test. A corporation would be deemed a citizen of the State that accounted for more than half of its gross income. The Conference changed its mind in light of criticism that such a test would prove too complex and impractical to apply. That history suggests that the words "principal place of business" should be interpreted to be no more complex than the initial "half of gross income" test. A "nerve center" test offers such a possibility. A general business activities test does not.

B

We recognize that there may be no perfect test that satisfies all administrative and purposive criteria. We recognize as well that, under the "nerve center" test we adopt today, there will be hard cases. For example, in this era of telecommuting, some corporations may divide their command and coordinating functions among officers who work at several different locations, perhaps communicating over the Internet. That said, our test nonetheless points courts in a single direction, towards the center of overall direction, control, and coordination. Courts do not have to try to weigh corporate functions, assets, or revenues different in kind, one from the other. Our approach provides a sensible test that is relatively easier to apply, not a test that will, in all instances, automatically generate a result.

We also recognize that the use of a "nerve center" test may in some cases produce results that seem to cut against the basic rationale for 28 U.S.C. §1332. For example, if the bulk of a company's business activities visible to the public take place in New Jersey, while its top officers direct those activities just across the river in New York, the "principal place of business" is New York. One could argue that members of the public in New Jersey would be *less* likely to be prejudiced against the corporation than persons in New York—yet the corporation will still be entitled to remove a New Jersey state case to federal court. And note too that the same corporation would be unable to remove a New York state case to federal court, despite the New York public's presumed prejudice against the corporation.

We understand that such seeming anomalies will arise. However, in view of the necessity of having a clearer rule, we must accept them. Accepting occasionally counterintuitive results is the price the legal system must pay to avoid overly complex jurisdictional administration while producing the benefits that accompany a more uniform legal system.

[…]

12.3. Supplemental

Often a lawsuit will include a mix of claims that arise under both federal and state law. In that circumstance, federal courts have recognized a power to take jurisdiction over related state-law claims, even in the absence of diversity jurisdiction, so long as there is at least one "anchor claim" over which there is an independent jurisdictional basis. This "supplemental" jurisdiction—formerly known by the twin terms as "pendent" and "ancillary" jurisdiction—illustrates the ways in which the different grants of subject-matter jurisdiction interact with and relate to one another.

United Mine Workers of America v. Gibbs

383 U.S. 715 (1966)

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Respondent Paul Gibbs was awarded compensatory and punitive damages in this action against petitioner United Mine Workers of America (UMW) for alleged violations of § 303 of the Labor Management Relations Act, 1947, 61 Stat. 158, as amended, [which prohibits certain unfair labor practices,] and of the common law of Tennessee. The case grew out of the rivalry between the United Mine Workers and the Southern Labor Union over representation of workers in the southern Appalachian coal fields. Tennessee Consolidated Coal Company, not a party here, laid off 100 miners of the UMW's Local 5881 when it closed one of its mines in southern Tennessee during the spring of 1960. Late that summer, Grundy Company, a wholly owned subsidiary of Consolidated, hired respondent as mine superintendent to attempt to open a new mine on Consolidated's property at nearby Gray's Creek through use of members of the Southern Labor Union. As part of the arrangement, Grundy also gave respondent a contract to haul the mine's coal to the nearest railroad loading point.

On August 15 and 16, 1960, armed members of Local 5881 forcibly prevented the opening of the mine, threatening respondent and beating an organizer for the rival union. The members of the local believed Consolidated had promised them the jobs at the new mine; they insisted that if anyone would do the work, they would. […] George Gilbert, the UMW's field representative for the area including Local 5881, […][had] explicit instructions from his international union superiors to establish a limited picket line, to prevent any further violence, and to see to it that the strike did not spread to neighboring mines. There was no further violence at the mine site […].

Respondent lost his job as superintendent, and never entered into performance of his haulage contract. He testified that he soon began to lose other trucking contracts and mine leases he held in nearby areas. Claiming these effects to be the result of a concerted union plan against him, he sought recovery not against Local 5881 or its members, but only against petitioner, the international union. The suit was brought in the United States District Court for the Eastern District of Tennessee, and jurisdiction was premised on allegations of secondary

boycotts under § 303. The state law claim, for which jurisdiction was based upon the doctrine of pendent jurisdiction, asserted "an unlawful conspiracy and an unlawful boycott aimed at him and [Grundy] to maliciously, wantonly and willfully interfere with his contract of employment and with his contract of haulage."

[…] The jury's verdict was that the UMW had violated both § 303 and state law. Gibbs was awarded $60,000 as damages under the employment contract and $14,500 under the haulage contract; he was also awarded $100,000 punitive damages. […]

I

A threshold question is whether the District Court properly entertained jurisdiction of the claim based on Tennessee law. […]

The Court held in *Hurn v. Oursler* that state law claims are appropriate for federal court determination if they form a separate but parallel ground for relief also sought in a substantial claim based on federal law. The Court distinguished permissible from nonpermissible exercises of federal judicial power over state law claims by contrasting "a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground*; in the latter it may not do so upon the non-federal *cause of action*." The question is into which category the present action fell.

Hurn was decided in 1933, before the unification of law and equity by the Federal Rules of Civil Procedure. At the time, the meaning of "cause of action" was a subject of serious dispute; the phrase might "mean one thing for one purpose and something different for another." The Court in *Hurn* identified what it meant by the term by citation of *Baltimore S. S. Co. v. Phillips*, 274 U.S. 316, a case in which "cause of action" had been used to identify the operative scope of the doctrine of *res judicata*. In that case the Court had noted that " 'the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time.' " It stated its holding in the following language, quoted in part in the *Hurn* opinion:

> Upon principle, it is perfectly plain that the respondent [a seaman suing for an injury sustained while working aboard ship] suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.

> A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. "The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear."

Had the Court found a jurisdictional bar to reaching the state claim in *Hurn*, we assume that the doctrine of *res judicata* would not have been applicable in any subsequent state suit. But the citation of *Baltimore S. S. Co.* shows that the Court found that the weighty policies of judicial economy and fairness to parties reflected in *res judicata* doctrine were in themselves strong counsel for the adoption of a rule which would permit federal courts to dispose of the state as well as the federal claims.

With the adoption of the Federal Rules of Civil Procedure and the unified form of action, Fed. R. Civ. P. 2, much of the controversy over "cause of action" abated. The phrase remained as the keystone of the *Hurn* test, however, and, as commentators have noted, has been the source of considerable confusion. Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged. Yet because the *Hurn* question involves issues of jurisdiction as well as convenience, there has been some tendency to limit its application to cases in which the state and federal claims are, as in *Hurn*, "little more than the equivalent of different epithets to characterize the same group of circumstances."

This limited approach is unnecessarily grudging. Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority … ," U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though

bound to apply state law to them. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals. There may, on the other hand, be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong. In the present case, for example, the allowable scope of the state claim implicates the federal doctrine of pre-emption; while this interrelationship does not create statutory federal question jurisdiction, *Louisville & Nashville R.R. Co. v. Mottley*, its existence is relevant to the exercise of discretion. Finally, there may be reasons independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal theories of relief, that would justify separating state and federal claims for trial, Fed. Rule Civ. Proc. 42(b). If so, jurisdiction should ordinarily be refused.

The question of power will ordinarily be resolved on the pleadings. But the issue whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation. Pretrial procedures or even the trial itself may reveal a substantial hegemony of state law claims, or likelihood of jury confusion, which could not have been anticipated at the pleading stage. Although it will of course be appropriate to take account in this circumstance of the already completed course of the litigation, dismissal of the state claim might even then be merited. For example, it may appear that the plaintiff was well aware of the nature of his proofs and the relative importance of his claims; recognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case. Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed.

We are not prepared to say that in the present case the District Court exceeded its discretion in proceeding to judgment on the state claim. […] It is true that the § 303 claims ultimately failed and that the only recovery allowed respondent was on the state claim. We cannot confidently say, however, that the federal issues were so remote or played such a minor role at the trial that in effect the state claim only was tried. […]

Aldinger v. Howard

Mr. Justice Rehnquist delivered the opinion of the Court. 427 U.S. 1 (1976)

This case presents [a] "subtle and complex question with far-reaching implications" […] : whether the doctrine of pendent jurisdiction extends to confer jurisdiction over a party as to whom no independent basis of federal jurisdiction exists. In this action, where jurisdiction over the main, federal claim against various officials of Spokane County, Wash., was grounded in 28 U.S.C. § 1343 (3), the Court of Appeals for the Ninth Circuit held that pendent jurisdiction was not available to adjudicate petitioner's state-law claims against Spokane County, over which party federal jurisdiction was otherwise nonexistent. […] We affirm.

I

This case arises at the pleading stage, and the allegations in petitioner's complaint are straightforward. Petitioner was hired in 1971 by respondent Howard, the Spokane County treasurer, for clerical work in that office. Two months later Howard informed petitioner by letter that although her job performance was "excellent," she would be dismissed, effective two weeks hence, because she was allegedly "living with [her] boy friend." Howard's action, petitioner alleged, was taken pursuant to a state statute which provides that the appointing county officer "may revoke each appointment at pleasure." Though a hearing was requested, none was held before or after the effective date of the discharge.

Petitioner's action in the United States District Court for the Eastern District of Washington, as embodied in her second amended complaint, claimed principally under the Civil Rights Act of 1871, 42 U.S.C. § 1983, that the discharge violated her substantive constitutional rights under the First, Ninth, and Fourteenth Amendments, and was procedurally defective under the latter's Due Process Clause. An injunction restraining the dismissal and damages for salary loss were sought against Howard, his wife, the named county commissioners, and the county. Jurisdiction over the federal claim was asserted under 28 U.S.C. § 1343(3),[3] and pendent jurisdiction was alleged to lie over the "state law claims against the parties." As to the county, the state-law claim was said to rest on state statutes waiving the county's sovereign immunity and providing for vicarious liability arising out of tortious conduct of its officials. The District Court dismissed the action as to the county on the ground that since it was not suable as a "person" under § 1983, there was no independent basis of jurisdiction over the county, and thus "this court [has no] power to exercise pendent jurisdiction over the claims against Spokane County." From this final judgment, *see* Fed. R. Civ. P. 54(b), petitioner appealed.

[3] "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States … ."

[…]

II

The question whether "pendent" federal jurisdiction encompasses not merely the litigation of additional *claims* between parties with respect to whom there is federal jurisdiction, but also the joining of additional *parties* with respect to whom there is no independent basis of federal jurisdiction, has been much litigated in other federal courts and much discussed by commentators since this Court's decision in *Gibbs*. *Gibbs*, in turn, is the most recent in a long line

of our cases dealing with the relationship between the judicial power of the United States and the actual contours of the cases and controversies to which that power is extended by Art. III.

[…]

[Our] cases, from *Osborn* to *Gibbs*, show that in treating litigation where nonfederal questions or claims were bound up with the federal claim upon which the parties were already in federal court, this Court has found nothing in Art. III's grant of judicial power which prevented adjudication of the nonfederal portions of the parties' dispute. None of them, however, adverted to the separate question, involved in the instant case, of whether a nonfederal claim could *in turn* be the basis for joining a party over whom no independent federal jurisdiction exists, simply because that claim could be derived from the "common nucleus of operative fact" giving rise to the dispute between the parties to the federal claim.

But while none of the foregoing line of cases discussed the joining of additional parties, other decisions of this Court have developed a doctrine of "ancillary jurisdiction" and it is in part upon this development—and its relationship to *Gibbs*—that petitioner relies to support "pendent party" jurisdiction here. Under this doctrine, the Court has identified certain considerations which justified the joining of parties with respect to whom there was no independent basis of federal jurisdiction. […]

The doctrine of ancillary jurisdiction […] is bottomed on the notion that since federal jurisdiction in the principal suit effectively controls the property or fund under dispute, other claimants thereto should be allowed to intervene in order to protect their interests, without regard to jurisdiction. As this Court stated in *Fulton Bank v. Hozier*:

The general rule is that when a federal court has properly acquired jurisdiction over a cause it may entertain, by intervention, dependent or ancillary controversies; but no controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit."

[…]

For purposes of addressing the jurisdictional question in this case, however, we think it quite unnecessary to formulate any general, all-encompassing jurisdictional rule. Given the complexities of the many manifestations of federal jurisdiction, together with the countless factual permutations possible under the Federal Rules, there is little profit in attempting to decide, for example, whether there are any "principled" differences between pendent and ancillary jurisdiction; or, if there are, what effect *Gibbs* had on such differences. Since it is upon *Gibbs*' language that the lower federal courts have relied in extending the kind of pendent-party jurisdiction urged by petitioner here, we think the better approach is to determine what *Gibbs* did and did not decide; and to identify what we deem are important differences between the jurisdiction sustained in *Gibbs* and that asserted here.

Gibbs and its lineal ancestor, *Osborn*, were couched in terms of Art. III's grant of judicial power in "Cases … arising under this Constitution, the Laws of the United States, and [its] Treaties," since they (and implicitly the cases which linked them) represented inquiries into the scope of Art. III jurisdiction in litigation where the "common nucleus of operative fact" gave rise to non-federal questions or claims between the parties. None of them posed the need for a further inquiry into the underlying statutory grant of federal jurisdiction or a flexible analysis of concepts such as "question," "claim," and "cause of action," because Congress had not addressed itself by statute to this matter. In short, Congress had said nothing about the scope of the word "Cases" in Art. III which would offer guidance on the kind of elusive question addressed in *Osborn* and *Gibbs*: whether and to what extent jurisdiction extended to a parallel state claim against the existing federal defendant.

Thus, it was perfectly consistent with Art. III, and the particular grant of subject-matter jurisdiction upon which the federal claim against the defendant in those cases was grounded, to require that defendant to answer as well to a second claim deriving from the "common nucleus" of fact, though it be of state-law vintage. This would not be an "unfair" use of federal power by the suing party, he already having placed the defendant properly in federal court for a substantial federal cause of action. Judicial economy would also be served because the plaintiff's claims were "such that he would ordinarily be expected to try them all in one judicial proceeding … ." *Gibbs*.

The situation with respect to the joining of a new party, however, strikes us as being both factually and legally different from the situation facing the Court in *Gibbs* and its predecessors. From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state-law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to join an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant "derive from a common nucleus of operative fact." True, the same considerations of judicial economy would be served insofar as plaintiff's claims "are such that he would ordinarily be expected to try them all in one judicial proceeding_._" But the addition of a completely new party would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress. […]

There is also a significant legal difference. In *Osborn* and *Gibbs* Congress was silent on the extent to which the defendant, already properly in federal court under a statute, might be called upon to answer nonfederal questions or claims; the way was thus left open for the Court to fashion its own rules under the general language of Art. III. But the extension of *Gibbs* to this kind of "pendent party" jurisdiction—bringing in an additional defendant at the behest of

the plaintiff—presents rather different statutory jurisdictional considerations. Petitioner's contention that she should be entitled to sue Spokane County as a new third party, and then to try a wholly state-law claim against the county, all of which would be "pendent" to her federal claim against respondent county treasurer, must be decided, not in the context of congressional silence or tacit encouragement, but in quite the opposite context. The question here, which it was not necessary to address in *Gibbs* or *Osborn*, is whether by virtue of the statutory grant of subject-matter jurisdiction, upon which petitioner's principal claim against the treasurer rests, Congress has addressed itself to the *party* as to whom jurisdiction pendent to the principal claim is sought. And it undoubtedly has done so.

III

Congress has in specific terms conferred Art. III jurisdiction on the district courts to decide actions brought to redress deprivations of civil rights. Under the opening language of § 1343, those courts "shall have original jurisdiction of any *civil action authorized by law* to be commenced by any person …" (emphasis added). The civil rights action set out in § 1983 is, of course, included within the jurisdictional grant of subsection (3) of § 1343. Yet petitioner does not, and indeed could not, contest the fact that as to § 1983, counties are excluded from the "person[s]" answerable to the plaintiff "in an action at law [or] suit in equity" to redress the enumerated deprivations. Petitioner must necessarily argue that in spite of the language emphasized above Congress left it open for the federal courts to fashion a jurisdictional doctrine under the general language of Art. III enabling them to circumvent this exclusion, as long as the civil rights action and the state-law claim arise from a "common nucleus of operative fact." But the question whether jurisdiction over the instant lawsuit extends not only to a related state-law claim, but to the defendant against whom that claim is made, turns initially, not on the general contours of the language in Art. III, *i.e.*, "Cases … arising under" but upon the deductions which may be drawn from congressional statutes as to whether Congress wanted to grant this sort of jurisdiction to federal courts. Parties such as counties, whom Congress *excluded* from liability in § 1983, and therefore by reference in the grant of jurisdiction under § 1343(3), can argue with a great deal of force that the scope of that "civil action" over which the district courts have been given statutory jurisdiction should not be so broadly read as to bring them *back* within that power merely because the facts also give rise to an ordinary civil action against them under state law. In short, as against a plaintiff's claim of *additional* power over a "pendent party," the reach of the statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which federal judicial power *has* been extended by Congress.

Resolution of a claim of pendent-party jurisdiction, therefore, calls for careful attention to the relevant statutory language. As we have indicated, we think a fair reading of the language used in § 1343, together with the scope of § 1983, requires a holding that the joinder of a municipal corporation, like the county here, for purposes of asserting a state-law claim not within federal diversity jurisdiction, is without the statutory jurisdiction of the district court.

There are, of course, many variations in the language which Congress has employed to confer jurisdiction upon the federal courts, and we decide here only the issue of so-called "pendent party" jurisdiction with respect to a claim brought under §§ 1343(3) and 1983. Other statutory grants and other alignments of parties and claims might call for a different result. When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in a federal court may all of the claims be tried together. As we indicated at the outset of this opinion, the question of pendent-party jurisdiction is "subtle and complex," and we believe that it would be as unwise as it would be unnecessary to lay down any sweeping pronouncement upon the existence or exercise of such jurisdiction. Two observations suffice for the disposition of the type of case before us. If the new party sought to be joined is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state-law claim. Before it can be concluded that such jurisdiction exists, a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence.

We conclude that in this case Congress has by implication declined to extend federal jurisdiction over a party such as Spokane County. The judgment of the Court of Appeals for the Ninth Circuit is therefore

Affirmed.

[…]

Owen Equipment & Erection Co. v. Kroger

437 U.S. 365 (1978)

Mr. Justice Stewart delivered the opinion of the Court.

In an action in which federal jurisdiction is based on diversity of citizenship, may the plaintiff assert a claim against a third-party defendant when there is no independent basis for federal jurisdiction over that claim? […]

I

On January 18, 1972, James Kroger was electrocuted when the boom of a steel crane next to which he was walking came too close to a high-tension electric power line. The respondent (his widow, who is the administratrix of his estate) filed a wrongful-death action in the United States District Court for the District of Nebraska against the Omaha Public Power District (OPPD). Her complaint alleged that OPPD's negligent construction, maintenance, and operation of the power line had caused Kroger's death. Federal jurisdiction was based on diversity of citizenship, since the respondent was a citizen of Iowa and OPPD was a Nebraska corporation.

OPPD then filed a third-party complaint pursuant to Fed. R. Civ. P. 14(a) against the petitioner, Owen Equipment and Erection Co. (Owen), alleging that the crane was owned and operated by Owen, and that Owen's negligence had been the proximate cause of Kroger's death. OPPD later moved for summary judgment on the respondent's complaint against it. While this motion was pending, the respondent was granted leave to file an amended complaint naming Owen as an additional defendant. Thereafter, the District Court granted OPPD's motion for summary judgment in an unreported opinion. The case thus went to trial between the respondent and the petitioner alone.

The respondent's amended complaint alleged that Owen was "a Nebraska corporation with its principal place of business in Nebraska." Owen's answer admitted that it was "a corporation organized and existing under the laws of the State of Nebraska" and denied every other allegation of the complaint. On the third day of trial, however, it was disclosed that the petitioner's principal place of business was in Iowa, not Nebraska,[5] and that the petitioner and the respondent were thus both citizens of Iowa.[6] The petitioner then moved to dismiss the complaint for lack of jurisdiction. The District Court reserved decision on the motion, and the jury thereafter returned a verdict in favor of the respondent. In an unreported opinion issued after the trial, the District Court denied the petitioner's motion to dismiss the complaint.

The judgment was affirmed on appeal. The Court of Appeals held that under this Court's decision in *Mine Workers v. Gibbs*, the District Court had jurisdictional power, in its discretion, to adjudicate the respondent's claim against the petitioner because that claim arose from the "core of 'operative facts' giving rise to both [respondent's] claim against OPPD and OPPD's claim against Owen." It further held that the District Court had properly exercised its discretion in proceeding to decide the case even after summary judgment had been granted to OPPD, because the petitioner had concealed its Iowa citizenship from the respondent. […]

II

It is undisputed that there was no independent basis of federal jurisdiction over the respondent's state-law tort action against the petitioner, since both are citizens of Iowa. And although Fed. R. Civ. P. 14(a) permits a plaintiff to assert a claim against a third-party defendant, it does not purport to say whether or not such a claim requires an independent basis of federal jurisdiction. Indeed, it could not determine that question, since it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction.

In affirming the District Court's judgment, the Court of Appeals relied upon the doctrine of ancillary jurisdiction, whose contours it believed were defined by this Court's holding in *Mine Workers v. Gibbs*. The *Gibbs* case differed from this one in that it involved pendent jurisdiction, which concerns the resolution of a plaintiff's federal- and state-law claims against a single defendant in one action. By contrast, in this case there was no claim based upon substantive federal law, but rather state-law tort claims against two different defendants. Nonetheless, the Court of Appeals was correct in perceiving that *Gibbs* and this case are two

[5] The problem apparently was one of geography. Although the Missouri River generally marks the boundary between Iowa and Nebraska, Carter Lake, Iowa, where the accident occurred and where Owen had its main office, lies west of the river, adjacent to Omaha, Neb. Apparently the river once avulsed at one of its bends, cutting Carter Lake off from the rest of Iowa.

[6] Title 28 U.S.C. § 1332(c) provides that "[f]or the purposes of ['diversity jurisdiction] … , a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."

species of the same generic problem: Under what circumstances may a federal court hear and decide a state-law claim arising between citizens of the same State? But we believe that the Court of Appeals failed to understand the scope of the doctrine of the *Gibbs* case.

The plaintiff in *Gibbs* alleged that the defendant union had violated the common law of Tennessee as well as the federal prohibition of secondary boycotts. This Court held that, although the parties were not of diverse citizenship, the District Court properly entertained the state-law claim as pendent to the federal claim. […]

It is apparent that *Gibbs* delineated the constitutional limits of federal judicial power. But even if it be assumed that the District Court in the present case had constitutional power to decide the respondent's lawsuit against the petitioner, it does not follow that the decision of the Court of Appeals was correct. Constitutional power is merely the first hurdle that must be overcome in determining that a federal court has jurisdiction over a particular controversy. For the jurisdiction of the federal courts is limited not only by the provisions of Art. III of the Constitution, but also by Acts of Congress.

That statutory law as well as the Constitution may limit a federal court's jurisdiction over nonfederal claims is well illustrated by two recent decisions of this Court, *Aldinger v. Howard*, and *Zahn v. International Paper Co*. In *Aldinger* the Court held that a Federal District Court lacked jurisdiction over a state-law claim against a county, even if that claim was alleged to be pendent to one against county officials under 42 U.S.C. § 1983. In *Zahn* the Court held that in a diversity class action under Fed. R. Civ. P. 23(b)(3), the claim of each member of the plaintiff class must independently satisfy the minimum jurisdictional amount set by 28 U.S.C. § 1332(a), and rejected the argument that jurisdiction existed over those claims that involved $10,000 or less as ancillary to those that involved more. In each case, despite the fact that federal and nonfederal claims arose from a "common nucleus of operative fact," the Court held that the statute conferring jurisdiction over the federal claim did not allow the exercise of jurisdiction over the nonfederal claims.

The *Aldinger* and *Zahn* cases thus make clear that a finding that federal and nonfederal claims arise from a "common nucleus of operative fact," the test of *Gibbs*, does not end the inquiry into whether a federal court has power to hear the nonfederal claims along with the federal ones. Beyond this constitutional minimum, there must be an examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim, in order to determine whether "Congress in [that statute] has … expressly or by implication negated" the exercise of jurisdiction over the particular nonfederal claim. *Aldinger v. Howard*.

III

The relevant statute in this case, 28 U.S.C. § 1332(a)(1), confers upon federal courts jurisdiction over "civil actions where the matter in controversy exceeds the sum or value of $10,000 … and is between … citizens of different States."

This statute and its predecessors have consistently been held to require complete diversity of citizenship. That is, diversity jurisdiction does not exist unless *each* defendant is a citizen of a different State from *each* plaintiff. Over the years Congress has repeatedly re-enacted or amended the statute conferring diversity jurisdiction, leaving intact this rule of complete diversity. Whatever may have been the original purposes of diversity-of-citizenship jurisdiction, this subsequent history clearly demonstrates a congressional mandate that diversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant.

Thus it is clear that the respondent could not originally have brought suit in federal court naming Owen and OPPD as codefendants, since citizens of Iowa would have been on both sides of the litigation. Yet the identical lawsuit resulted when she amended her complaint. Complete diversity was destroyed just as surely as if she had sued Owen initially. In either situation, in the plain language of the statute, the "matter in controversy" could not be "between … citizens of different States."

It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded. Yet under the reasoning of the Court of Appeals in this case, a plaintiff could defeat the statutory requirement of complete diversity by the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants. If, as the Court of Appeals thought, a "common nucleus of operative fact" were the only requirement for ancillary jurisdiction in a diversity case, there would be no principled reason why the respondent in this case could not have joined her cause of action against Owen in her original complaint as ancillary to her claim against OPPD. Congress' requirement of complete diversity would thus have been evaded completely.

It is true, as the Court of Appeals noted, that the exercise of ancillary jurisdiction over nonfederal claims has often been upheld in situations involving impleader, cross-claims or counterclaims. But in determining whether jurisdiction over a nonfederal claim exists, the context in which the non-federal claim is asserted is crucial. _See *Aldinger v. Howard*. And the claim here arises in a setting quite different from the kinds of nonfederal claims that have been viewed in other cases as falling within the ancillary jurisdiction of the federal courts.

First, the nonfederal claim in this case was simply not ancillary to the federal one in the same sense that, for example, the impleader by a defendant of a third-party defendant always is. A third-party complaint depends at least in part upon the resolution of the primary lawsuit. Its relation to the original complaint is thus not mere factual similarity but logical dependence. The respondent's claim against the petitioner, however, was entirely separate from her original claim against OPPD, since the petitioner's liability to her depended not at all upon whether or not OPPD was also liable. Far from being an ancillary and dependent claim, it was a new and independent one.

Second, the nonfederal claim here was asserted by the plaintiff, who voluntarily chose to bring suit upon a state-law claim in a federal court. By contrast, ancillary jurisdiction typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court. A plaintiff cannot complain if ancillary jurisdiction does not encompass all of his possible claims in a case such as this one, since it is he who has chosen the federal rather than the state forum and must thus accept its limitations. "[T]he efficiency plaintiff seeks so avidly is available without question in the state courts."

It is not unreasonable to assume that, in generally requiring complete diversity, Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve an entire, logically entwined lawsuit. Those practical needs are the basis of the doctrine of ancillary jurisdiction. But neither the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction to a plaintiff's cause of action against a citizen of the same State in a diversity case. Congress has established the basic rule that diversity jurisdiction exists under 28 U.S.C. § 1332 only when there is complete diversity of citizenship. "The policy of the statute calls for its strict construction." To allow the requirement of complete diversity to be circumvented as it was in this case would simply flout the congressional command.

Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

Mr. Justice White, with whom Mr. Justice Brennan joins, dissenting.

[…]

[A]s far as Art. III of the Constitution is concerned, the District Court had power to entertain Mrs. Kroger's claim against Owen. The majority correctly points out, however, that the analysis cannot stop here. As *Aldinger v. Howard* teaches, the jurisdictional power of the federal courts may be limited by Congress, as well as by the Constitution. In *Aldinger*, although the plaintiff's state claim against Spokane County was closely connected with her 42 U.S.C. § 1983 claim against the county treasurer, the Court held that the District Court did not have pendent jurisdiction over the state claim, for, under the Court's precedents at that time, it was thought that Congress had specifically determined not to confer on the federal courts jurisdiction over civil rights claims against cities and counties. That being so, the Court refused to allow "the federal courts to fashion a jurisdictional doctrine under the general language of Art. III enabling them to circumvent this exclusion … ."

In the present case, the only indication of congressional intent that the Court can find is that contained in the diversity jurisdictional statute, 28 U.S.C. § 1332(a), which states that "district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 … and is between … citizens of different States … ."Because this statute

has been interpreted as requiring complete diversity of citizenship between each plaintiff and each defendant, *Strawbridge v. Curtiss*, the Court holds that the District Court did not have ancillary jurisdiction over Mrs. Kroger's claim against Owen. In so holding, the Court unnecessarily expands the scope of the complete-diversity requirement while substantially limiting the doctrine of ancillary jurisdiction.

The complete-diversity requirement, of course, could be viewed as meaning that in a diversity case, a federal district court may adjudicate only those claims that are between parties of different States. Thus, in order for a defendant to implead a third-party defendant, there would have to be diversity of citizenship; the same would also be true for cross-claims between defendants and for a third-party defendant's claim against a plaintiff. Even the majority, however, refuses to read the complete-diversity requirement so broadly; it recognizes with seeming approval the exercise of ancillary jurisdiction over nonfederal claims in situations involving impleader, cross-claims, and counterclaims. Given the Court's willingness to recognize ancillary jurisdiction in these contexts, despite the requirements of § 1332(a), I see no justification for the Court's refusal to approve the District Court's exercise of ancillary jurisdiction in the present case.

[…]

Finley v. United States

Justice Scalia delivered the opinion of the Court.

490 U.S. 545 (1989)

On the night of November 11, 1983, a twin-engine plane carrying petitioner's husband and two of her children struck electric transmission lines during its approach to a San Diego, California, airfield. No one survived the resulting crash. Petitioner brought a tort action in state court, claiming that San Diego Gas and Electric Company had negligently positioned and inadequately illuminated the transmission lines, and that the city of San Diego's negligent maintenance of the airport's runway lights had rendered them inoperative the night of the crash. When she later discovered that the Federal Aviation Administration (FAA) was in fact the party responsible for the runway lights, petitioner filed the present action against the United States in the United States District Court for the Southern District of California. The complaint based jurisdiction upon the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), alleging negligence in the FAA's operation and maintenance of the runway lights and performance of air traffic control functions. Almost a year later, she moved to amend the federal complaint to include claims against the original state-court defendants, as to which no independent basis for federal jurisdiction existed. The District Court granted petitioner's motion and asserted "pendent" jurisdiction under *Mine Workers v. Gibbs*, finding it "clear" that "judicial economy and efficiency" favored trying the actions together, and concluding that they arose "from a common nucleus of operative facts." The District Court certified an interlocutory appeal to the Court of Appeals for the Ninth Circuit under 28 U.S.C. §

1292(b). That court summarily reversed […]. We granted certiorari to resolve a split among the Circuits on whether the FTCA permits an assertion of pendent jurisdiction over additional parties.

The FTCA provides that "the district courts … shall have exclusive jurisdiction of civil actions on claims against the United States" for certain torts of federal employees acting within the scope of their employment. 28 U.S.C. § 1346(b). Petitioner seeks to append her claims against the city and the utility to her FTCA action against the United States, even though this would require the District Court to extend its authority to additional parties for whom an independent jurisdictional base—such as diversity of citizenship, 28 U.S.C. § 1332(a)(1)—is lacking.

[…]

Analytically, petitioner's case is fundamentally different from *Gibbs* in that it brings into question what has become known as pendent-party jurisdiction, that is, jurisdiction over parties not named in any claim that is independently cognizable by the federal court. We may assume, without deciding, that the constitutional criterion for pendent-party jurisdiction is analogous to the constitutional criterion for pendent-claim jurisdiction, and that petitioner's state-law claims pass that test. Our cases show, however, that with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly. In *Zahn v. International Paper Co.*, we refused to allow a plaintiff pursuing a diversity action worth less than the jurisdictional minimum of $10,000 to append his claim to the jurisdictionally adequate diversity claims of other members of a plaintiff class—even though all of the *claims* would together have amounted to a single "case" under *Gibbs*, see *Owen Equipment & Erection Co. v. Kroger*. We based this holding upon "the statutes defining the jurisdiction of the District Court," and did not so much as mention *Gibbs.*

Two years later, the nontransferability of *Gibbs* to pendent-party claims was made explicit. In *Aldinger v. Howard*, the plaintiff brought federal claims under 42 U.S.C. § 1983 against individual defendants, and sought to append to them a related state claim against Spokane County, Washington. […] We specifically disapproved application of the *Gibbs* mode of analysis, finding a "significant legal difference." "[T]he addition of a completely new party," we said, "would run counter to the well-established principle that federal courts … are courts of limited jurisdiction marked out by Congress." "Resolution of a claim of pendent-party jurisdiction … calls for careful attention to the relevant statutory language." We held in *Aldinger* that the jurisdictional statute under which suit was brought, 28 U.S.C. § 1343, which conferred district court jurisdiction over civil actions of certain types "authorized by law to be commenced," did not mean to include as "authorized by law" a state-law claim against a party that had been statutorily insulated from similar federal suit. The county had been _"excluded_ from liability in § 1983, and therefore by reference in the grant of jurisdiction under § 1343(3)."

We reaffirmed and further refined our approach to pendent-party jurisdiction in *Owen Equipment & Erection Co. v. Kroger*—a case, like *Zahn*, involving the diversity statute, 28 U.S.C. § 1332(a)(1), but focusing on the requirement that the suit be "between … citizens of different states," rather than the requirement that it "excee[d] the sum or value of $10,000." We held that the jurisdiction which § 1332(a)(1) confers over a "matter in controversy" between a plaintiff and defendant of diverse citizenship cannot be read to confer pendent jurisdiction over a different, non-diverse defendant, even if the *claim* involving that other defendant meets the *Gibbs* test. _"Gibbs_," we said,"does not end the inquiry into whether a federal court has power to hear the nonfederal claims along with the federal ones. Beyond this constitutional minimum, there must be an examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim,"

The most significant element of "posture" or of "context," in the present case (as in *Zahn*, *Aldinger*, and *Kroger)* is precisely that the added claims involve added parties over whom no independent basis of jurisdiction exists. While in a narrow class of cases a federal court may assert authority over such a claim "ancillary" to jurisdiction otherwise properly vested—for example, when an additional party has a claim upon contested assets within the court's exclusive control, or when necessary to give effect to the court's judgment—we have never reached such a result solely on the basis that the *Gibbs* test has been met. And little more basis than that can be relied upon by petitioner here. As in *Kroger*, the relationship between petitioner's added claims and the original complaint is one of "mere factual similarity," which is of no consequence since "neither the convenience of the litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction." It is true that here, unlike in *Kroger*, the party seeking to bring the added claims had little choice but to be in federal rather than state court, since the FTCA permits the Federal Government to be sued only there. But that alone is not enough, since we have held that suits against the United States under the Tucker Act (which can of course be brought only in federal court, *see* 28 U.S.C. §§ 1346(a)(2), 1491(a)(1)), cannot include private defendants.

The second factor invoked by *Kroger*, the text of the jurisdictional statute at issue, likewise fails to establish petitioner's case. The FTCA, § 1346(b), confers jurisdiction over "civil actions on claims against the United States." It does not say "civil actions on claims that include requested relief against the United States," nor "civil actions in which there is a claim against the United States"—formulations one might expect if the presence of a claim against the United States constituted merely a minimum jurisdictional requirement, rather than a definition of the permissible scope of FTCA actions. Just as the statutory provision "between … citizens of different States" has been held to mean citizens of different States and no one else, see *Kroger*,so also here we conclude that "against the United States" means against the United States and no one else. "Due regard for the rightful independence of state governments … requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined." The statute here defines jurisdiction in a manner that does not reach defendants other than the United States.

Petitioner contends, however, that an affirmative grant of pendent-party jurisdiction is suggested by changes made to the jurisdictional grant of the FTC A as part of the comprehensive 1948 revision of the Judicial Code. In its earlier form, the FTCA had conferred upon district courts "exclusive jurisdiction to hear, determine, and render judgment *on any claim* against the United States" for specified torts. 28 U.S.C. § 931 (1946 ed.) (emphasis added). In the 1948 revision, this provision was changed to "exclusive jurisdiction of *civil actions on claims* against the United States." 28 U.S.C. § 1346(b) (1952 ed.) (emphasis added). Petitioner argues that this broadened the scope of the statute, permitting the assertion of jurisdiction over any "civil action," so long as that action *includes* a claim against the United States. We disagree.

Under established canons of statutory construction, "it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." Concerning the 1948 recodification of the Judicial Code in particular, we have stated that "no changes in law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." We have found no suggestion, much less a clear expression, that the minor rewording at issue here imported a substantive change.

The change from "claim against the United States" to "civil actions on claims against the United States" would be a strange way to express the substantive revision asserted by petitioner—but a perfectly understandable way to achieve another objective. The 1948 recodification came relatively soon after the adoption of the Federal Rules of Civil Procedure, which provide that "[t]here shall be one form of action to be known as 'civil action.'" Fed. R. Civ. P. 2. Consistent with this new terminology, the 1948 revision inserted the expression "civil action" throughout the provisions governing district-court jurisdiction.

Reliance upon the 1948 recodification also ignores the fact that the concept of pendent-party jurisdiction was not considered remotely viable until *Gibbs* liberalized the concept of pendent-claim jurisdiction—nearly 20 years later. […]

Because the FTCA permits the Government to be sued only in federal court, our holding that parties to related claims cannot necessarily be sued there means that the efficiency and convenience of a consolidated action will sometimes have to be forgone in favor of separate actions in state and federal courts. We acknowledged this potential consideration in *Aldinger*, but now conclude that the present statute permits no other result.

* * *

As we noted at the outset, our cases do not display an entirely consistent approach with respect to the necessity that jurisdiction be explicitly conferred. The *Gibbs* line of cases was a departure from prior practice, and a departure that we have no intent to limit or impair. But *Aldinger* indicated that the *Gibbs* approach would not be extended to the pendent-party field, and we decide today to retain that line. Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress. What

is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts. All our cases—*Zahn*, *Aldinger*, and *Kroger*—have held that a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties. Our decision today reaffirms that interpretive rule; the opposite would sow confusion.

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

Justice Stevens, with whom Justice Brennan and Justice Marshall join, dissenting.

[…]

I

[…]

I would […] hold that the grant of jurisdiction to hear "civil actions on claims against the United States" authorizes the federal courts to hear state-law claims against a pendent party. As many other judges have recognized, the fact that such claims are within the exclusive federal jurisdiction, together with the absence of any evidence of congressional disapproval of the exercise of pendent-party jurisdiction in FTCA cases, provides a fully sufficient justification for applying the holding in *Gibbs* to this case.

II

[…]

The Court's focus on diversity cases may explain why it loses sight of the purpose behind the principle of pendent jurisdiction. The doctrine of pendent jurisdiction rests in part on a recognition that forcing a federal plaintiff to litigate his or her case in both federal and state courts impairs the ability of the federal court to grant full relief, and "imparts a fundamental bias against utilization of the federal forum owing to the deterrent effect imposed by the needless requirement of duplicate litigation if the federal forum is chosen." "The courts, by recognizing pendent jurisdiction, are effectuating Congress' decision to provide the plaintiff with a federal forum for litigating a jurisdictionally sufficient claim." This is especially the case when, by virtue of the grant of exclusive federal jurisdiction, "*only* in a federal court may all of the claims be tried together." *Aldinger*.In such circumstances, in which Congress has unequivocally indicated its intent that the federal right be litigated in a federal forum, there is reason to believe that Congress did not intend that the substance of the federal right be diminished by the increased costs in efficiency and convenience of litigation in two forums. No such special federal interest is present when federal jurisdiction is invoked on the basis of the diverse citizenship of the parties and the state-law claims may be litigated in a state forum. *See Owen Equipment & Erection Co. v. Kroger*. To be sure "[w]hatever we say regarding the scope of jurisdiction conferred by a particular statute can … be changed by Congress,"

but that does not relieve us of our responsibility to be faithful to the congressional design. The Court is quite incorrect to presume that because Congress did not sanction the exercise of pendent-party jurisdiction in the diversity context, it has not permitted its exercise with respect to claims within the exclusive federal jurisdiction.

[…]

I respectfully dissent.

Notes & Questions

1. What is the difference between "pendent claim" jurisdiction and "pendent party" jurisdiction? What basis exists for treating them differently under Article III? Under statutory grants of subject-matter jurisdiction?
2. Consider *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), which is discussed in both *Kroger* and *Finley*. That case involved a state-law tort action brought by owners of property on Lake Champlain, in Vermont, against a New York paper company, for allegedly polluting the waters of the lake. In this putative class action, the lead plaintiffs invoked diversity jurisdiction over their claims, which exceeded the then-applicable $10,000 jurisdictional amount. The key question when the case came before the Supreme Court was whether individuals whose claims were for less than $10,000 could be joined as class members under Rule 23. The Court held that each member of a Rule 23(b)(3) class must satisfy the minimum jurisdictional amount under the diversity jurisdiction statute.
3. After the Supreme Court decided *Finley v. United States*, Congress codified the doctrine of supplemental jurisdiction by enacting 28 U.S.C. § 1367 in 1990. Read that statute and consider what effect it has, if any, on the holdings in *Aldinger*, *Kroger*, and *Finley*.

Exxon Mobil Corp. v. Allapattah Servs., Inc.

545 U.S. 546 (2005)

JUSTICE KENNEDY delivered the opinion of the Court.

These consolidated cases present the question whether a federal court in a diversity action may exercise supplemental jurisdiction over additional plaintiffs whose claims do not satisfy the minimum amount-in-controversy requirement, provided the claims are part of the same case or controversy as the claims of plaintiffs who do allege a sufficient amount in controversy. Our decision turns on the correct interpretation of 28 U.S.C. § 1367. The question has divided the Courts of Appeals, and we granted certiorari to resolve the conflict.

We hold that, where the other elements of jurisdiction are present and at least one named plaintiff in the action satisfies the amount-in-controversy requirement, § 1367 does authorize supplemental jurisdiction over the claims of other

plaintiffs in the same Article III case or controversy, even if those claims are for less than the jurisdictional amount specified in the statute setting forth the requirements for diversity jurisdiction. […]

I

In 1991, about 10,000 Exxon dealers filed a class-action suit against the Exxon Corporation in the United States District Court for the Northern District of Florida. The dealers alleged an intentional and systematic scheme by Exxon under which they were overcharged for fuel purchased from Exxon. The plaintiffs invoked the District Court's § 1332(a) diversity jurisdiction. After a unanimous jury verdict in favor of the plaintiffs, the District Court certified the case for interlocutory review, asking whether it had properly exercised § 1367 supplemental jurisdiction over the claims of class members who did not meet the jurisdictional minimum amount in controversy.

The Court of Appeals for the Eleventh Circuit upheld the District Court's extension of supplemental jurisdiction to these class members. […]

In the other case now before us the Court of Appeals for the First Circuit took a different position on the meaning of § 1367(a). In that case, a 9-year-old girl sued Star-Kist in a diversity action in the United States District Court for the District of Puerto Rico, seeking damages for unusually severe injuries she received when she sliced her finger on a tuna can. Her family joined in the suit, seeking damages for emotional distress and certain medical expenses. The District Court granted summary judgment to Star-Kist, finding that none of the plaintiffs met the minimum amount-in-controversy requirement. The Court of Appeals for the First Circuit, however, ruled that the injured girl, but not her family members, had made allegations of damages in the requisite amount.

The Court of Appeals then addressed whether, in light of the fact that one plaintiff met the requirements for original jurisdiction, supplemental jurisdiction over the remaining plaintiffs' claims was proper under § 1367. The court held that § 1367 authorizes supplemental jurisdiction only when the district court has original jurisdiction over the action, and that in a diversity case original jurisdiction is lacking if one plaintiff fails to satisfy the amount-in-controversy requirement. […]

II

A

[…]

Although the district courts may not exercise jurisdiction absent a statutory basis, it is well established—in certain classes of cases—that, once a court has original jurisdiction over some claims in the action, it may exercise supplemental jurisdiction over additional claims that are part of the same case or controversy. The leading modern case for this principle is *Mine Workers v. Gibbs*. […]

As we later noted, the decision allowing jurisdiction over pendent state claims in *Gibbs* did not mention, let alone come to grips with, the text of the jurisdictional statutes and the bedrock principle that federal courts have no jurisdiction

without statutory authorization. *Finley v. United States*. In *Finley*, we nonetheless reaffirmed and rationalized *Gibbs* and its progeny by inferring from it the interpretive principle that, in cases involving supplemental jurisdiction over additional claims between parties properly in federal court, the jurisdictional statutes should be read broadly, on the assumption that in this context Congress intended to authorize courts to exercise their full Article III power to dispose of an "entire action before the court [which] comprises but one constitutional 'case.' "

We have not, however, applied *Gibbs*' expansive interpretive approach to other aspects of the jurisdictional statutes. For instance, we have consistently interpreted § 1332 as requiring complete diversity: In a case with multiple plaintiffs and multiple defendants, the presence in the action of a single plaintiff from the same State as a single defendant deprives the district court of original diversity jurisdiction over the entire action. […] In order for a federal court to invoke supplemental jurisdiction under *Gibbs*, it must first have original jurisdiction over at least one claim in the action. Incomplete diversity destroys original jurisdiction with respect to all claims, so there is nothing to which supplemental jurisdiction can adhere.

[…]

As the jurisdictional statutes existed in 1989, then, here is how matters stood: First, the diversity requirement in § 1332(a) required complete diversity; absent complete diversity, the district court lacked original jurisdiction over all of the claims in the action. *Strawbridge*; *Kroger*. Second, if the district court had original jurisdiction over at least one claim, the jurisdictional statutes implicitly authorized supplemental jurisdiction over all other claims between the same parties arising out of the same Article III case or controversy. *Gibbs*. Third, even when the district court had original jurisdiction over one or more claims between particular parties, the jurisdictional statutes did not authorize supplemental jurisdiction over additional claims involving other parties. *Zahn*; *Finley*.

B

In *Finley* we emphasized that "[w]hatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress." In 1990, Congress accepted the invitation. It passed the Judicial Improvements Act, which enacted § 1367, the provision which controls these cases.

Section 1367 provides, in relevant part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include

> claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332

All parties to this litigation and all courts to consider the question agree that § 1367 overturned the result in *Finley.* […]

Section 1367(a) is a broad grant of supplemental jurisdiction over other claims within the same case or controversy, as long as the action is one in which the district courts would have original jurisdiction. The last sentence of § 1367(a) makes it clear that the grant of supplemental jurisdiction extends to claims involving joinder or intervention of additional parties. The single question before us, therefore, is whether a diversity case in which the claims of some plaintiffs satisfy the amount-in-controversy requirement, but the claims of other plaintiffs do not, presents a "civil action of which the district courts have original jurisdiction." If the answer is yes, § 1367(a) confers supplemental jurisdiction over all claims, including those that do not independently satisfy the amount-in-controversy requirement, if the claims are part of the same Article III case or controversy. If the answer is no, § 1367(a) is inapplicable and, in light of our holdings in *Clark* and *Zahn*, the district court has no statutory basis for exercising supplemental jurisdiction over the additional claims.

We now conclude the answer must be yes. When the well-pleaded complaint contains at least one claim that satisfies the amount-in-controversy requirement, and there are no other relevant jurisdictional defects, the district court, beyond all question, has original jurisdiction over that claim. The presence of other claims in the complaint, over which the district court may lack original jurisdiction, is of no moment. If the court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a "civil action" within the meaning of § 1367(a), even if the civil action over which it has jurisdiction comprises fewer claims than were included in the complaint. Once the court determines it has original jurisdiction over the civil action, it can turn to the question whether it has a constitutional and statutory basis for exercising supplemental jurisdiction over the other claims in the action.

Section 1367(a) commences with the direction that §§ 1367(b) and (c), or other relevant statutes, may provide specific exceptions, but otherwise § 1367(a) is a broad jurisdictional grant, with no distinction drawn between pendent-claim and pendent-party cases. In fact, the last sentence of § 1367(a) makes clear that the provision grants supplemental jurisdiction over claims involving joinder

or intervention of additional parties. The terms of § 1367 do not acknowledge any distinction between pendent jurisdiction and the doctrine of so-called ancillary jurisdiction. Though the doctrines of pendent and ancillary jurisdiction developed separately as a historical matter, the Court has recognized that the doctrines are "two species of the same generic problem," *Kroger*. Nothing in § 1367 indicates a congressional intent to recognize, preserve, or create some meaningful, substantive distinction between the jurisdictional categories we have historically labeled pendent and ancillary.

If § 1367(a) were the sum total of the relevant statutory language, our holding would rest on that language alone. The statute, of course, instructs us to examine § 1367(b) to determine if any of its exceptions apply, so we proceed to that section. While § 1367(b) qualifies the broad rule of § 1367(a), it does not withdraw supplemental jurisdiction over the claims of the additional parties at issue here. The specific exceptions to § 1367(a) contained in § 1367(b), moreover, provide additional support for our conclusion that § 1367(a) confers supplemental jurisdiction over these claims. Section 1367(b), which applies only to diversity cases, withholds supplemental jurisdiction over the claims of plaintiffs proposed to be joined as indispensable parties under Federal Rule of Civil Procedure 19, or who seek to intervene pursuant to Rule 24. Nothing in the text of § 1367(b), however, withholds supplemental jurisdiction over the claims of plaintiffs permissively joined under Rule 20 (like the additional plaintiffs in No. 04-79) or certified as class-action members pursuant to Rule 23 (like the additional plaintiffs in No. 04-70). The natural, indeed the necessary, inference is that § 1367 confers supplemental jurisdiction over claims by Rule 20 and Rule 23 plaintiffs. This inference, at least with respect to Rule 20 plaintiffs, is strengthened by the fact that § 1367(b) explicitly excludes supplemental jurisdiction over claims against defendants joined under Rule 20.

[…]

Finally, it is suggested that our interpretation of § 1367(a) creates an anomaly regarding the exceptions listed in § 1367(b): It is not immediately obvious why Congress would withhold supplemental jurisdiction over plaintiffs joined as parties "needed for just adjudication" under Rule 19 but would allow supplemental jurisdiction over plaintiffs permissively joined under Rule 20. The omission of Rule 20 plaintiffs from the list of exceptions in § 1367(b) may have been an "unintentional drafting gap." If that is the case, it is up to Congress rather than the courts to fix it. The omission may seem odd, but it is not absurd. An alternative explanation for the different treatment of Rules 19 and 20 is that Congress was concerned that extending supplemental jurisdiction to Rule 19 plaintiffs would allow circumvention of the complete diversity rule: A nondiverse plaintiff might be omitted intentionally from the original action, but joined later under Rule 19 as a necessary party. The contamination theory described above, if applicable, means this ruse would fail, but Congress may have wanted to make assurance double sure. More generally, Congress may have concluded that federal jurisdiction is only appropriate if the district court would have original jurisdiction over the claims of all those plaintiffs who are so essential to the action that they could be joined under Rule 19.

To the extent that the omission of Rule 20 plaintiffs from the list of § 1367(b) exceptions is anomalous, moreover, it is no more anomalous than the inclusion of Rule 19 plaintiffs in that list would be if the alternative view of § 1367(a) were to prevail. If the district court lacks original jurisdiction over a civil diversity action where any plaintiff's claims fail to comply with all the requirements of § 1332, there is no need for a special § 1367(b) exception for Rule 19 plaintiffs who do not meet these requirements. Though the omission of Rule 20 plaintiffs from § 1367(b) presents something of a puzzle on our view of the statute, the inclusion of Rule 19 plaintiffs in this section is at least as difficult to explain under the alternative view.

And so we circle back to the original question. When the well-pleaded complaint in district court includes multiple claims, all part of the same case or controversy, and some, but not all, of the claims are within the court's original jurisdiction, does the court have before it "any civil action of which the district courts have original jurisdiction"? It does. Under § 1367, the court has original jurisdiction over the civil action comprising the claims for which there is no jurisdictional defect. No other reading of § 1367 is plausible in light of the text and structure of the jurisdictional statute. Though the special nature and purpose of the diversity requirement mean that a single nondiverse party can contaminate every other claim in the lawsuit, the contamination does not occur with respect to jurisdictional defects that go only to the substantive importance of individual claims.

It follows from this conclusion that the threshold requirement of § 1367(a) is satisfied in cases, like those now before us, where some, but not all, of the plaintiffs in a diversity action allege a sufficient amount in controversy. We hold that § 1367 by its plain text overruled *Clark* and *Zahn* and authorized supplemental jurisdiction over all claims by diverse parties arising out of the same Article III case or controversy, subject only to enumerated exceptions not applicable in the cases now before us.

[…]

* * *

The judgment of the Court of Appeals for the Eleventh Circuit is affirmed. The judgment of the Court of Appeals for the First Circuit is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

12.4. Removal

The plaintiff gets the first choice of forum. Wherever she files her complaint will be the court that first hears her case. But since the earliest days of federal courts, Congress has given some defendants a chance to shift the court that will hear claims against them. In particular, under certain circumstances, defendants can "remove" a case from state to federal court. The general rule,

supplied by 28 U.S.C. § 1441, is that a defendant may remove any case over which "the district courts of the United States have original jurisdiction." In other words, a defendant typically may remove a case to federal court if the plaintiff could have filed it there in the first instance. Notable exceptions include the forum-defendant rule, which bars local defendants from removing cases where the only basis for federal jurisdiction is grounded on diversity of citizenship. *See* 28 U.S.C. § 1441(b)(2). A separate statute, 28 U.S.C. § 1446, details the procedures to be used for removal and, if appropriate, remand to state court. The cases that follow explore some of the difficult questions that can arise in the context of removal.

Caterpillar, Inc. v. Lewis

519 U.S. 61 (1996)

GINSBURG, J., delivered the opinion of the Court.

This case, commenced in a state court, involves personal injury claims arising under state law. The case was removed to a federal court at a time when, the Court of Appeals concluded, complete diversity of citizenship did not exist among the parties. Promptly after the removal, the plaintiff moved to remand the case to the state court, but the District Court denied that motion. Before trial of the case, however, all claims involving the nondiverse defendant were settled, and that defendant was dismissed as a party to the action. Complete diversity thereafter existed. The case proceeded to trial, jury verdict, and judgment for the removing defendant. The Court of Appeals vacated the judgment, concluding that, absent complete diversity at the time of removal, the District Court lacked subject-matter jurisdiction.

The question presented is whether the absence of complete diversity at the time of removal is fatal to federal-court adjudication. We hold that a district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered.

Respondent James David Lewis, a resident of Kentucky, filed this lawsuit in Kentucky state court on June 22, 1989, after sustaining injuries while operating a bulldozer. Asserting state-law claims based on defective manufacture, negligent maintenance, failure to warn, and breach of warranty, Lewis named as defendants both the manufacturer of the bulldozer—petitioner Caterpillar Inc., a Delaware corporation with its principal place of business in Illinois—and the company that serviced the bulldozer—Whayne Supply Company, a Kentucky corporation with its principal place of business in Kentucky.

Several months later, Liberty Mutual Insurance Group, the insurance carrier for Lewis' employer, intervened in the lawsuit as a plaintiff. A Massachusetts corporation with its principal place of business in that State, Liberty Mutual asserted subrogation claims against both Caterpillar and Whayne Supply for workers' compensation benefits Liberty Mutual had paid to Lewis on behalf of his employer.

Lewis entered into a settlement agreement with defendant Whayne Supply less than a year after filing his complaint. Shortly after learning of this agreement, Caterpillar filed a notice of removal, on June 21, 1990, in the United States District Court for the Eastern District of Kentucky. Grounding federal jurisdiction on diversity of citizenship, Caterpillar satisfied with only a day to spare the statutory requirement that a diversity-based removal take place within one year of a lawsuit's commencement, *see* 28 U.S.C. § 1446(b). Caterpillar's notice of removal explained that the case was nonremovable at the lawsuit's start: Complete diversity was absent then because plaintiff Lewis and defendant Whayne Supply shared Kentucky citizenship. Proceeding on the understanding that the settlement agreement between these two Kentucky parties would result in the dismissal of Whayne Supply from the lawsuit, Caterpillar stated that the settlement rendered the case removable.

Lewis objected to the removal and moved to remand the case to state court. Lewis acknowledged that he had settled his own claims against Whayne Supply. But Liberty Mutual had not yet settled its subrogation claim against Whayne Supply, Lewis asserted. Whayne Supply's presence as a defendant in the lawsuit, Lewis urged, defeated diversity of citizenship. Without addressing this argument, the District Court denied Lewis' motion to remand on September 24, 1990, treating as dispositive Lewis' admission that he had settled his own claims against Whayne Supply.

In June 1993, [Liberty Mutual settled with Whayne]. With Caterpillar as the sole defendant adverse to Lewis, the case proceeded to a 6-day jury trial in November 1993, ending in a unanimous verdict for Caterpillar. […]

[…]

We note, initially, two "givens" in this case as we have accepted it for review. First, the District Court, in its decision denying Lewis' timely motion to remand, incorrectly treated Whayne Supply, the nondiverse defendant, as effectively dropped from the case prior to removal. Second, the Sixth Circuit correctly determined that the complete diversity requirement was not satisfied at the time of removal. We accordingly home in on this question: Does the District Court's initial misjudgment still burden and run with the case, or is it overcome by the eventual dismissal of the nondiverse defendant?

[…]

Having preserved his objection to an improper removal, Lewis urges that an "all's well that ends well" approach is inappropriate here. He maintains that ultimate satisfaction of the subject-matter jurisdiction requirement ought not swallow up antecedent statutory violations. The course Caterpillar advocates, Lewis observes, would disfavor diligent plaintiffs who timely, but unsuccessfully, move to check improper removals in district court. Further, that course would allow improperly removing defendants to profit from their disregard of Congress' instructions, and their ability to lead district judges into error.

Concretely, in this very case, Lewis emphasizes, adherence to the rules Congress prescribed for removal would have kept the case in state court. Only

by removing prematurely was Caterpillar able to get to federal court inside the 1-year limitation set in § 1446(b). Had Caterpillar waited until the case was ripe for removal, *i.e.*, until Whayne Supply was dismissed as a defendant, the 1-year limitation would have barred the way, and plaintiff's choice of forum would have been preserved.[14] These arguments are hardly meritless, but they run up against an overriding consideration. Once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie R. Co. v. Tompkins* considerations of finality, efficiency, and economy become overwhelming.

[14] Lewis preferred state court to federal court based on differences he perceived in, inter alia, the state and federal jury systems and rules of evidence.

[…]

Our view is in harmony with a main theme of the removal scheme Congress devised. Congress ordered a procedure calling for expeditious superintendence by district courts. The lawmakers specified a short time, 30 days, for motions to remand for defects in removal procedure, 28 U.S.C. § 1447(c), and district court orders remanding cases to state courts generally are "not reviewable on appeal or otherwise," § 1447(d). Congress did not similarly exclude appellate review of refusals to remand. But an evident concern that may explain the lack of symmetry relates to the federal courts' subject-matter jurisdiction. Despite a federal trial court's threshold denial of a motion to remand, if, at the end of the day and case, a jurisdictional defect remains uncured, the judgment must be vacated. *See* Fed. R. Civ. Proc. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). In this case, however, no jurisdictional defect lingered through judgment in the District Court. To wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice. Lewis ultimately argues that, if the final judgment against him is allowed to stand, "all of the various procedural requirements for removal will become unenforceable"; therefore, "defendants will have an enormous incentive to attempt wrongful removals." In particular, Lewis suggests that defendants will remove prematurely "in the hope that some subsequent developments, such as the eventual dismissal of nondiverse defendants, will permit the case to be kept in federal court." We do not anticipate the dire consequences Lewis forecasts.

The procedural requirements for removal remain enforceable by the federal trial court judges to whom those requirements are directly addressed. Lewis' prediction that rejection of his petition will "encourag[e] state court defendants to remove cases improperly" rests on an assumption we do not indulge—that district courts generally will not comprehend, or will balk at applying, the rules on removal Congress has prescribed. The prediction furthermore assumes defendants' readiness to gamble that any jurisdictional defect, for example, the absence of complete diversity, will first escape detection, then disappear prior to judgment. The well-advised defendant, we are satisfied, will foresee the likely outcome of an unwarranted removal—a swift and nonreviewable remand order, *see* 28 U.S.C. § 1447(c), (d), attended by the displeasure of a district court

whose authority has been improperly invoked. The odds against any gain from a wrongful removal, in sum, render improbable Lewis' projection of increased resort to the maneuver.

For the reasons stated, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

Notes & Questions

1. *Lewis* seems to fly in the face of a key feature of subject-matter jurisdiction. The usual rule is that a final judgment can be set aside, and the case sent back to square one, if the court lacked power over the case. To see this dynamic in practice, consider *Kroger*, *supra*, in which a jury verdict was vacated based on a jurisdictional defect not discovered until the middle of trial. Yet despite a similar jurisdictional defect, the Court in *Lewis* allowed the judgment to stand. Why?
2. Relatedly, why did Caterpillar remove the case when it did? What was their strategy? Was it a mistake for the Court to reward Caterpillar for pursuing that strategy?

Standard Fire Ins. Co. v. Knowles

BREYER, J., delivered the opinion of the Court. 568 U.S. 588 (2013)

The Class Action Fairness Act of 2005 (CAFA) provides that the federal "district courts shall have original jurisdiction" over a civil "class action" if, among other things, the "matter in controversy exceeds the sum or value of $5,000,000." The statute adds that "to determine whether the matter in controversy exceeds the sum or value of $5,000,000," the "claims of the individual class members shall be aggregated."

The question presented concerns a class-action plaintiff who stipulates, prior to certification of the class, that he, and the class he seeks to represent, will not seek damages that exceed $5 million in total. Does that stipulation remove the case from CAFA's scope? In our view, it does not.

I

In April 2011 respondent, Greg Knowles, filed this proposed class action in an Arkansas state court against petitioner, the Standard Fire Insurance Company. Knowles claimed that, when the company had made certain homeowner's insurance loss payments, it had unlawfully failed to include a general contractor fee. And Knowles sought to certify a class of "hundreds, and possibly thousands" of similarly harmed Arkansas policyholders. In describing the relief sought, the complaint says that the "Plaintiff and Class stipulate they will seek to recover total aggregate damages of less than five million dollars." An attached affidavit stipulates that Knowles "will not at any time during this case … seek damages for the class … in excess of $5,000,000 in the aggregate."

On May 18, 2011, the company, pointing to CAFA's jurisdictional provision, removed the case to Federal District Court [where the judge accepted the stipulation as binding and remanded to state court.] 28 U.S.C. § 1332(d); § 1453. […]

[…]

II

CAFA provides the federal district courts with "original jurisdiction" to hear a "class action" if the class has more than 100 members, the parties are minimally diverse, and the "matter in controversy exceeds the sum or value of $5,000,000." 28 U.S.C. § 1332(d)(2), (d)(5)(B). To "determine whether the matter in controversy" exceeds that sum, "the claims of the individual class members shall be aggregated." § 1332(d)(6). And those "class members" include "persons (named or unnamed) who fall within the definition of the proposed or certified class." § 1332(d)(1)(D) (emphasis added).

As applied here, the statute tells the District Court to determine whether it has jurisdiction by adding up the value of the claim of each person who falls within the definition of Knowles' proposed class and determine whether the resulting sum exceeds $5 million. If so, there is jurisdiction and the court may proceed with the case. The District Court in this case found that resulting sum would have exceeded $5 million but for the stipulation. And we must decide whether the stipulation makes a critical difference.

In our view, it does not. Our reason is a simple one: Stipulations must be binding. See 9 J. Wigmore, Evidence § 2588, p. 821 (J. Chadbourn rev. 1981) (defining a "judicial admission or stipulation" as an "express waiver made … by the party or his attorney conceding for the purposes of the trial the truth of some alleged fact" (emphasis deleted)); 9 Wigmore, *supra*, § 2590, at 822 (the "vital feature" of a judicial admission is "universally conceded to be its conclusiveness upon the party making it"). The stipulation Knowles proffered to the District Court, however, does not speak for those he purports to represent.

That is because a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified.

Because his precertification stipulation does not bind anyone but himself, Knowles has not reduced the value of the putative class members' claims. For jurisdictional purposes, our inquiry is limited to examining the case "as of the time it was filed in state court." At that point, Knowles lacked the authority to concede the amount-in-controversy issue for the absent class members. The Federal District Court, therefore, wrongly concluded that Knowles' precertification stipulation could overcome its finding that the CAFA jurisdictional threshold had been met.

Knowles concedes that "[f]ederal jurisdiction cannot be based on contingent future events." Yet the two legal principles to which we have just referred—that stipulations must be binding and that a named plaintiff cannot bind precertification class members—mean that the amount to which Knowles has stipulated is in effect contingent.

If, for example, as Knowles' complaint asserts, "hundreds, and possibly thousands" of persons in Arkansas have similar claims, and if each of those claims places a significant sum in controversy, the state court might certify the class and permit the case to proceed, but only on the condition that the stipulation be excised. Or a court might find that Knowles is an inadequate representative due to the artificial cap he purports to impose on the class's recovery. Even were these possibilities remote in Knowles' own case, there is no reason to think them farfetched in other cases where similar stipulations could have more dramatic amount-lowering effects.

The strongest counterargument, we believe, takes a syllogistic form: First, *this* complaint contains a presently nonbinding stipulation that the class will seek damages that amount to less than $5 million. Second, if the state court eventually certifies that class, the stipulation will bind those who choose to remain as class members. Third, if the state court eventually insists upon modification of the stipulation (thereby permitting class members to obtain more than $5 million), it will have in effect created a new, different case. Fourth, CAFA, however, permits the federal court to consider only the complaint that the plaintiff has filed, *i.e.*, *this* complaint, not a new, modified (or amended) complaint that might eventually emerge.

Our problem with this argument lies in its conclusion. We do not agree that CAFA forbids the federal court to consider, for purposes of determining the amount in controversy, the very real possibility that a nonbinding, amount-limiting, stipulation may not survive the class certification process. This potential outcome does not result in the creation of a new case not now before the federal court. To hold otherwise would, for CAFA jurisdictional purposes, treat a nonbinding stipulation as if it were binding, exalt form over substance, and run directly counter to CAFA's primary objective: ensuring "Federal court consideration of interstate cases of national importance." It would also have the effect of allowing the subdivision of a $100 million action into 21 just-below-$5-million state-court actions simply by including nonbinding stipulations; such an outcome would squarely conflict with the statute's objective.

[…]

Knowles also points out that federal courts permit individual plaintiffs, who are the masters of their complaints, to avoid removal to federal court, and to obtain a remand to state court, by stipulating to amounts at issue that fall below the federal jurisdictional requirement. That is so. But the key characteristic about those stipulations is that they are legally binding on all plaintiffs. That essential feature is missing here, as Knowles cannot yet bind the absent class.

[…]

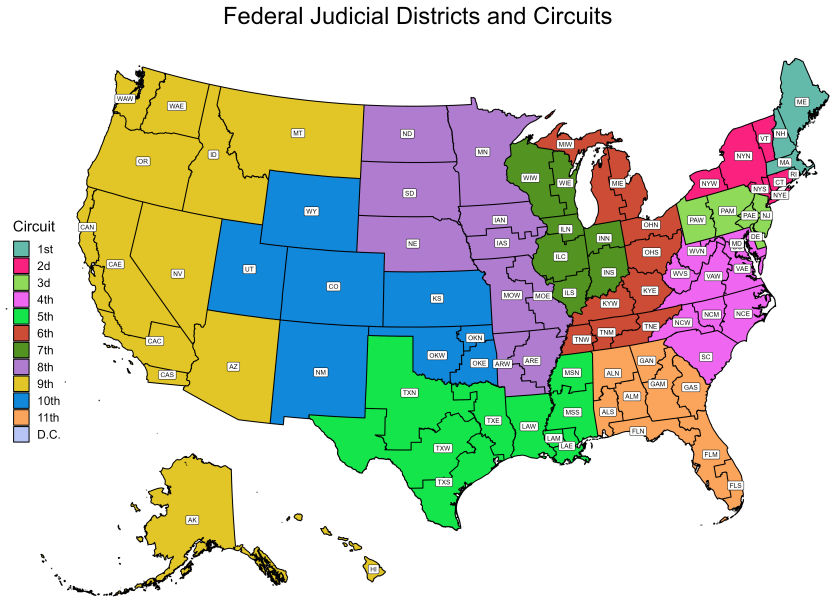
In sum, the stipulation at issue here can tie Knowles' hands, but it does not resolve the amount-in-controversy question in light of his inability to bind the rest of the class. For this reason, we believe the District Court, when following the statute to aggregate the proposed class members' claims, should have ignored that stipulation. Because it did not, we vacate the judgment below and remand the case for further proceedings consistent with this opinion.

13. Venue

13.1. Venue & Transfer

Entirely separate from the requirements of personal jurisdiction and subject-matter jurisdiction is the purely statutory (not constitutional) requirement of venue. Each lawsuit filed in federal court must be filed in a proper venue. Venue is defined by reference to federal judicial districts, which are geographically defined territories, each with its own roster of federal trial judges. Each state has between one and four districts. The map below displays the federal judicial districts, and the larger circuits into which they are grouped.

Figure 13.1.: United States Judicial Districts



Venue limits which districts may entertain a case. There are many different venue statutes, but the main one is found at 28 U.S.C. § 1391. Read that statute

carefully before you proceed to the next case, which explores the venue provision allowing suit to be brought in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b)(2).

Once you have a handle on how the venue statute works, the subsequent case—*Atlantic Marine*—will illustrate how venue interacts with forum selection clauses and the related concept of *forum non conveniens*.

Bates v. C & S Adjusters, Inc.

980 F.2d 865 (2d Cir. 1992)

Newman, Circuit Judge

This appeal concerns venue in an action brought under the Fair Debt Collection Practices Act. Specifically, the issue is whether venue exists in a district in which the debtor resides and to which a bill collector's demand for payment was forwarded. The issue arises on an appeal by Phillip E. Bates from the May 21, 1992, judgment of the District Court for the Western District of New York, dismissing his complaint because of improper venue. We conclude that venue was proper under 28 U.S.C. § 1391(b)(2) and therefore reverse and remand.

Bates commenced this action in the Western District of New York upon receipt of a collection notice from C & S Adjusters, Inc. ("C & S"). Bates alleged violations of the Fair Debt Collection Practices Act, and demanded statutory damages, costs, and attorney's fees. The facts relevant to venue are not in dispute. Bates incurred the debt in question while he was a resident of the Western District of Pennsylvania. The creditor, a corporation with its principal place of business in that District, referred the account to C & S, a local collection agency which transacts no regular business in New York. Bates had meanwhile moved to the Western District of New York. When C & S mailed a collection notice to Bates at his Pennsylvania address, the Postal Service forwarded the notice to Bates' new address in New York.

In its answer, C & S asserted two affirmative defenses and also counterclaimed for costs, alleging that the action was instituted in bad faith and for purposes of harassment. C & S subsequently filed a motion to dismiss for improper venue, which the District Court granted.

Discussion

1. Venue and the 1990 amendments to 28 U.S.C. § 1391(b)

Bates concedes that the only plausible venue provision for this action is 28 U.S.C. § 1391(b)(2), which allows an action to be brought in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." Prior to 1990, section 1391 allowed for venue in "the judicial district … in which the claim arose." 28 U.S.C. § 1391(b). This case represents our first opportunity to consider the significance of the 1990 amendments.

Prior to 1966, venue was proper in federal question cases, absent a special venue statute, only in the defendant's state of citizenship. If a plaintiff sought to sue multiple defendants who were citizens of different states, there might be no district where the entire action could be brought. Congress closed this "venue gap" by adding a provision allowing suit in the district "in which the claim arose." This phrase gave rise to a variety of conflicting interpretations. Some courts thought it meant that there could be only one such district; others believed there could be several. Different tests developed, with courts looking for "substantial contacts," the "weight of contacts," the place of injury or performance, or even to the boundaries of personal jurisdiction under state law.

The Supreme Court gave detailed attention to section 1391(b) in *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979). The specific holding of *Leroy* was that Great Western, a Texas corporation, which had attempted to take over an Idaho corporation, could not bring suit in Texas against Idaho officials who sought to enforce a state anti-takeover law. Although the effect of the Idaho officials' action might be felt in Texas, the Court rejected this factor as a basis for venue, since it would allow the Idaho officials to be sued anywhere a shareholder of the target corporation could allege that he wanted to accept Great Western's tender offer. The Court made several further observations: (1) the purpose of the 1966 statute was to close venue gaps and should not be read more broadly than necessary to close those gaps; (2) the general purpose of the venue statute was to protect defendants against an unfair or inconvenient trial location; (3) location of evidence and witnesses was a relevant factor; (4) familiarity of the Idaho federal judges with the Idaho anti-takeover statute was a relevant factor; (5) plaintiff's convenience was not a relevant factor; and (6) in only rare cases should there be more than one district in which a claim can be said to arise.

Subsequent to *Leroy* and prior to the 1990 amendment to section 1391(b), most courts have applied at least a form of the "weight of contacts" test. Courts continued to have difficulty in determining whether more than one district could be proper.

Against this background, we understand Congress' 1990 amendment to be at most a marginal expansion of the venue provision. The House Report indicates that the new language was first proposed by the American Law Institute in a 1969 Study, and observes:

> The great advantage of referring to the place where things happened … is that it avoids the litigation breeding phrase "in which the claim arose." It also avoids the problem created by the frequent cases in which substantial parts of the underlying events have occurred in several districts.

H.R.Rep. No. 734, 101st Cong., 2d Sess. 23. Thus it seems clear that *Leroy*'s strong admonition against recognizing multiple venues has been disapproved. Many of the factors in *Leroy*—for instance, the convenience of defendants and the location of evidence and witnesses—are most useful in distinguishing between two or more plausible venues. Since the new statute does not, as a general matter, require the District Court to determine the best venue, these factors

will be of less significance. Apart from this point, however, *Leroy* and other precedents remain important sources of guidance.

2. Fair Debt Collection Practices Act

Under the version of the venue statute in force from 1966 to 1990, at least three District Courts held that venue was proper under the Fair Debt Collection Practices Act in the plaintiff's home district if a collection agency had mailed a collection notice to an address in that district or placed a phone call to a number in that district. None of these cases involved the unusual fact, present in this case, that the defendant did not deliberately direct a communication to the plaintiff's district.

We conclude, however, that this difference is inconsequential, at least under the current venue statute. The statutory standard for venue focuses not on whether a defendant has made a deliberate contact—a factor relevant in the analysis of personal jurisdiction[1]—but on the location where events occurred. Under the new version of section 1391(b)(2), we must determine only whether a "substantial part of the events … giving rise to the claim" occurred in the Western District of New York.

[1] C & S has waived whatever claim it might have had that the District Court lacked personal jurisdiction over it. Waiver resulted from C & S's failure to allege lack of personal jurisdiction in its answer or motion to dismiss. *See* Fed. R. Civ. P. 12(b)(2), (h).

In adopting this statute, Congress was concerned about the harmful effect of abusive debt practices on consumers. See 15 U.S.C. § 1692(a) ("Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."). This harm does not occur until receipt of the collection notice. Indeed, if the notice were lost in the mail, it is unlikely that a violation of the Act would have occurred. Moreover, a debt collection agency sends its dunning letters so that they will be received. Forwarding such letters to the district to which a debtor has moved is an important step in the collection process. If the bill collector prefers not to be challenged for its collection practices outside the district of a debtor's original residence, the envelope can be marked "do not forward." We conclude that receipt of a collection notice is a substantial part of the events giving rise to a claim under the Fair Debt Collection Practices Act.

The relevant factors identified in *Leroy* add support to our conclusion. Although "bona fide error" can be a defense to liability under the Act, the alleged violations of the Act turn largely not on the collection agency's intent, but on the content of the collection notice. The most relevant evidence—the collection notice—is located in the Western District of New York. Because the collection agency appears not to have marked the notice with instructions not to forward, and has not objected to the assertion of personal jurisdiction, trial in the Western District of New York would not be unfair.

Conclusion

The judgment of the District Court is reversed, and the matter is remanded for further proceedings consistent with this decision.

Atlantic Marine Construction Co. v. U.S. District Court

Justice ALITO delivered the opinion of the Court. 571 U.S. 49 (2013)

The question in this case concerns the procedure that is available for a defendant in a civil case who seeks to enforce a forum-selection clause. We reject petitioner's argument that such a clause may be enforced by a motion to dismiss under 28 U.S.C. § 1406(a) or Rule 12(b)(3) of the Federal Rules of Civil Procedure. Instead, a forum-selection clause may be enforced by a motion to transfer under § 1404(a), which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." When a defendant files such a motion, we conclude, a district court should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer.

I

Petitioner Atlantic Marine Construction Co., a Virginia corporation with its principal place of business in Virginia, entered into a contract with the United States Army Corps of Engineers to construct a child-development center at Fort Hood in the Western District of Texas. Atlantic Marine then entered into a subcontract with respondent J-Crew Management, Inc., a Texas corporation, for work on the project. This subcontract included a forum-selection clause, which stated that all disputes between the parties "'shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division.'"

When a dispute about payment under the subcontract arose, however, J-Crew sued Atlantic Marine in the Western District of Texas, invoking that court's diversity jurisdiction. Atlantic Marine moved to dismiss the suit, arguing that the forum-selection 196clause rendered venue in the Western District of Texas "wrong" under §1406(a) and "improper" under Federal Rule of Civil Procedure 12(b)(3). In the alternative, Atlantic Marine moved to transfer the case to the Eastern District of Virginia under §1404(a). J-Crew opposed these motions.

The District Court denied both motions [and the Fifth Circuit affirmed]. […]

[…]

II

Atlantic Marine contends that a party may enforce a forum-selection clause by seeking dismissal of the suit under § 1406(a) and Rule 12(b)(3). We disagree. Section 1406(a) and Rule 12(b)(3) allow dismissal only when venue is "wrong" or "improper." Whether venue is "wrong" or "improper" depends exclusively on whether the court in which the case was brought satisfies the requirements of federal venue laws, and those provisions say nothing about a forum-selection clause.

A

Section 1406(a) provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." Rule 12(b)(3) states that a party may move to dismiss a case for "improper venue." These provisions therefore authorize dismissal only when venue is "wrong" or "improper" in the forum in which it was brought.

This questio—whether venue is "wrong" or "improper"—is generally governed by 28 U.S.C. § 1391.[2] That provision states that "[e]xcept as otherwise provided by law … this section shall govern the venue of all civil actions brought in district courts of the United States." § 1391(a)(1) (emphasis added). It further provides that "[a] civil action may be brought in—(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action." § 1391(b). When venue is challenged, the court must determine whether the case falls within one of the three categories set out in § 1391(b). If it does, venue is proper; if it does not, venue is improper, and the case must be dismissed or transferred under § 1406(a).Whether the parties entered into a contract containing a forum-selection clause has no bearing on whether a case falls into one of the categories of cases listed in § 1391(b). As a result, a case filed in a district that falls within § 1391 may not be dismissed under § 1406(a) or Rule 12(b)(3).

[2] Section 1391 governs "venue generally," that is, in cases where a more specific venue provision does not apply. Cf., e.g., § 1400 (identifying proper venue for copyright and patent suits).

Petitioner's contrary view improperly conflates the special statutory term "venue" and the word "forum." It is certainly true that, in some contexts, the word "venue" is used synonymously with the term "forum," but §1391 makes clear that venue in "all civil actions" must be determined in accordance with the criteria outlined in that section. That language cannot reasonably be read to allow judicial consideration of other, extrastatutory limitations on the forum in which a case may be brought.

The structure of the federal venue provisions confirms that they alone define whether venue exists in a given forum. In particular, the venue statutes reflect Congress' intent that venue should always lie in some federal court whenever federal courts have personal jurisdiction over the defendant. The first two paragraphs of § 1391(b) define the preferred judicial districts for venue in a typical case, but the third paragraph provides a fallback option: If no other venue is proper, then venue will lie in "*any judicial district* in which any defendant is subject to the court's personal jurisdiction" (emphasis added). The statute thereby ensures that so long as a federal court has personal jurisdiction over the defendant, venue will always lie somewhere. As we have previously noted, "Congress does not in general intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other." Yet petitioner's approach would mean that in some number

of cases—those in which the forum-selection clause points to a state or foreign court—venue would not lie in any federal district. That would not comport with the statute's design, which contemplates that venue will always exist in some federal court.

[…]

B

Although a forum-selection clause does not render venue in a court "wrong" or "improper" within the meaning of § 1406(a) or Rule 12(b)(3), the clause may be enforced through a motion to transfer under § 1404(a). That provision states that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." Unlike § 1406(a), § 1404(a) does not condition transfer on the initial forum's being "wrong." And it permits transfer to any district where venue is also proper (*i.e.*, "where [the case] might have been brought") or to any other district to which the parties have agreed by contract or stipulation.

Section 1404(a) therefore provides a mechanism for enforcement of forum-selection clauses that point to a particular federal district. And for the reasons we address in Part III, a proper application of § 1404(a) requires that a forum-selection clause be "given controlling weight in all but the most exceptional cases."

Atlantic Marine argues that § 1404(a) is not a suitable mechanism to enforce forum-selection clauses because that provision cannot provide for transfer when a forum-selection clause specifies a state or foreign tribunal, and we agree with Atlantic Marine that the Court of Appeals failed to provide a sound answer to this problem. The Court of Appeals opined that a forum-selection clause pointing to a nonfederal forum should be enforced through Rule 12(b)(3), which permits a party to move for dismissal of a case based on "improper venue." As Atlantic Marine persuasively argues, however, that conclusion cannot be reconciled with our construction of the term "improper venue" in § 1406 to refer only to a forum that does not satisfy federal venue laws. If venue is proper under federal venue rules, it does not matter for the purpose of Rule 12(b)(3) whether the forum-selection clause points to a federal or a nonfederal forum.

Instead, the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*. Section 1404(a) is merely a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system; in such cases, Congress has replaced the traditional remedy of outright dismissal with transfer. For the remaining set of cases calling for a nonfederal forum, § 1404(a) has no application, but the residual doctrine of *forum non conveniens* "has continuing application in federal courts." And because both § 1404(a) and the *forum non conveniens* doctrine from which it derives entail the same balancing-of-interests standard, courts should evaluate a forum-selection

clause pointing to a nonfederal forum in the same way that they evaluate a forum-selection clause pointing to a federal forum.

[…]

III

Although the Court of Appeals correctly identified § 1404(a) as the appropriate provision to enforce the forum-selection clause in this case, the Court of Appeals erred in failing to make the adjustments required in a §1404(a) analysis when the transfer motion is premised on a forum-selection clause. When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause.5 Only under extraordinary circumstances unrelated to the convenience of the parties should a §1404(a) motion be denied. And no such exceptional factors appear to be present in this case.

[…]

When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations. A forum-selection clause, after all, may have figured centrally in the parties' negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, "the interest of justice" is served by holding parties to their bargain.

[…]

We reverse the judgment of the Court of Appeals for the Fifth Circuit. Although no public-interest factors that might support the denial of Atlantic Marine's motion to transfer are apparent on the record before us, we remand the case for the courts below to decide that question.

It is so ordered.

13.2. Forum Non Conveniens

Transferring venue within the federal court system is easy enough, especially in light of cases like *Atlantic Marine*. But a much tricker problem results when a party claims that the appropriate forum for a suit is in an entirely different court system—either a different state court or a court in a foreign country. In that circumstance, the most effective mechanism for a defendant to seek to move a case is a motion to dismiss on grounds of *forum non conveniens*. This common-law doctrine directs courts to weigh the comparative convenience of two alternative forums and to dismiss if the alternate forum is adequate and more convenient. The following two cases provide 1) the Supreme Court's most authoritative statement on the law of *forum non conveniens*; and 2) a look at how the doctrine is applied in lower courts.

Piper Aircraft v. Reyno

JUSTICE MARSHALL delivered the opinion of the Court. 454 U.S. 235 (1981)

These cases arise out of an air crash that took place in Scotland. Respondent, acting as representative of the estates of several Scottish citizens killed in the accident, brought wrongful-death actions against petitioners that were ultimately transferred to the United States District Court for the Middle District of Pennsylvania. Petitioners moved to dismiss on the ground of *forum non conveniens*. After noting that an alternative forum existed in Scotland, the District Court granted their motions. The United States Court of Appeals for the Third Circuit reversed. The Court of Appeals based its decision, at least in part, on the ground that dismissal is automatically barred where the law of the alternative forum is less favorable to the plaintiff than the law of the forum chosen by the plaintiff. Because we conclude that the possibility of an unfavorable change in law should not, by itself, bar dismissal, and because we conclude that the District Court did not otherwise abuse its discretion, we reverse.

I

A

In July 1976, a small commercial aircraft crashed in the Scottish highlands during the course of a charter flight from Blackpool to Perth. The pilot and five passengers were killed instantly. The decedents were all Scottish subjects and residents, as are their heirs and next of kin. There were no eyewitnesses to the accident. At the time of the crash the plane was subject to Scottish air traffic control.

The aircraft, a twin-engine Piper Aztec, was manufactured in Pennsylvania by petitioner Piper Aircraft Co. (Piper). The propellers were manufactured in Ohio by petitioner Hartzell Propeller, Inc. (Hartzell). At the time of the crash the aircraft was registered in Great Britain and was owned and maintained by Air Navigation and Trading Co., Ltd. (Air Navigation). It was operated by McDonald Aviation, Ltd. (McDonald), a Scottish air taxi service. Both Air Navigation and McDonald were organized in the United Kingdom. The wreckage of the plane is now in a hangar in Farnsborough, England.

The British Department of Trade investigated the accident shortly after it occurred. A preliminary report found no evidence of defective equipment and indicated that pilot error may have contributed to the accident. The pilot, who had obtained his commercial pilot's license only three months earlier, was flying over high ground at an altitude considerably lower than the minimum height required by his company's operations manual.

In July 1977, a California probate court appointed respondent Gaynell Reyno administratrix of the estates of the five passengers. Reyno is not related to and does not know any of the decedents or their survivors; she was a legal secretary to the attorney who filed this lawsuit. Several days after her appointment, Reyno commenced separate wrongful-death actions against Piper and Hartzell in the Superior Court of California, claiming negligence and strict liability. […]

Reyno candidly admits that the action against Piper and Hartzell was filed in the United States because its laws regarding liability, capacity to sue, and damages are more favorable to her position than are those of Scotland. Scottish law does not recognize strict liability in tort. Moreover, it permits wrongful-death actions only when brought by a decedent's relatives. The relatives may sue only for "loss of support and society."

On petitioners' motion, the suit was removed to the United States District Court for the Central District of California. Piper then moved for transfer to the United States District Court for the Middle District of Pennsylvania[, where Hartzell's business with Piper supported jurisdiction], pursuant to 28 U.S.C. § 1404(a). Hartzell moved to dismiss for lack of personal jurisdiction, or in the alternative, to transfer[, also to the Middle District of Pennsylvania]. In December 1977, the District Court […] transferred the case to the Middle District of Pennsylvania. […]

B

[A]fter the suit had been transferred, both Hartzell and Piper moved to dismiss the action on the ground of *forum non conveniens*. The District Court granted these motions in October 1979. It relied on the balancing test set forth by this Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and its companion case, *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947). In those decisions, the Court stated that a plaintiff's choice of forum should rarely be disturbed. However, when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would "establish … oppressiveness and vexation to a defendant … out of all proportion to plaintiff's convenience," or when the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems," the court may, in the exercise of its sound discretion, dismiss the case. To guide trial court discretion, the Court provided a list of "private interest factors" affecting the convenience of the litigants, and a list of "public interest factors" affecting the convenience of the forum.[6] [[6] The factors pertaining to the private interests of the litigants included the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." The public factors bearing on the question included the administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.]

[The Third Circuit reversed, on the ground that dismissal for *forum non conveniens* is never appropriate where the law of the alternative forum is less favorable to the plaintiff.]

II

The Court of Appeals erred in holding that plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.

We expressly rejected the position adopted by the Court of Appeals in our decision in *Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. 413 (1932). […]

The Court of Appeals' decision is inconsistent with this Court's earlier *forum non conveniens* decisions in another respect. Those decisions have repeatedly emphasized the need to retain flexibility. In *Gilbert*, the Court refused to identify specific circumstances "which will justify or require either grant or denial of remedy." Similarly, in *Koster*, the Court rejected the contention that where a trial would involve inquiry into the internal affairs of a foreign corporation, dismissal was always appropriate. "That is one, but only one, factor which may show convenience." And in *Williams v. Green Bay & Western R. Co.*, 326 U.S. 549, 557 (1946), we stated that we would not lay down a rigid rule to govern discretion, and that "[e]ach case turns on its facts." If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable.

In fact, if conclusive or substantial weight were given to the possibility of a change in law, the *forum non conveniens* doctrine would become virtually useless. Jurisdiction and venue requirements are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous. Thus, if the possibility of an unfavorable change in substantive law is given substantial weight in the *forum non conveniens* inquiry, dismissal would rarely be proper.

[…]

Upholding the decision of the Court of Appeals would result in other practical problems. At least where the foreign plaintiff named an American manufacturer as defendant, a court could not dismiss the case on grounds of *forum non conveniens* where dismissal might lead to an unfavorable change in law. The American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts.[19]

[…]

We do not hold that the possibility of an unfavorable change in law should never be a relevant consideration in a *forum non conveniens* inquiry. Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice. In these cases, however, the remedies that

[19] In holding that the possibility of a change in law unfavorable to the plaintiff should not be given substantial weight, we also necessarily hold that the possibility of a change in law favorable to defendant should not be considered. Respondent suggests that Piper and Hartzell filed the motion to dismiss, not simply because trial in the United States would be inconvenient, but also because they believe the laws of Scotland are more favorable. She argues that this should be taken into account in the analysis of the private interests. We recognize, of course, that Piper and Hartzell may be engaged in reverse forum-shopping. However, this possibility ordinarily should not enter into a trial court's analysis of the private interests. If the defendant is able to overcome the presumption in favor of plaintiff by showing that trial in the chosen forum would be unnecessarily burdensome, dismissal is appropriate—regardless of the fact that defendant may also be motivated by a desire to obtain a more favorable forum.

would be provided by the Scottish courts do not fall within this category. Although the relatives of the decedents may not be able to rely on a strict liability theory, and although their potential damages award may be smaller, there is no danger that they will be deprived of any remedy or treated unfairly.

III

The Court of Appeals also erred in rejecting the District Court's *Gilbert* analysis. The Court of Appeals stated that more weight should have been given to the plaintiff's choice of forum, and criticized the District Court's analysis of the private and public interests. However, the District Court's decision regarding the deference due plaintiff's choice of forum was appropriate. Furthermore, we do not believe that the District Court abused its discretion in weighing the private and public interests.

A

The District Court acknowledged that there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum. It held, however, that the presumption applies with less force when the plaintiff or real parties in interest are foreign.

The District Court's distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified. In *Koster*, the Court indicated that a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum. When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.

B

The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference. […]

(1)

In analyzing the private interest factors, the District Court stated that the connections with Scotland are "overwhelming." This characterization may be somewhat exaggerated. Particularly with respect to the question of relative ease of access to sources of proof, the private interests point in both directions. As respondent emphasizes, records concerning the design, manufacture, and testing of the propeller and plane are located in the United States. She would have greater access to sources of proof relevant to her strict liability and negligence theories if trial were held here.[25] However, the District Court did not act unreasonably in concluding that fewer evidentiary problems would

[25] In the future, where similar problems are presented, district courts might dismiss subject to the condition that defendant corporations agree to provide the records relevant to the plaintiff's claims.

be posed if the trial were held in Scotland. A large proportion of the relevant evidence is located in Great Britain.

[…]

The District Court correctly concluded that the problems posed by the inability to implead potential third-party defendants clearly supported holding the trial in Scotland. Joinder of the pilot's estate, Air Navigation, and McDonald is crucial to the presentation of petitioners' defense. If Piper and Hartzell can show that the accident was caused not by a design defect, but rather by the negligence of the pilot, the plane's owners, or the charter company, they will be relieved of all liability. […]

(2)

The District Court's review of the factors relating to the public interest was also reasonable. On the basis of its choice-of-law analysis, it concluded that if the case were tried in the Middle District of Pennsylvania, Pennsylvania law would apply to Piper and Scottish law to Hartzell. It stated that a trial involving two sets of laws would be confusing to the jury. It also noted its own lack of familiarity with Scottish law. Consideration of these problems was clearly appropriate under *Gilbert*; in that case we explicitly held that the need to apply foreign law pointed towards dismissal. […]

Scotland has a very strong interest in this litigation. The accident occurred in its airspace. All of the decedents were Scottish. Apart from Piper and Hartzell, all potential plaintiffs and defendants are either Scottish or English. As we stated in *Gilbert*, there is "a local interest in having localized controversies decided at home." Respondent argues that American citizens have an interest in ensuring that American manufacturers are deterred from producing defective products, and that additional deterrence might be obtained if Piper and Hartzell were tried in the United States, where they could be sued on the basis of both negligence and strict liability. However, the incremental deterrence that would be gained if this trial were held in American court is likely to be insignificant. The American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here.

IV

The Court of Appeals erred in holding that the possibility of an unfavorable change in law bars dismissal on the ground of *forum non conveniens.* It also erred in rejecting the District Court's *Gilbert* analysis. The District Court properly decided that the presumption in favor of the respondent's forum choice applied with less than maximum force because the real parties in interest are foreign. It did not act unreasonably in deciding that the private interests pointed towards trial in Scotland. Nor did it act unreasonably in deciding that the public interests favored trial in Scotland. Thus, the judgment of the Court of Appeals is

Reversed.

[Justices POWELL and O'CONNOR took no part in the decision of these cases. The concurring opinion of Justice White and the dissent of Justices STEVENS and BRENNAN are omitted.]

Iragorri v. United Techs. Corp.

274 F.3d 65 (2d Cir. 2001) (*en banc*)

PIERRE N. LEVAL and JOSÉ A. CABRANES, Circuit Judges.

Our court convened this rehearing *en banc* not out of dissatisfaction with the panel's disposition, but because we believed that it would be useful for the full court to review the relevance of a plaintiff's residence in the United States but outside the district in which an action is filed when the defendants seek dismissal for *forum non conveniens*. […] The *en banc* order states that we convene to answer the question common to those decisions and the instant case, namely, "what degree of deference should the district court accord to a United States plaintiff's choice of a United States forum where that forum is different from the one in which the plaintiff resides." […]

Background

On October 3, 1992, Mauricio Iragorri—a domiciliary of Florida since 1981 and a naturalized United States citizen since 1989—fell five floors to his death down an open elevator shaft in the apartment building where his mother resided in Cali, Colombia. Mauricio left behind his widow, Haidee, and their two teenaged children, Patricia and Maurice, all of whom are the plaintiffs in this action. The plaintiffs have been domiciliaries of Florida since 1981. At the time of the accident, however, Haidee and the two children were living temporarily in Bogota, Colombia, because the children were attending a Bogota school as part of an educational exchange program sponsored by their Florida high school.

The Iragorris brought suit in the United States District Court for the District of Connecticut (Arterton, *J.)* on September 30, 1994. The named defendants were Otis Elevator Company ("Otis"), a New Jersey corporation with its principal place of business in Connecticut; United Technologies Corporation ("United")—the parent of Otis—a Delaware corporation whose principal place of business is also in Connecticut; and International Elevator, Inc. ("International"), a Maine corporation, which since 1988 had done business solely in South America. It is alleged that prior to the accident, an employee of International had negligently wedged open the elevator door with a screwdriver to perform service on the elevator, thereby leaving the shaft exposed and unprotected.

The complaint alleged two theories of liability against defendants Otis and United: that (a) International acted as an agent for Otis and United so that the negligent acts of its employee should be imputed to them, and (b) Otis and United were liable under Connecticut's products liability statute for the defective design and manufacture of the elevator which was sold and installed by their affiliate, Otis of Brazil.

On February 12, 1998, the claims against International Elevator were transferred by Judge Arterton to the United States District Court for the District of Maine. That district court then dismissed the case against International Elevator on *forum non conveniens* grounds, and the First Circuit affirmed.

Defendants Otis and United meanwhile moved to dismiss under *forum non conveniens*, arguing that plaintiffs' suit should be brought in Cali, Colombia, where the accident occurred. On March 31, 1999, Judge Arterton granted the motion and dismissed the claims against Otis and United on the condition that they agree to appear in the courts of Cali.

A panel of this Court vacated and remanded to the District Court for reconsideration in light of our recent decisions on *forum non conveniens.* Nearly simultaneously, this Court issued the order to hear the case *en banc.*

Discussion

I. The Degree of Deference Accorded to Plaintiff's Choice of Forum

The United States Supreme Court authorities establish various general propositions about *forum non conveniens.* We are told that courts should give deference to a plaintiff's choice of forum. "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." We understand this to mean that a court reviewing a motion to dismiss for *forum non conveniens* should begin with the assumption that the plaintiff's choice of forum will stand unless the defendant meets the burden of demonstrating the points outlined below.

At the same time, we are led to understand that this deference is not dispositive and that it may be overcome. Notwithstanding the deference, "dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper." *Piper Aircraft Co. v. Reyno*.

We are instructed that the degree of deference given to a plaintiff's forum choice varies with the circumstances. We are told that plaintiff's choice of forum is generally entitled to great deference when the plaintiff has sued in the plaintiff's home forum. But we are also instructed that the choice of a United States forum by a foreign plaintiff is entitled to less deference. *Piper* ("The District Court's distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified. … When the plaintiff is foreign, … [the] assumption [favoring the plaintiff's choice of forum] is much less reasonable.").

In our recent cases on the subject of *forum non conveniens*, our Court has faced situations involving a fact pattern not directly addressed by the Supreme Court: a United States resident plaintiff's suit in a U.S. district other than that in which the plaintiff resides. As a full court, we now undertake to apply to this general fact pattern the principles that we find implicit in Supreme Court precedents.

We regard the Supreme Court's instructions that (1) a plaintiff's choice of her home forum should be given great deference, while (2) a foreign resident's

choice of a U.S. forum should receive less consideration, as representing consistent applications of a broader principle under which the degree of deference to be given to a plaintiff's choice of forum moves on a sliding scale depending on several relevant considerations.

The Supreme Court explained in *Piper* that the reason we give deference to a plaintiff's choice of her home forum is because it is presumed to be convenient. ("When the home forum has been chosen, it is reasonable to assume that this choice is convenient.") In contrast, when a foreign plaintiff chooses a U.S. forum, it "is much less reasonable" to presume that the choice was made for convenience. In such circumstances, a plausible likelihood exists that the selection was made for forum-shopping reasons, such as the perception that United States courts award higher damages than are common in other countries. Even if the U.S. district was not chosen for such forum-shopping reasons, there is nonetheless little reason to assume that it is convenient for a foreign plaintiff.

Based on the Supreme Court's guidance, our understanding of how courts should address the degree of deference to be given to a plaintiff's choice of a U.S. forum is essentially as follows: The more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice. Stated differently, the greater the plaintiff's or the lawsuit's *bona fide* connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for *forum non conveniens.* Thus, factors that argue against *forum non conveniens* dismissal include the convenience of the plaintiff's residence in relation to the chosen forum, the availability of witnesses or evidence to the forum district, the defendant's amenability to suit in the forum district, the availability of appropriate legal assistance, and other reasons relating to convenience or expense. On the other hand, the more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons—such as attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum—the less deference the plaintiff's choice commands and, consequently, the easier it becomes for the defendant to succeed on a *forum non conveniens* motion by showing that convenience would be better served by litigating in another country's courts.

The decision to dismiss a case on *forum non conveniens* grounds "lies wholly within the broad discretion of the district court and may be overturned only when we believe that discretion has been *clearly abused*." In other words, "[o]ur limited review … encompasses the right to determine whether the district court reached an erroneous conclusion on either the facts or the law," or relied on an incorrect rule of law in reaching its determination. Accordingly, we do not, on appeal, undertake our own *de novo* review, simply substituting our view of the

matter for that of the district court. Nonetheless, the district court must follow the governing legal standards. In our recent cases, we vacated dismissals for *forum non conveniens* because we believed that the district courts had misapplied the basic rules, apparently assuming that deference is given to the plaintiff's choice of forum only when the plaintiff sues in the plaintiff's home district.

The rule is not so abrupt or arbitrary. One of the factors that necessarily affects a plaintiff's choice of forum is the need to sue in a place where the defendant is amenable to suit. Consider for example a hypothetical plaintiff residing in New Jersey, who brought suit in the Southern District of New York, barely an hour's drive from the plaintiff's residence, because the defendant was amenable to suit in the Southern District but not in New Jersey. It would make little sense to withhold deference for the plaintiff's choice merely because she did not sue in her home district. Where a U.S. resident leaves her home district to sue the defendant where the defendant has established itself and is thus amenable to suit, this would not ordinarily indicate a choice motivated by desire to impose tactical disadvantage on the defendant. This is all the more true where the defendant's amenability to suit in the plaintiff's home district is unclear. A plaintiff should not be compelled to mount a suit in a district where she cannot be sure of perfecting jurisdiction over the defendant, if by moving to another district, she can be confident of bringing the defendant before the court. In many circumstances, it will be far more convenient for a U.S. resident plaintiff to sue in a U.S. court than in a foreign country, even though it is not the district in which the plaintiff resides. It is not a correct understanding of the rule to accord deference only when the suit is brought in the plaintiff's home district. Rather, the court must consider a plaintiff's likely motivations in light of all the relevant indications. We thus understand the Supreme Court's teachings on the deference due to plaintiff's forum choice as instructing that we give greater deference to a plaintiff's forum choice to the extent that it was motivated by legitimate reasons, including the plaintiff's convenience and the ability of a U.S. resident plaintiff to obtain jurisdiction over the defendant, and diminishing deference to a plaintiff's forum choice to the extent that it was motivated by tactical advantage.

II. The Assessment of Conveniences

The deference given to a plaintiff's choice of forum does not dispose of a *forum non conveniens* motion. It is only the first level of inquiry. Even after determining whether the plaintiff's choice is entitled to more or less deference, a district court must still conduct the analysis set out in *Gilbert*, *Koster*, and *Piper*. Initially, the court must consider whether an adequate alternative forum exists. If so, it must balance two sets of factors to ascertain whether the case should be adjudicated in the plaintiff's chosen forum or in the alternative forum proposed by the defendant. The first set of factors considered are the private interest factors — the convenience of the litigants. These include "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive."

In considering these factors, the court is necessarily engaged in a comparison between the hardships defendant would suffer through the retention of jurisdiction and the hardships the plaintiff would suffer as the result of dismissal and the obligation to bring suit in another country. Rather than simply characterizing the case as one in negligence, contract, or some other area of law, the court should focus on the precise issues that are likely to be actually tried, taking into consideration the convenience of the parties and the availability of witnesses and the evidence needed for the trial of these issues. In a suit alleging negligence, for example, the court might reach different results depending on whether the alleged negligence lay in the conduct of actors at the scene of the accident, or in the design or manufacture of equipment at a plant distant from the scene of the accident. The court should consider also whether the plaintiff's damages are genuinely in dispute and where the parties will have better access to the evidence relating to those damages.

The court also considers public interest factors. As the Supreme Court has explained:

> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Gilbert.

Thus, while plaintiff's citizenship and residence can serve as a proxy for, or indication of, convenience, neither the plaintiff's citizenship nor residence, nor the degree of deference given to her choice of forum, necessarily controls the outcome. There is no "rigid rule of decision protecting U.S. citizen or resident plaintiffs from dismissal for *forum non conveniens*."

As is implicit in the meaning of "deference," the greater the degree of deference to which the plaintiff's choice of forum is entitled, the stronger a showing of inconvenience the defendant must make to prevail in securing *forum non conveniens* dismissal. At the same time, a lesser degree of deference to the plaintiff's choice bolsters the defendant's case but does not guarantee dismissal. A defendant does not carry the day simply by showing the existence of an adequate alternative forum. The action should be dismissed only if the chosen forum is shown to be genuinely inconvenient and the selected forum significantly preferable. In considering this point, the court furthermore must balance the greater convenience to the defendant of litigating in its preferred forum against

any greater inconvenience to the plaintiff if the plaintiff is required to institute the suit in the defendant's preferred foreign jurisdiction.

Courts should be mindful that, just as plaintiffs sometimes choose a forum for forum-shopping reasons, defendants also may move for dismissal under the doctrine of *forum non conveniens* not because of genuine concern with convenience but because of similar forum-shopping reasons. District courts should therefore arm themselves with an appropriate degree of skepticism in assessing whether the defendant has demonstrated genuine inconvenience and a clear preferability of the foreign forum. And the greater the degree to which the plaintiff has chosen a forum where the defendant's witnesses and evidence are to be found, the harder it should be for the defendant to demonstrate inconvenience.

III. The Application of the Principles to the Facts of This Case

We believe that the District Court in the case before us, lacking the benefit of our most recent opinions concerning *forum non conveniens*, did not accord appropriate deference to the plaintiffs' chosen forum. Although the plaintiffs had resided temporarily in Bogota at the time of Mauricio Iragorri's accident, it appears that they had returned to their permanent, long-time domicile in Florida by the time the suit was filed. The fact that the children and their mother had spent a few school terms in Colombia on a foreign exchange program seems to us to present little reason for discrediting the bona fides of their choice of the Connecticut forum. Heightened deference to the plaintiffs' chosen forum usually applies even where a plaintiff has temporarily or intermittently resided in the foreign jurisdiction. So far as the record reveals, there is little indication that the plaintiffs chose the defendants' principal place of business for forum-shopping reasons. Plaintiffs were apparently unable to obtain jurisdiction in Florida over the original third defendant, International, but could obtain jurisdiction over all three in Connecticut. It appears furthermore that witnesses and documentary evidence relevant to plaintiffs' defective design theory are to be found at the defendants' installations in Connecticut. As we have explained, "live testimony of key witnesses is necessary so that the trier of fact can assess the witnesses' demeanor." Also, in assessing where the greater convenience lies, the District Court must of course consider how great would be the inconvenience and difficulty imposed on the plaintiffs were they forced to litigate in Cali. Among other factors, plaintiffs claim that they fear for their safety in Cali and that various witnesses on both sides may be unwilling to travel to Cali; if these concerns are warranted, they appear highly relevant to the balancing inquiry that the District Court must conduct.

Accordingly, we remand for reconsideration in light of the principles here discussed. The District Court should determine the degree of deference to which plaintiffs' choice is entitled, the balance of hardships to the respective parties as between the competing fora, and the public interest factors involved. The District Court's decision, if appealed, would be reviewable under the clear-abuse-of-discretion standard that we have enunciated.

Conclusion

The judgment of the District Court is hereby vacated and the case remanded for further proceedings.

[…]

14. The Erie Doctrine

This section explores the *Erie* doctrine, one of the murkiest and most important features of our federal system of courts. The gist of the *Erie* doctrine can be stated in simplified form:

> The *Erie* Doctrine
>
> When a federal court sits in diversity, it applies state substantive and federal procedural law.

Working out that simple statement in practice, however, is quite tricky.

14.1. Ascertaining State Law

One of the most surprising features of our federal system of courts is that we not only have both state and federal courts, we also have both state and federal law. Confusingly, questions of federal law are often addressed by state courts, and questions of state law are often addressed by federal courts (as is the case with diversity jurisdiction). In other words, just because you know the forum doesn't mean you know the substantive law—and vice versa.

The question of which body of substantive law will apply in litigation is known as "choice of law." When we are trying to decide which of several states' laws might apply, the question is more specifically known as *horizontal* choice of law. By contrast, the choice between state and federal law is known as *vertical* choice of law. These two choice of law questions are related, but they are answered using different analytical tools under our constitutional system.

Article III of the U.S. Constitution grants to Congress the decision whether to create federal courts other than the Supreme Court. Since the first Congress, the legislature has used this power to establish a variety of lower federal courts. The first statute to do so was the Judiciary Act of 1789, a statute that continues to influence the structure of federal courts today. Among its many provisions, Section 34 of the Judiciary Act of 1789 included the first version of what is now known as the Rules of Decision Act. That provision, currently codified at 28 U.S.C. § 1652, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require

> or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

The Rules of Decision Act specifies that, unless federal law applies, state law governs—even in federal court. But the Rules of Decision Act is not entirely clear about what counts as the "laws of the several states." Surely that category includes state constitutions and statutes. But does it include judicial precedent issued by state courts? And how does the common law fit into all of this? If state judges interpret the common law differently from federal judges, whose interpretation controls when litigation is brought in federal court?

From 1841 until 1938, the Supreme Court held that judicial precedent interpreting the common law did not count as the "laws of the several states" for purposes of the Rules of Decision Act. The groundbreaking case was *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). Here is how Supreme Court Justice Hugo Black described the *Swift* case in 1942:

> The famous case of *Swift v. Tyson* arose from the following rather commonplace circumstances: Two persons, [Norton] and Keith, gave Swift a bill of exchange in payment of a promissory note. The bill was accepted, or guaranteed, by another person named Tyson who in so doing meant to pay for certain land which he was purchasing from Norton and Keith. Sadly enough for Tyson, he discovered that Norton and Keith could not sell him the land because they did not own it. Therefore, when Swift sued Tyson on the bill, Tyson defended on the ground that there had been a failure of consideration to him, and that Swift could not, under these circumstances recover as a bona-fide holder for valuable consideration because Swift had paid nothing for the bill—all he had done was to accept the bill as new evidence of an old debt. The controlling issue thus became whether a new bill of exchange for an old debt was an adequate consideration for Swift's acceptance of the bill.
>
> The bill was made in the State of Maine; it was accepted in New York. If governed by the laws of New York, which might have been thought applicable, Swift would probably have been found to have given no consideration.[*]

[*] Address of U.S. Supreme Court Associate Justice Hugo L. Black to the Missouri Bar Annual Banquet, Sept. 25, 1942, reprinted in 64 J.Mo.B. 26, 27 (2008).

The question in *Swift* was which body of law applied: the common law as understood by the judges of New York, or the common law as understood by the judges of the United States. If the Rules of Decision Act's reference to the "laws of the several states" is read to include state judicial precedent, then New York judicial precedent controlled. If not, then federal judges were free to interpret the general common law as they understood it. Writing for the majority in *Swift*, Justice Joseph Story—the leading expert on choice of law in that era—concluded that federal courts sitting in diversity did not need to follow New York judicial precedent when applying commercial common law:

> [T]he courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage: but they deduce the doctrine from the general principles of commercial law. It is, however, contended, that the thirty-fourth section of the judiciary act of 1789, ch. 20, furnishes a rule obligatory upon this court to follow the decisions of the state tribunals in all cases to which they apply. […] In order to maintain the argument, it is essential, therefore, to hold, that the word "laws," in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often reexamined, reversed, and qualified by the Courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the various cases, which have hitherto come before us for decision, this court have uniformly supposed, that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section […] is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.

Swift remained governing law for nearly a century. Toward the end of its reign, commentators began to attack the intellectual foundations of *Swift*. Justice Oliver Wendell Holmes articulated the critique best: "The common law is not

a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified […]. It always is the law of some State […]." The idea is that the common law is a creature of state law, and state judges are its expositors.

S. Pac. Co. v. Jensen, 244 U.S. 205, 218, 222 (1917) (Holmes, J., dissenting).

Against the backdrop of these criticisms and some notorious decisions that had cast doubt on the wisdom of the *Swift* regime, the Court abruptly reversed course in the case that follows.

Harry James Tompkins, of Hughestown, PA, walked home from his mother-in-law's house sometime after midnight. His route took him on a footpath that ran parallel to the Erie Railroad tracks. As Tompkins walked down the path, an Erie train—the Ashley Special No. 2499, on its way to Wilkes-Barre—wound its way down the tracks toward him. As it passed Tompkins, the train struck him, severing his right arm. Tompkins testified that he was struck by "a black object that looked like a door" extending outward from the passing train.

Whether Tompkins could recover damages for his injuries from the railroad turned on whether the law treated a pedestrian walking next to train tracks as a trespasser—as Pennsylvania courts had held—or rather as a member of the public permitted to walk along the path—as federal courts had held. If Tompkins was a trespasser, the railroad owed him a duty to avoid only wanton negligence; if he was permitted on the footpath, they owed him a duty of ordinary care.

For that reason, under the rule of *Swift v. Tyson*, federal courts—applying their understanding of "general law"—would hold the railroad to a higher standard than would Pennsylvania courts. Recognizing this, Tompkins's lawyers filed suit in the United States District Court for the Southern District of New York. The case went to trial, and the jury awarded Tompkins $30,000 in damages. The railroad appealed, and the case reached the Supreme Court, which was surprisingly open to revisiting the doctrine of *Swift v. Tyson*.

Erie Railroad v. Tompkins

304 U.S. 64 (1938)

Brandeis, J., delivered the opinion of the Court.

The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved.

Tompkins, a citizen of Pennsylvania, was injured on a dark night by a passing freight train of the Erie Railroad Company while walking along its right of way at Hughestown in that State. He claimed that the accident occurred through negligence in the operation, or maintenance, of the train; that he was rightfully on the premises as licensee because on a commonly used beaten footpath which ran for a short distance alongside the tracks; and that he was struck by something which looked like a door projecting from one of the moving cars. To enforce that claim he brought an action in the federal court for southern New

York, which had jurisdiction because the company is a corporation of that State. It denied liability; and the case was tried by a jury.

The Erie insisted that its duty to Tompkins was no greater than that owed to a trespasser. It contended, among other things, that its duty to Tompkins, and hence its liability, should be determined in accordance with the Pennsylvania law; that under the law of Pennsylvania, as declared by its highest court, persons who use pathways along the railroad right of way—that is a longitudinal pathway as distinguished from a crossing—are to be deemed trespassers; and that the railroad is not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or wilful. Tompkins denied that any such rule had been established by the decisions of the Pennsylvania courts; and contended that, since there was no statute of the State on the subject, the railroad's duty and liability is to be determined in federal courts as a matter of general law.

The trial judge refused to rule that the applicable law precluded recovery. The jury brought in a verdict of $30,000; and the judgment entered thereon was affirmed by the Circuit Court of Appeals, which held that it was unnecessary to consider whether the law of Pennsylvania was as contended, because the question was one not of local, but of general, law and that "upon questions of general law the federal courts are free, in the absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law. … Where the public has made open and notorious use of a railroad right of way for a long period of time and without objection, the company owes to persons on such permissive pathway a duty of care in the operation of its trains. … It is likewise generally recognized law that a jury may find that negligence exists toward a pedestrian using a permissive path on the railroad right of way if he is hit by some object projecting from the side of the train."

The Erie had contended that application of the Pennsylvania rule was required, among other things, by § 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 28 U.S.C. § 725, which provides:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Because of the importance of the question whether the federal court was free to disregard the alleged rule of the Pennsylvania common law, we granted certiorari.

First. Swift v. Tyson held that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the State is—or should be; and that, as there stated by Mr. Justice Story:

> [T]he true interpretation of the [Rules of Decision Act] limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and extraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was intended to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract of instrument, or what is the just rule furnished by the principles of commercial law to govern the case.

[…] The federal courts assumed, in the broad field of "general law," the power to declare rules of decision which Congress was confessedly without power to enact as statutes. Doubt was repeatedly expressed as to the correctness of the construction given [the Act], and as to the soundness of the rule which it introduced. But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written.[5]

[5] Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 Harv. L. Rev. 49, 51-52, 81-88, 108.

Criticism of the doctrine became widespread after the decision of *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co*. There, Brown and Yellow, a Kentucky corporation owned by Kentuckians, and the Louisville and Nashville Railroad, also a Kentucky corporation, wished that the former should have the exclusive privilege of soliciting passenger and baggage transportation at the Bowling Green, Kentucky, railroad station; and that the Black and White, a competing Kentucky corporation, should be prevented from interfering with that privilege. Knowing that such a contract would be void under the common law of Kentucky, it was arranged that the Brown and Yellow reincorporate under the law of Tennessee, and that the contract with the railroad should be executed there. The suit was then brought by the Tennessee corporation in the federal court for Western Kentucky to enjoin competition by the Black and White; an injunction issued by the District Court was sustained by the Court of Appeals; and this Court, citing many decisions in which the doctrine of *Swift v. Tyson* had been applied, affirmed the decree.

Second. Experience in applying the doctrine of *Swift v. Tyson* had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a

satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.

On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in State courts against those not citizens of the State. *Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State.

The discrimination resulting became in practice far-reaching. This resulted in part from the broad province accorded to the so-called "general law" as to which federal courts exercised an independent judgment. [The court gave various examples.]

In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction. […]

The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. Other legislative relief has been proposed. If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.

Third. Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. As stated by Mr. Justice Field when protesting in *Baltimore & Ohio R.R. Co. v. Baugh* against ignoring the Ohio common law of fellow-servant liability:

> "[…] [N]otwithstanding the frequency with which the doctrine [of *Swift v. Tyson*] has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the states,—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as

> to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence."

The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts "the parties are entitled to an independent judgment on matters of general law":

> [B]ut law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. … The authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word.

Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." In disapproving that doctrine we do not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.

Fourth. The defendant contended that by the common law of Pennsylvania as declared by its highest court in *Falchetti v. Pennsylvania R. Co.*, the only duty owed to the plaintiff was to refrain from willful or wanton injury. The plaintiff denied that such is the Pennsylvania law. In support of their respective contentions the parties discussed and cited many decisions of the Supreme Court of the State. The Circuit Court of Appeals ruled that the question of liability is one of general law; and on that ground declined to decide the issue of state law. As we hold this was error, the judgment is reversed and the case remanded to it for further proceedings in conformity with our opinion.

Reversed.

Butler, J.[, concurring]

[…]

Defendant's petition for writ of certiorari presented two questions: Whether its duty toward plaintiff should have been determined in accordance with the law as found by the highest court of Pennsylvania, and whether the evidence conclusively showed plaintiff guilty of contributory negligence. […]

No constitutional question was suggested or argued below or here. And as a general rule, this Court will not consider any question not raised below and presented by the petition. Here it does not decide either of the questions presented, but, changing the rule of decision in force since the foundation of the government, remands the case to be adjudged according to a standard never before deemed permissible.

[…]

The doctrine of [*Swift v. Tyson*] has been followed by this Court in an unbroken line of decisions. So far as appears, it was not questioned until more than 50 years later, and then by a single judge. *Baltimore & O. Railroad Co. v. Baugh*. […]

And since that decision, the division of opinion in this Court has been of the same character as it was before. In 1910, Mr. Justice Holmes, speaking for himself and two other Justices, dissented from the holding that a court of the United States was bound to exercise its own independent judgment in the construction of a conveyance made before the state courts had rendered an authoritative decision as to its meaning and effect. *Kuhn v. Fairmont Coal Co.* […]. But that dissent accepted […] as "settled" the doctrine of *Swift v. Tyson*, and insisted […] merely that the case under consideration was by nature and necessity peculiarly local.

[…]

So far as appears, no litigant has ever challenged the power of Congress to establish the rule as construed. It has so long endured that its destruction now without appropriate deliberation cannot be justified. There is nothing in the opinion to suggest that consideration of any constitutional question is necessary to a decision of the case. […] Against the protest of those joining in this opinion, the Court declines to assign the case for reargument. It may not justly be assumed that the labor and argument of counsel for the parties would not disclose the right conclusion and aid the Court in the statement of reasons to support it. Indeed, it would have been appropriate to give Congress opportunity to be heard before divesting it of power to prescribe rules of decision to be followed in the courts of the United States.

[…]

I am of opinion that the constitutional validity of the rule need not be considered, because under the law, as found by the courts of Pennsylvania and generally throughout the country, it is plain that the evidence required a finding that plaintiff was guilty of negligence that contributed to cause his injuries, and that the judgment below should be reversed upon that ground.

Reed, J.[, concurring]

I concur in the conclusion reached in this case, in the disapproval of the doctrine of *Swift v. Tyson*, and in the reasoning of the majority opinion except insofar as it relies upon the unconstitutionality of the "course pursued" by the federal courts.

[„,]

To decide the case now before us and to "disapprove" the doctrine of *Swift v. Tyson* requires only that we say that the words "the laws" [in the Rules of Decision Act] include in their meaning the decisions of the local tribunals. […] [T]his Court is now of the view that "laws" includes "decisions," [and] it is unnecessary to go further and declare that the "course pursued" was "unconstitutional," instead of merely erroneous.

The "unconstitutional" course referred to in the majority opinion is apparently the ruling in *Swift v. Tyson* that the supposed omission of Congress to legislate as to the effect of decisions leaves federal courts free to interpret general law for themselves. I am not at all sure whether, in the absence of federal statutory direction, federal courts would be compelled to follow state decisions. There was sufficient doubt about the matter in 1789 to induce the first Congress to legislate. […] If the opinion commits this Court to the position that the Congress is without power to declare what rules of substantive law shall govern the federal courts, that conclusion also seems questionable. The line between procedural and substantive law is hazy but no one doubts federal power over procedure. The Judiciary Article and the "necessary and proper" clause of Article One may fully authorize legislation, such as this section of the Judiciary Act.

In this Court, stare decisis, in statutory construction, is a useful rule, not an inexorable command. It seems preferable to overturn an established construction of an Act of Congress, rather than, in the circumstances of this case, to interpret the Constitution.

[…]

Notes & Questions

1. What is the basis for the Court's holding in *Erie*: the constitution? The Rules of Decision Act? Both?

2. Justice Brandeis's majority opinion in *Erie* cites an article written by Professor Charles Warren. That article's major contribution was uncovering a lost draft of the original Rules of Decision Act of 1789. That draft provided: "And be it further enacted, That the Statute law of the several States in force for the time being and their unwritten or common law now in use, whether by adoption from the common law of England, the ancient statutes of the same or otherwise, except where the Constitution, Treaties or Statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in the trials at common law in the courts of the United States in cases where they apply." What light does this lost draft cast on the final, enacted version of the Rules of Decision Act?

3. The regime of *Swift v. Tyson* was premised on the idea that there is a single body of general common law, and that judges deciding common-law cases recognize those general principles rather than making law themselves. In declaring that "there is no federal general common law," the *Erie* Court attacked the very notion of general common law. Instead, *Erie* recognized that the common law can only be *law* to the extent it is connected to some sovereign power—*i.e.*, state judges. Put differently, *Swift* was premised on the arguably fictional idea that judges merely "find" law, whereas *Erie* is premised on the arguably crass suggestion that judges "make" law. Which do you think is the better view of things?

4. *Erie* was decided in 1938, the same year that the Federal Rules of Civil Procedure took effect. The late 1930s were a pivotal period in American law, and *Erie* was a key part of the transformation. But *Erie* threatened to undermine the newly adopted Rules. If state law supplies the substantive law in diversity cases, does that mean state rules of practice should govern instead of the Federal Rules? As you will see, *Erie*'s holding is limited to *substantive*—not procedural—law. But the distinction between substance and procedure is maddeningly vague. To see why, consider the next case, which asks an almost recursive question: which body of law governs the question of which body of law applies to a particular dispute? In other words, does state or federal law dictate the horizontal choice of law inquiry in a diversity case?

Klaxon Co. v. Stentor Elec. Mfg. Co

MR. JUSTICE REED delivered the opinion of the Court.

313 U.S. 487 (1941)

The principal question in this case is whether in diversity cases the federal courts must follow conflict of laws rules prevailing in the states in which they sit. […]

In 1918, respondent, a New York corporation, transferred its entire business to petitioner, a Delaware corporation. Petitioner contracted to use its best efforts to further the manufacture and sale of certain patented devices covered by the agreement, and respondent was to have a share of petitioner's profits. The agreement was executed in New York, the assets were transferred there, and petitioner began performance there although later it moved its operations to other states. Respondent was voluntarily dissolved under New York law in 1919. Ten years later it instituted this action in the United States District Court for the District of Delaware, alleging that petitioner had failed to perform its agreement to use its best efforts. Jurisdiction rested on diversity of citizenship. In 1939 respondent recovered a jury verdict of $100,000, upon which judgment was entered. Respondent then moved to correct the judgment by adding interest at the rate of six percent from June 1, 1929, the date the action had been brought. The basis of the motion was the provision in § 480 of the New York Civil Practice Act directing that in contract actions interest be added to the principal sum "whether theretofore liquidated or unliquidated."[1] The

[1] Section 480, New York Civil Practice Act:
"Interest to be included in recovery. Where in any action, except as provided in section four hundred eighty-a, final judgment is rendered for a sum of money awarded by a verdict, report or decision, interest upon the total amount awarded, from the time when the verdict was rendered or the report or decision was made to the time of entering judgment, must be computed by the clerk, added to the total amount awarded, and included in the amount of the judgment. In every action wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated and shall be added to and be a part of the total sum awarded."

District Court granted the motion, taking the view that the rights of the parties were governed by New York law and that under New York law the addition of such interest was mandatory. The Circuit Court of Appeals affirmed, and we granted certiorari, limited to the question whether § 480 of the New York Civil Practice Act is applicable to an action in the federal court in Delaware.

The Circuit Court of Appeals was of the view that under New York law the right to interest before verdict under § 480 went to the substance of the obligation, and that proper construction of the contract in suit fixed New York as the place of performance. It then concluded that § 480 was applicable to the case because "it is clear by what we think is undoubtedly the better view of the law that the rules for ascertaining the measure of damages are not a matter of procedure at all, but are matters of substance which should be settled by reference to the law of the appropriate state according to the type of case being tried in the forum. The measure of damages for breach of a contract is determined by the law of the place of performance; Restatement, Conflict of Laws § 413." The court referred also to § 418 of the Restatement, which makes interest part of the damages to be determined by the law of the place of performance. Application of the New York statute apparently followed from the court's independent determination of the "better view" without regard to Delaware law, for no Delaware decision or statute was cited or discussed.

We are of opinion that the prohibition declared in *Erie R. Co. v. Tompkins*, against such independent determinations by the federal courts, extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. Any other ruling would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws. Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. This Court's views are not the decisive factor in determining the applicable conflicts rule. And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be.

Besides these general considerations, the traditional treatment of interest in diversity cases brought in the federal courts points to the same conclusion. 28 U.S.C. § 811, relating to interest on judgments, provides that it be calculated from the date of judgment at such rate as is allowed by law on judgments recovered in the courts of the state in which the court is held. […]

Looking then to the Delaware cases, petitioner relies on one group to support his contention that the Delaware state courts would refuse to apply § 480 of the New York Civil Practice Act, and respondent on another to prove the contrary.

We make no analysis of these Delaware decisions, but leave this for the Circuit Court of Appeals when the case is remanded.

[…]

Accordingly, the judgment is reversed and the case remanded to the Circuit Court of Appeals for decision in conformity with the law of Delaware.

Reversed.

Notes & Questions

1. *Klaxon* held that state choice-of-law rules govern horizontal choice of law in diversity cases.
2. What test did the *Klaxon* Court use to determine whether the choice-of-law inquiry should be governed by state or federal law?
3. The question whether state or federal law should govern proliferated across many areas of the law. The next cases asks which body of law should govern the inquiry about the preclusive effect of a state-court judgment—i.e., *res judicata*. For more on this topic, see Chapter 8.

Semtek Int'l Inc. v. Lockheed Martin Corp.

Scalia, J., delivered the opinion of the Court.

531 U.S. 497 (2001)

This case presents the question whether the claim-preclusive effect of a federal judgment dismissing a diversity action on statute-of-limitations grounds is determined by the law of the State in which the federal court sits.

I

Petitioner filed a complaint against respondent in California state court, alleging breach of contract and various business torts. Respondent removed the case to the United States District Court for the Central District of California on the basis of diversity of citizenship, and successfully moved to dismiss petitioner's claims as barred by California's 2-year statute of limitations. In its order of dismissal, the District Court, adopting language suggested by respondent, dismissed petitioner's claims "in [their] entirety on the merits and with prejudice." […] Petitioner [then] brought suit against respondent in the State Circuit Court for Baltimore City, Maryland, alleging the same causes of action, which were not time barred under Maryland's 3-year statute of limitations. […] Following a hearing, the Maryland state court granted respondent's motion to dismiss on the ground of *res judicata*. […] The [Maryland] Court of Special Appeals affirmed, holding that, regardless of whether California would have accorded claim-preclusive effect to a statute-of-limitations dismissal by one of its own courts, the dismissal by the California federal court barred the complaint filed in Maryland, since the *res judicata* effect of federal diversity judgments is

prescribed by federal law, under which the earlier dismissal was on the merits and claim preclusive. […]

II

Petitioner contends that the outcome of this case is controlled by *Dupasseur v. Rochereau*, 88 U.S. 130, 135 (1875), which held that the *res judicata* effect of a federal diversity judgment "is such as would belong to judgments of the State courts rendered under similar circumstances," and may not be accorded any "higher sanctity or effect." Since, petitioner argues, the dismissal of an action on statute-of-limitations grounds by a California state court would not be claim preclusive, it follows that the similar dismissal of this diversity action by the California federal court cannot be claim preclusive. While we agree that this would be the result demanded by *Dupasseur*, the case is not dispositive because it was decided under the Conformity Act of 1872 [the pre-Rules legislation] which required federal courts to apply the procedural law of the forum State in nonequity cases. […]

Respondent, for its part, contends that the outcome of this case is controlled by Federal Rule of Civil Procedure 41(b), which provides as follows:

> [Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.][*]

Since the dismissal here did not "[state] otherwise" (indeed, it specifically stated that it *was* "on the merits"), and did not pertain to the excepted subjects of jurisdiction, venue, or joinder, it follows, respondent contends, that the dismissal "is entitled to claim preclusive effect."

Implicit in this reasoning is the unstated minor premise that all judgments denominated "on the merits" are entitled to claim-preclusive effect. That premise is not necessarily valid [, because the phrase's meaning has changed over time]. […]

In short, it is no longer true that a judgment "on the merits" is necessarily a judgment entitled to claim-preclusive effect; and there are a number of reasons for believing that the phrase "adjudication upon the merits" does not bear that meaning in Rule 41(b). […]

And even apart from the purely default character of Rule 41 (b), it would be peculiar to find a rule governing the effect that must be accorded federal judgments by other courts ensconced in rules governing the internal procedures of the rendering court itself. Indeed, such a rule would arguably violate the jurisdictional limitation of the Rules Enabling Act: that the Rules "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b). […] In the present case, for example, if California law left petitioner free to sue on this

[*] When this case was decided, the text of Rule 41(b) read: Involuntary Dismissal: Effect Thereof For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits. *–Ed.*

claim in Maryland even after the California statute of limitations had expired, the federal court's extinguishment of that right (through Rule 41(b)'s mandated claim-preclusive effect of its judgment) would seem to violate this limitation.

Moreover, as so interpreted, the Rule would in many cases violate the federalism principle of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938), by engendering " 'substantial' variations [in outcomes] between state and federal litigation" which would "likely … influence the choice of a forum," *Hanna v. Plumer*. See also *Guaranty Trust Co. v. York*. With regard to the claim-preclusion issue involved in the present case, for example, the traditional rule is that expiration of the applicable statute of limitations merely bars the remedy and does not extinguish the substantive right, so that dismissal on that ground does not have claim-preclusive effect in other jurisdictions with longer, unexpired limitation periods. Out-of-state defendants sued on stale claims in California and in other States adhering to this traditional rule would systematically remove state-law suits brought against them to federal court—where, unless otherwise specified, a statute-of-limitations dismissal would bar suit everywhere.[1] We think the key to a more reasonable interpretation of the meaning of "operates as an adjudication upon the merits" in Rule 41(b) is to be found in Rule 41(a)[(1)(B)], which, in discussing the effect of voluntary dismissal by the plaintiff, makes clear that an "adjudication upon the merits" is the opposite of a "dismissal without prejudice":

> [Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.[*]

The primary meaning of "dismissal without prejudice," we think, is dismissal without barring the defendant from returning later, to the same court, with the same underlying claim. That will also ordinarily (though not always) have the consequence of not barring the claim from *other* courts, but its primary meaning relates to the dismissing court itself. […]

We think, then, that the effect of the "adjudication upon the merits" default provision of Rule 41(b)—and, presumably, of the explicit order in the present case that used the language of that default provision—is simply that, unlike a dismissal "without prejudice," the dismissal in the present case barred refiling of the same claim in the United States District Court for the Central District of California. That is undoubtedly a necessary condition, but it is not a sufficient one, for claim-preclusive effect in other courts.[2]

III

Having concluded that the claim-preclusive effect, in Maryland, of this California federal diversity judgment is dictated neither by *Dupasseur v. Rochereau*, as petitioner contends, nor by Rule 41(b), as respondent contends, we turn to consideration of what determines the issue. Neither the Full Faith and Credit Clause, U.S. Const., Art. IV, §1, nor the full faith and credit statute, 28 U.S.C. §1738, addresses the question. By their terms they govern the effects to be given

[1] Rule 41(b), interpreted as a preclusion-establishing rule, would not have the two effects described in the preceding paragraphs—arguable violation of the Rules Enabling Act and incompatibility with *Erie R. Co. v. Tompkins*—if the court's failure to specify an other-than-on-the-merits dismissal were subject to reversal on appeal whenever it would alter the rule of claim preclusion applied by the State in which the federal court sits. No one suggests that this is the rule, and we are aware of no case that applies it.

[*] At the time of the decision, the text of Rule 41(b) read:

"Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim."

–*Ed.*

[2] We do not decide whether, in a diversity case, a federal court's "dismissal upon the merits" (in the sense we have described), under circumstances where a state court would decree only a "dismissal without prejudice," abridges a "substantive right" and thus exceeds the authorization of the Rules Enabling Act. We think the situation will present itself more rarely than would the arguable violation of the Act that would ensue from interpreting Rule 41(b) as a rule of claim preclusion; and if it is a violation, can be more easily dealt with on direct appeal.

only to state-court judgments (and, in the case of the statute, to judgments by courts of territories and possessions). And no other federal textual provision, neither of the Constitution nor of any statute, addresses the claim-preclusive effect of a judgment in a federal diversity action.

[…]

It is left to us, then, to determine the appropriate federal rule. And despite the sea change that has occurred in the background law since *Dupasseur* was decided—not only repeal of the Conformity Act but also the watershed decision of this Court in *Erie*—we think the result decreed by *Dupasseur* continues to be correct for diversity cases. Since state, rather than federal, substantive law is at issue there is no need for a uniform federal rule. And indeed, nationwide uniformity in the substance of the matter is better served by having the same claim-preclusive rule (the state rule) apply whether the dismissal has been ordered by a state or a federal court. This is, it seems to us, a classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits. *See Gasperini v. Ctr. for Humanities, Inc*. As we have alluded to above, any other rule would produce the sort of "forum-shopping … and … inequitable administration of the laws" that *Erie* seeks to avoid, since filing in, or removing to, federal court would be encouraged by the divergent effects that the litigants would anticipate from likely grounds of dismissal. See *Guaranty Trust Co. v. York*.

This federal reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests. If, for example, state law did not accord claim-preclusive effect to dismissals for willful violation of discovery orders, federal courts' interest in the integrity of their own processes might justify a contrary federal rule. No such conflict with potential federal interests exists in the present case. Dismissal of this state cause of action was decreed by the California federal court only because the California statute of limitations so required; and there is no conceivable federal interest in giving that time bar more effect in other courts than the California courts themselves would impose.

Because the claim-preclusive effect of the California federal court's dismissal "upon the merits" of petitioner's action on statute-of-limitations grounds is governed by a federal rule that in turn incorporates California's law of claim preclusion (the content of which we do not pass upon today), the Maryland Court of Special Appeals erred in holding that the dismissal necessarily precluded the bringing of this action in the Maryland courts. The judgment is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Notes & Questions

1. *Semtek* operates at several levels. To understand the case, you must understand each level separately. The first question was which body of law determined the claim-preclusive effect of the California federal court's judgment. The Court's answer to that question was "federal common law." The second question was what rule of claim preclusion existed under federal common law. The Court's answer was that, as a matter of federal common law, the preclusive effect of a judgment issued by a federal court sitting in diversity is the same as the preclusive effect a state-court judgment would have if it were issued by a state court.
2. As a result of the foregoing, the Supreme Court remanded a case to Maryland state courts so that they could determine the claim preclusion rules applicable in California state courts, so that they could determine the preclusive effect of the federal-court judgment. Sometimes, federalism can be extremely complicated.
3. A careful reader will have already recognzied a potential problem. If the source of the claim-preclusion rules applied in *Semtek* is "federal common law," how can the outcome in *Semtek* be squared with *Erie*, which famously pronounced that "[t]here is no federal general common law." How does the *Semtek* Court deal with this problem. Is the kind of common law at issue in *Semtek* something other than "general"?

14.2. Federal Supremacy

Stewart Org., Inc. v. Ricoh Corp

JUSTICE MARSHALL delivered the opinion of the Court.

487 U.S. 22 (1988)

This case presents the issue whether a federal court sitting in diversity should apply state or federal law in adjudicating a motion to transfer a case to a venue provided in a contractual forum-selection clause.

I

The dispute underlying this case grew out of a dealership agreement that obligated petitioner company, an Alabama corporation, to market copier products of respondent, a nationwide manufacturer with its principal place of business in New Jersey. The agreement contained a forum-selection clause providing that any dispute arising out of the contract could be brought only in a court located in Manhattan.[1] Business relations between the parties soured under circumstances that are not relevant here. In September 1984, petitioner brought a complaint in the United States District Court for the Northern District of Alabama. The core of the complaint was an allegation that respondent had breached the dealership agreement, but petitioner also included claims for breach of warranty, fraud, and antitrust violations.

[1] Specifically, the forum-selection clause read: "Dealer and Ricoh agree that any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case or controversy arising under or in connection with this Agreement and shall be a proper forum in which to adjudicate such case or controversy."

Relying on the contractual forum-selection clause, respondent moved the District Court either to transfer the case to the Southern District of New York under 28 U.S.C. § 1404(a) or to dismiss the case for improper venue under 28 U.S.C. § 1406. The District Court denied the motion. It reasoned that the transfer motion was controlled by Alabama law and that Alabama looks unfavorably upon contractual forum-selection clauses. The court certified its ruling for interlocutory appeal, *see* 28 U.S.C. § 1292(b), and the Court of Appeals for the Eleventh Circuit accepted jurisdiction.

On appeal, a divided panel of the Eleventh Circuit reversed the District Court. The panel concluded that questions of venue in diversity actions are governed by federal law, and that the parties' forum-selection clause was enforceable as a matter of federal law. The panel therefore reversed the order of the District Court and remanded with instructions to transfer the case to a Manhattan court. After petitioner successfully moved for rehearing *en banc*, the full Court of Appeals proceeded to adopt the result, and much of the reasoning, of the panel opinion. The *en banc* court, citing Congress' enactment or approval of several rules to govern venue determinations in diversity actions, first determined that "[v]enue is a matter of federal procedure." […] We now affirm under somewhat different reasoning.

II

Both the panel opinion and the opinion of the full Court of Appeals referred to the difficulties that often attend "the sticky question of which law, state or federal, will govern various aspects of the decisions of federal courts sitting in diversity." A district court's decision whether to apply a federal statute such as § 1404(a) in a diversity action, however, involves a considerably less intricate analysis than that which governs the "relatively unguided *Erie* choice." *Hanna v. Plumer*. Our cases indicate that when the federal law sought to be applied is a congressional statute, the first and chief question for the district court's determination is whether the statute is "sufficiently broad to control the issue before the Court." *Walker v. Armco Steel Corp*; *Burlington Northern R. Co. v. Woods*. This question involves a straightforward exercise in statutory interpretation to determine if the statute covers the point in dispute.

If the district court determines that a federal statute covers the point in dispute, it proceeds to inquire whether the statute represents a valid exercise of Congress' authority under the Constitution. See *Hanna v. Plumer*. If Congress intended to reach the issue before the district court, and if it enacted its intention into law in a manner that abides with the Constitution, that is the end of the matter; "[f]ederal courts are bound to apply rules enacted by Congress with respect to matters … over which it has legislative power." Thus, a district court sitting in diversity must apply a federal statute that controls the issue before the court and that represents a valid exercise of Congress' constitutional powers.

III

Applying the above analysis to this case persuades us that federal law, specifically 28 U.S.C. § 1404(a), governs the parties' venue dispute.

A

At the outset we underscore a methodological difference in our approach to the question from that taken by the Court of Appeals. The *en banc* court determined that federal law controlled the issue based on a survey of different statutes and judicial decisions that together revealed a significant federal interest in questions of venue in general, and in choice-of-forum clauses in particular. The Court of Appeals then proceeded to […] determine that the forum-selection clause in this case was enforceable. But the immediate issue before the District Court was whether to grant respondent's motion to transfer the action under § 1404(a), and as Judge Tjoflat properly noted in his special concurrence below, the immediate issue before the Court of Appeals was whether the District Court's denial of the § 1404(a) motion constituted an abuse of discretion. […] [T]he first question for consideration should have been whether § 1404(a) itself controls respondent's request to give effect to the parties' contractual choice of venue and transfer this case to a Manhattan court. For the reasons that follow, we hold that it does.

B

Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Under the analysis outlined above, we first consider whether this provision is sufficiently broad to control the issue before the court. That issue is whether to transfer the case to a court in Manhattan in accordance with the forum-selection clause. We believe that the statute, fairly construed, does cover the point in dispute.

Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an "individualized, case-by-case consideration of convenience and fairness." A motion to transfer under § 1404(a) thus calls on the district court to weigh in the balance a number of case-specific factors. The presence of a forum-selection clause such as the parties entered into in this case will be a significant factor that figures centrally in the district court's calculus. In its resolution of the § 1404(a) motion in this case, for example, the District Court will be called on to address such issues as the convenience of a Manhattan forum given the parties' expressed preference for that venue, and the fairness of transfer in light of the forum-selection clause and the parties' relative bargaining power. The flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences.

Section 1404(a) may not be the only potential source of guidance for the District Court to consult in weighing the parties' private designation of a suitable forum. The premise of the dispute between the parties is that Alabama law may refuse to enforce forum-selection clauses providing for out-of-state venues as a matter of state public policy. If that is so, the District Court will have either to integrate the factor of the forum-selection clause into its weighing of considerations as prescribed by Congress, or else to apply, as it did in this case, Alabama's categorical policy disfavoring forum-selection clauses. Our cases

make clear that, as between these two choices in a single "field of operation," the instructions of Congress are supreme.

It is true that § 1404(a) and Alabama's putative policy regarding forum-selection clauses are not perfectly coextensive. Section 1404(a) directs a district court to take account of factors other than those that bear solely on the parties' private ordering of their affairs. The district court also must weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of "the interest of justice." It is conceivable in a particular case, for example, that because of these factors a district court acting under § 1404(a) would refuse to transfer a case notwithstanding the counterweight of a forum-selection clause, whereas the coordinate state rule might dictate the opposite result. But this potential conflict in fact frames an additional argument for the supremacy of federal law. Congress has directed that multiple considerations govern transfer within the federal court system, and a state policy focusing on a single concern or a subset of the factors identified in § 1404(a) would defeat that command. Its application would impoverish the flexible and multifaceted analysis that Congress intended to govern motions to transfer within the federal system. The forum-selection clause, which represents the parties' agreement as to the most proper forum, should receive neither dispositive consideration (as respondent might have it) nor no consideration (as Alabama law might have it), but rather the consideration for which Congress provided in § 1404(a). This is thus not a case in which state and federal rules "can exist side by side … each controlling its own intended sphere of coverage without conflict." *Walker*.

Because § 1404(a) controls the issue before the District Court, it must be applied if it represents a valid exercise of Congress' authority under the Constitution. The constitutional authority of Congress to enact § 1404(a) is not subject to serious question. As the Court made plain in *Hanna*, "the constitutional provision for a federal court system … carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." Section 1404(a) is doubtless capable of classification as a procedural rule, and indeed, we have so classified it in holding that a transfer pursuant to § 1404(a) does not carry with it a change in the applicable law. It therefore falls comfortably within Congress' powers under Article III as augmented by the Necessary and Proper Clause.

We hold that federal law, specifically 28 U.S.C. § 1404(a), governs the District Court's decision whether to give effect to the parties' forum-selection clause and transfer this case to a court in Manhattan. We therefore affirm the Eleventh Circuit order reversing the District Court's application of Alabama law. The case is remanded so that the District Court may determine in the first instance the appropriate effect under federal law of the parties' forum-selection clause on respondent's § 1404(a) motion.

It is so ordered.

JUSTICE SCALIA, dissenting.

I agree with the opinion of the Court that the initial question before us is whether the validity between the parties of a contractual forum-selection clause falls within the scope of 28 U.S.C. § 1404(a). I cannot agree, however, that the answer to that question is yes. Nor do I believe that the federal courts can, consistent with the twin-aims test of *Erie R. Co. v. Tompkins*, fashion a judge-made rule to govern this issue of contract validity.

I

When a litigant asserts that state law conflicts with a federal procedural statute or formal Rule of Procedure, a court's first task is to determine whether the disputed point in question in fact falls within the scope of the federal statute or Rule. In this case, the Court must determine whether the scope of § 1404(a) is sufficiently broad to cause a direct collision with state law or implicitly to control the issue before the Court, *i.e.*, validity between the parties of the forum-selection clause, thereby leaving no room for the operation of state law. I conclude that it is not.

Although the language of § 1404(a) provides no clear answer, in my view it does provide direction. The provision vests the district courts with authority to transfer a civil action to another district "[f]or the convenience of parties and witnesses, in the interest of justice." This language looks to the present and the future. As the specific reference to convenience of parties and witnesses suggests, it requires consideration of what is likely to be just in the future, when the case is tried, in light of things as they now stand. Accordingly, the courts in applying § 1404(a) have examined a variety of factors, each of which pertains to facts that currently exist or will exist: *e.g.*, the forum actually chosen by the plaintiff, the current convenience of the parties and witnesses, the current location of pertinent books and records, similar litigation pending elsewhere, current docket conditions, and familiarity of the potential courts with governing state law. In holding that the validity between the parties of a forum-selection clause falls within the scope of § 1404(a), the Court inevitably imports, in my view without adequate textual foundation, a new *retrospective* element into the court's deliberations, requiring examination of what the facts were concerning, among other things, the bargaining power of the parties and the presence or absence of overreaching at the time the contract was made.

The Court largely attempts to avoid acknowledging the novel scope it gives to § 1404(a) by casting the issue as how much *weight* a district court should give a forum-selection clause as against other factors when it makes its determination under § 1404(a). I agree that if the weight-among-factors issue were before us, it would be governed by § 1404 (a). That is because, while the parties may decide who between them should bear any inconvenience, only a court can decide how much weight should be given under § 1404(a) to the factor of the parties' convenience as against other relevant factors such as the convenience of witnesses. But the Court's description of the issue begs the question: what law governs whether the forum-selection clause is a *valid* or *invalid* allocation of any inconvenience between the parties. If it is invalid, *i.e.*, should be voided,

between the parties, it cannot be entitled to any weight in the § 1404(a) determination. Since under Alabama law the forum-selection clause should be voided, in this case the question of what weight should be given the forum-selection clause can be reached only if as a preliminary matter federal law controls the issue of the validity of the clause between the parties.

Second, § 1404(a) was enacted against the background that issues of contract, including a contract's validity, are nearly always governed by state law. It is simply contrary to the practice of our system that such an issue should be wrenched from state control in absence of a clear conflict with federal law or explicit statutory provision. It is particularly instructive in this regard to compare § 1404(a) with another provision, enacted by the same Congress a year earlier, that *did* preempt state contract law, and in precisely the same field of agreement regarding forum selection. Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

> A written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

We have said that an arbitration clause is a "kind of forum-selection clause," and the contrast between this explicit pre-emption of state contract law on the subject and § 1404(a) could not be more stark. Section 1404(a) is simply a venue provision that nowhere mentions contracts or agreements, much less that the validity of certain contracts or agreements will be matters of federal law. It is difficult to believe that state contract law was meant to be pre-empted by this provision that we have said "should be regarded as a federal judicial housekeeping measure," that we have said did not change "the relevant factors" which federal courts used to consider under the doctrine of *forum non conveniens*, and that we have held can be applied retroactively because it is procedural. It seems to me the generality of its language—"[f]or the convenience of parties and witnesses, in the interest of justice"—is plainly insufficient to work the great change in law asserted here.

Third, it has been common ground in this Court since *Erie* that when a federal procedural statute or Rule of Procedure is not on point, substantial uniformity of predictable outcome between federal and state courts in adjudicating claims should be striven for. *See also Klaxon Co. v. Stentor Electric Mfg. Co.* This rests upon a perception of the constitutional and congressional plan underlying the creation of diversity and pendent jurisdiction in the lower federal courts, which should quite obviously be carried forward into our interpretation of ambiguous statutes relating to the exercise of that jurisdiction. We should assume, in other words, when it is fair to do so, that Congress is just as concerned as we have been to avoid significant differences between state and federal courts in

adjudicating claims. Thus, in deciding whether a federal procedural statute or Rule of Procedure encompasses a particular issue, a broad reading that would create significant disuniformity between state and federal courts should be avoided if the text permits. *See, e.g.*, *Walker*; *Cohen*. As I have shown, the interpretation given § 1404(a) by the Court today is neither the plain nor the more natural meaning; at best, § 1404(a) is ambiguous. I would therefore construe it to avoid the significant encouragement to forum shopping that will inevitably be provided by the interpretation the Court adopts today.

II

Since no federal statute or Rule of Procedure governs the validity of a forum-selection clause, the remaining issue is whether federal courts may fashion a judge-made rule to govern the question. If they may not, the Rules of Decision Act, 28 U.S.C. § 1652, mandates use of state law. *See Erie*; *Hanna v. Plumer* (if federal courts lack authority to fashion a rule, "state law must govern because there can be no other law").

[Justice Scalia concluded that forum-selection clauses raise questions of substance rather than procedure and therefore that state law should govern.]

For the reasons stated, I respectfully dissent.

Notes & Questions

1. Recall that the gist of the *Erie* doctrine is that federal courts sitting in diversity apply state substantive law and federal procedural law. *Klaxon* introduces a wrinkle: because of the constitution's Supremacy Clause, reproduced in the margin, federal law applies whenever it speaks directly to the question at issue. As a result, if there is a valid federal statute or Rule, it will apply—no matter whether the state law it displaces is procedural or substantive.
2. Where does Justice Scalia part ways with the majority?
3. *Stewart Organization* teaches that an important part of the *Erie* inquiry is determining whether state and federal law are in conflict with one another. If there is no conflict, then there is often no need to choose between them—both can apply. But in cases of genuine conflict, *Erie* demands a choice. The cases that follow explore the extent to which state and federal law conflict in greater detail.

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const., Art. VI, ¶ 2.

14.3. Identifying Conflict

Guaranty Trust Co. v. York

MR. JUSTICE FRANKFURTER delivered the opinion of the Court. 326 U.S. 99 (1945)

[…]

Th[is] suit, instituted as a class action on behalf of [some of Guaranty's creditors] and brought in a federal court solely because of diversity of citizenship, is based on an alleged breach of trust by Guaranty in that it failed to protect the interests of the noteholders in [connection with certain corporate transactions]. [Guaranty] moved for summary judgment [on statute of limitations grounds], which was granted […]. On appeal, the Circuit Court of Appeals, one Judge dissenting […] held that in a suit brought on the equity side of a federal district court that court is not required to apply the State statute of limitations that would govern like suits in the courts of a State where the federal court is sitting even though the exclusive basis of federal jurisdiction is diversity of citizenship.

Our starting point must be the policy of federal jurisdiction which *Erie R. Co. v. Tompkins* embodies. In overruling *Swift v. Tyson*, *Erie R. Co. v. Tompkins* did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare. Law was conceived as a "brooding omnipresence" of Reason, of which decisions were merely evidence and not themselves the controlling formulations. Accordingly, federal courts deemed themselves free to ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State law, even in cases where a legal right as the basis for relief was created by State authority and could not be created by federal authority and the case got into a federal court merely because it was "between Citizens of different States" under Art. III, § 2 of the Constitution of the United States.

[…]

[…] [T]his case reduces itself to the narrow question whether, when no recovery could be had in a State court because the action is barred by the statute of limitations, a federal court in equity can take cognizance of the suit because there is diversity of citizenship between the parties. Is the outlawry, according to State law, of a claim created by the States a matter of "substantive rights" to be respected by a federal court of equity when that court's jurisdiction is dependent on the fact that there is a State-created right, or is such statute of "a mere remedial character," which a federal court may disregard?

[…]

And so the question is not whether a statute of limitations is deemed a matter of "procedure" in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?

It is therefore immaterial whether statutes of limitation are characterized either as "substantive" or "procedural" in State court opinions in any use of those

terms unrelated to the specific issue before us. *Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. […]

[…]

[…] The source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be had in equity.

Dicta may be cited characterizing equity as an independent body of law. To the extent that we have indicated, it is. But insofar as these general observations go beyond that, they merely reflect notions that have been replaced by a sharper analysis of what federal courts do when they enforce rights that have no federal origin. And so, before the true source of law that is applied by the federal courts under diversity jurisdiction was fully explored, some things were said that would not now be said. […]

The judgment is reversed and the case is remanded for proceedings not inconsistent with this opinion.

So ordered.

[The dissenting opinion of Justice Rutledge is omitted.]

Notes & Questions

1. What test did the *York* Court apply to determine whether state or federal law governed the statute of limitations?
2. What did the Court mean when it said that it is "immaterial whether statutes of limitation are characterized either as 'substantive' or 'procedural' "? Isn't that what the *Erie* doctrine is all about?
3. *York* says that the aim of the *Erie* doctrine is to ensure that "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." Is that a fair reading of *Erie*?
4. After *York* was decided, the Supreme Court decided a series of cases that, like *York*, found many questions to be substantive and therefore governed by state law. *See, e.g.*, *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) (holding that state law governs the question of when a

lawsuit is filed, for statute of limitations purposes); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (holding that a state law requiring shareholders to post a bond before suing a corporation was substantive for *Erie* purposes); *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949) (holding that a state law barring out-of-state corporations who do not pay state taxes from suing in state courts was substantive for *Erie* purposes); *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956) (holding that state law barring arbitration of employment law matters was substantive for *Erie* purposes).

5. In the wake of these aggressive applications of state law, the next case represents a bit of a retreat.

Byrd v. Blue Ridge Rural Electrical Cooperative

356 U.S. 525 (1958)

Brennan, J., delivered the opinion of the Court.

This case was brought in the District Court for the Western District of South Carolina. Jurisdiction was based on diversity of citizenship. [Plaintiff], a resident of North Carolina, sued [defendant], a South Carolina corporation, for […] negligence. [The jury returned a verdict in favor of the plaintff.] […]

[Defendant] is in the business of selling electric power to subscribers in rural sections of South Carolina. [Plaintiff] was employed as a lineman in the construction crew of a construction contractor. The contractor, R. H. Bouligny, Inc., held a contract with the respondent in the amount of $334,300 for the [electrical work]. The petitioner was injured while connecting power lines […].

One of respondent's affirmative defenses was that, under the South Carolina Workmen's Compensation Act, [plaintiff]—because the work contracted to be done by his employer was work of the kind also done by the respondent's own construction and maintenance crews—[qualified as defendant's employee for purposes of worker's compensation law. As a result, defendant argued, plaintiff was barred from suing in court and was instead required by state law] to accept statutory compensation benefits as the exclusive remedy for his injuries. […]

II

A question is also presented as to whether on remand the factual issue is to be decided by the judge or by the jury. The respondent argues on the basis of the decision of the Supreme Court of South Carolina in *Adams v. Davison-Paxon Co.*, that the issue of [whether plaintiff was a statutory employee or not] should be decided by the judge and not by the jury. […]

[Defendant] argues that this state-court decision governs the present diversity case and "divests the jury of its normal function" to decide the disputed fact question of [the plaintiff's status as defendant's employee]. This is to contend that the federal court is bound under *Erie R. Co. v. Tompkins* to follow the state

court's holding to secure uniform enforcement of the […] State['s worker's compensation scheme].

First. It was decided in *Erie R. Co. v. Tompkins* that the federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts. We must, therefore, first examine the rule in *Adams v. Davison-Paxon Co.* to determine whether it is bound up with these rights and obligations in such a way that its application in the federal court is required.

The Workmen's Compensation Act is administered in South Carolina by its Industrial Commission. The South Carolina courts hold that, on judicial review of actions of the Commission […], the question whether the claim of an injured workman is within the Commission's jurisdiction is a matter of law for decision by the court, which makes its own findings of fact relating to that jurisdiction. The South Carolina Supreme Court states no reasons in *Adams v. Davison-Paxon Co.* why, although the jury decides all other factual issues raised by the cause of action and defenses, the jury is displaced as to the factual issue raised by the affirmative defense […]. […] We find nothing to suggest that this rule was announced as an integral part of the special relationship created by the statute. Thus the requirement appears to be merely a form and mode of enforcing the immunity, *Guaranty Trust Co. v. York*, and not a rule intended to be bound up with the definition of the rights and obligations of the parties. […]

Second. But cases following *Erie* have evinced a broader policy to the effect that the federal courts should conform as near as may be—in the absence of other considerations—to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular local rule. E.g., *Guaranty Trust Co. v. York*; *Bernhardt v. Polygraphic Co.* Concededly the nature of the tribunal which tries issues may be important in the enforcement of the parcel of rights making up a cause of action or defense, and bear significantly upon achievement of uniform enforcement of the right. It may well be that in the instant personal-injury case the outcome would be substantially affected by whether the issue of immunity is decided by a judge or a jury. Therefore, were "outcome" the only consideration, a strong case might appear for saying that the federal court should follow the state practice.

[10] Our conclusion makes unnecessary the consideration of—and we intimate no view upon—the constitutional question whether the right of jury trial protected in federal courts by the Seventh Amendment embraces the factual issue of statutory immunity when asserted, as here, as an affirmative defense in a common-law negligence action.

[12] This Court held in *Sibbach v. Wilson & Co.* that Federal Rule of Civil Procedure 35 should prevail over a contrary state rule.

But there are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions

between judge and jury and, under the influence—if not the command[10]—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. The policy of uniform enforcement of state-created rights and obligations, see, e.g., *Guaranty Trust Co. v. York*, supra, cannot in every case exact compliance with a state rule[12]—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury. Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.

We think that in the circumstances of this case the federal court should not follow the state rule. It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts. […] Perhaps even more clearly in light of the influence of the Seventh Amendment, the function assigned to the jury "is an essential factor in the process for which the Federal Constitution provides." […]

Third. We have discussed the problem upon the assumption that the outcome of the litigation may be substantially affected by whether the issue of immunity is decided by a judge or a jury. But clearly there is not present here the certainty that a different result would follow, cf. *Guaranty Trust Co. v. York*, supra, or even the strong possibility that this would be the case. There are factors present here which might reduce that possibility. The trial judge in the federal system has powers denied the judges of many States to comment on the weight of evidence and credibility of witnesses, and discretion to grant a new trial if the verdict appears to him to be against the weight of the evidence. We do not think the likelihood of a different result is so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome.

[…]

Reversed and remanded.

[The opinions of Justices Whittaker, Frankfurter, and Harlan are omitted.]

Notes & Questions

1. How does *Byrd* differ from *York* and its immediate progeny?

2. What is the rule to be divined from *Byrd*?

3. Would *Byrd* have come out differently if it had been governed by the rule of *York*? If so, does that mean *Byrd* overruled *York* at least in part?

Hanna v. Plumer

WARREN, C.J., delivered the opinion of the Court. 380 U.S. 460 (1965)

The question to be decided is whether, in a civil action where the jurisdiction of the United States district court is based upon diversity of citizenship between the parties, service of process shall be made in the manner prescribed by state law or that set forth in Rule 4[(e)(2)(B)] of the Federal Rules of Civil Procedure.

[Plaintiff,] a citizen of Ohio, filed her complaint in the District Court for the District of Massachusetts, claiming damages in excess of $10,000 for personal injuries resulting from an automobile accident in South Carolina, allegedly caused by the negligence of one Louise Plumer Osgood, a Massachusetts citizen deceased at the time of the filing of the complaint. Respondent, Mrs. Osgood's executor and also a Massachusetts citizen, was named as defendant. […] [S]ervice was made by leaving copies of the summons and the complaint with respondent's wife at his residence, concededly in compliance with Rule 4[(e)(2)(B).] […]

[Defendant moved for summary judgment, arguing that service was improper because it did not comply with the statute governing service of process in Massachusetts state court. Under the circumstances of this case, that law required required service by hand upon the defendant personally, and the deadline for effecting service by hand had passed. Plaintiff responded that Fed. R. Civ. P. 4—not the Massachusetts statute—governed service of process in actions pending in federal court.]

We conclude that the adoption of Rule 4[(e)(2)(B)], designed to control service of process in diversity actions, neither exceeded the congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds, and that the Rule is therefore the standard against which the District Court should have measured the adequacy of the service. Accordingly, we reverse the decision of the Court of Appeals.

The [version of the] Rules Enabling Act, 28 U.S.C. § 2072 [then in effect] provide[d] in pertinent part:

> "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions."
>
> "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury. …"

Under the cases construing the scope of the Enabling Act, Rule 4[(e)(2)(B)] clearly passes muster. Prescribing the manner in which a defendant is to be notified that a suit has been instituted against him, it relates to the "practice and procedure of the district courts." "The test must be whether a rule really

regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson & Co.*

[…]

[If there were] no conflicting state procedure, Rule 4[(e)(2)(B)] would clearly control. However, respondent, focusing on the contrary Massachusetts rule, calls to the Court's attention another line of cases, a line which—like the Federal Rules—had its birth in 1938. *Erie R. Co. v. Tompkins*, overruling *Swift v. Tyson*, held that federal courts sitting in diversity cases, when deciding questions of "substantive" law, are bound by state court decisions as well as state statutes. The broad command of *Erie* was therefore identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law. However, as subsequent cases sharpened the distinction between substance and procedure, the line of cases following *Erie* diverged markedly from the line construing the Enabling Act. […]

Respondent […] suggests that the *Erie* doctrine acts as a check on the Federal Rules of Civil Procedure, that despite the clear command of Rule 4[(e)(2)(B)], *Erie* and its progeny demand the application of the Massachusetts rule. Reduced to essentials, the argument is: (1) *Erie*, as refined in *York*, demands that federal courts apply state law whenever application of federal law in its stead will alter the outcome of the case. (2) In this case, a determination that the Massachusetts service requirements obtain will result in immediate victory for respondent. If, on the other hand, it should be held that Rule 4[(e)(2)(B)] is applicable, the litigation will continue, with possible victory for petitioner. (3) Therefore, *Erie* demands application of the Massachusetts rule. The syllogism possesses an appealing simplicity, but is for several reasons invalid.

In the first place, it is doubtful that, even if there were no Federal Rule making it clear that in-hand service is not required in diversity actions, the *Erie* rule would have obligated the District Court to follow the Massachusetts procedure. "Outcome-determination" analysis was never intended to serve as a talisman. *Byrd v. Blue Ridge Cooperative*. Indeed, the message of *York* itself is that choices between state and federal law are to be made not by application of any automatic, "litmus paper" criterion, but rather by reference to the policies underlying the *Erie* rule.

The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court. […]

The decision was also in part a reaction to the practice of "forum-shopping" which had grown up in response to the rule of *Swift v. Tyson*. That the *York* test was an attempt to effectuate these policies is demonstrated by the fact that the opinion framed the inquiry in terms of "substantial" variations between state and federal litigation. Not only are nonsubstantial, or trivial, variations not likely to raise the sort of constitutional problems which troubled the Court in *Erie*; they are also unlikely to influence the choice of a forum. The "outcome-determination" test therefore cannot be read without reference to the

twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.

The difference between the conclusion that the Massachusetts rule is applicable, and the conclusion that it is not, is of course at this point "outcome-determinative" in the sense that if we hold the state rule to apply, respondent prevails, whereas if we hold that Rule 4[(e)(2)(B)] governs, the litigation will continue. But in this sense every procedural variation is "outcome-determinative." For example, having brought suit in a federal court, a plaintiff cannot then insist on the right to file subsequent pleadings in accord with the time limits applicable in the state courts, even though enforcement of the federal timetable will, if he continues to insist that he must meet only the state time limit, result in determination of the controversy against him. So it is here. Though choice of the federal or state rule will at this point have a marked effect upon the outcome of the litigation, the difference between the two rules would be of scant, if any, relevance to the choice of a forum. Petitioner, in choosing her forum, was not presented with a situation where application of the state rule would wholly bar recovery; rather, adherence to the state rule would have resulted only in altering the way in which process was served. Moreover, it is difficult to argue that permitting service of defendant's wife to take the place of in-hand service of defendant himself alters the mode of enforcement of state-created rights in a fashion sufficiently "substantial" to raise the sort of equal protection problems to which the *Erie* opinion alluded.

There is, however, a more fundamental flaw in respondent's syllogism: the incorrect assumption that the rule of *Erie R. Co. v. Tompkins* constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure. The *Erie* rule has never been invoked to void a Federal Rule. It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law. […]

(Here, of course, the clash is unavoidable; Rule 4[(e)(2)(B)] says—implicitly, but with unmistakable clarity—that in-hand service is not required in federal courts.) At the same time, in cases adjudicating the validity of Federal Rules, we have not applied the *York* rule or other refinements of *Erie*, but have to this day continued to decide questions concerning the scope of the Enabling Act and the constitutionality of specific Federal Rules in light of the distinction set forth in *Sibbach*.

Nor has the development of two separate lines of cases been inadvertent. The line between "substance" and "procedure" shifts as the legal context changes. […] It is true that both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state "substantive" law and federal "procedural" law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions. When a situation is covered

by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

We are reminded by the *Erie* opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law. But the opinion in *Erie*, which involved no Federal Rule and dealt with a question which was "substantive" in every traditional sense (whether the railroad owed a duty of care to Tompkins as a trespasser or a licensee), surely neither said nor implied that measures like Rule 4[(e)(2)(B)] are unconstitutional. For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

Erie and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules. […] Thus, though a court, in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts, it cannot be forgotten that the *Erie* rule, and the guidelines suggested in *York*, were created to serve another purpose altogether. To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act. Rule 4[(e)(2)(B)] is valid and controls the instant case.

Reversed.

BLACK, J., concurs in the result.

HARLAN, J., concurring.

[…]

Erie was something more than an opinion which worried about "forum-shopping and avoidance of inequitable administration of the laws," although to be sure these were important elements of the decision. I have always regarded that decision as one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems. *Erie* recognized that there should not be two conflicting systems of law controlling the primary activity of citizens,

for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs.1 And it recognized that the scheme of our Constitution envisions an allocation of lawmaking functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers in this regard. Thus, in diversity cases *Erie* commands that it be the state law governing primary private activity which prevails.

The shorthand formulations which have appeared in some past decisions are prone to carry untoward results that frequently arise from oversimplification. The Court is quite right in stating that the "outcome-determinative" test of *Guaranty Trust Co. v. York*, if taken literally, proves too much, for any rule, no matter how clearly "procedural," can affect the outcome of litigation if it is not obeyed. In turning from the "outcome" test of *York* back to the unadorned forum-shopping rationale of *Erie*, however, the Court falls prey to like oversimplification, for a simple forum-shopping rule also proves too much; litigants often choose a federal forum merely to obtain what they consider the advantages of the Federal Rules of Civil Procedure or to try their cases before a supposedly more favorable judge. To my mind the proper line of approach in determining whether to apply a state or a federal rule, whether "substantive" or "procedural," is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation. If so, *Erie* and the Constitution require that the state rule prevail, even in the face of a conflicting federal rule.

The Court weakens, if indeed it does not submerge, this basic principle by finding, in effect, a grant of substantive legislative power in the constitutional provision for a federal court system, and through it, setting up the Federal Rules as a body of law inviolate. […] So long as a reasonable man could characterize any duly adopted federal rule as "procedural," the Court, unless I misapprehend what is said, would have it apply no matter how seriously it frustrated a State's substantive regulation of the primary conduct and affairs of its citizens. Since the members of the Advisory Committee, the Judicial Conference, and this Court who formulated the Federal Rules are presumably reasonable men, it follows that the integrity of the Federal Rules is absolute. Whereas the unadulterated outcome and forum-shopping tests may err too far toward honoring state rules, I submit that the Court's "arguably procedural, ergo constitutional" test moves too fast and far in the other direction. […]

[Justice Harlan concluded that, under his proposed test, the federal Rule controlled because it would not materially affect parties' conduct before litigation began.]

Notes & Questions

1. What is the rule of *Hanna*?

2. What test did Justice Harlan propose in his influential concurrence? How, if at all, does his proposed test diverge from that of the majority?
3. What role does the Rules Enabling Act, 28 U.S.C. § 2072, play in the *Hanna* inquiry?
4. *Hanna* says that the "twin aims" of *Erie* are the "discouragement of forum-shopping and avoidance of inequitable administration of the laws." What does that mean?

14.4. Accommodating State Law

One can understand the history of the *Erie* doctrine as a dialogue between two views. On the one hand, cases like *Stewart Org.* and *Hanna* suggest that federal law applies where it exists, and state law fills in the gaps. On the other hand, cases like *York* suggest that whenever state law is substantive, it should generally apply. A third category of cases, exemplified by *Byrd*, try to accommodate both state and federal interests in the *Erie* inquiry. The tension between these views of the *Erie* doctrine is on full display in the following pair of cases, the most recent word from the Supreme Court on the *Erie* doctrine.

Gasperini v. Center for Humanities, Inc

518 U.S. 415 (1996)

Justice Ginsburg delivered the opinion of the Court.

Under the law of New York, appellate courts are empowered to review the size of jury verdicts and to order new trials when the jury's award "deviates materially from what would be reasonable compensation." N.Y. Civ. Prac. Law and Rules (CPLR) § 5501(c). Under the Seventh Amendment, which governs proceedings in federal court, but not in state court, "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const., Amdt. 7. The compatibility of these provisions, in an action based on New York law but tried in federal court by reason of the parties' diverse citizenship, is the issue we confront in this case. We hold that New York's law controlling compensation awards for excessiveness or inadequacy can be given effect, without detriment to the Seventh Amendment, if the review standard set out in CPLR § 5501(c) is applied by the federal trial court judge, with appellate control of the trial court's ruling limited to review for "abuse of discretion."

I

Petitioner William Gasperini, a journalist for CBS News and the Christian Science Monitor, began reporting on events in Central America in 1984. He earned his living primarily in radio and print media and only occasionally sold his photographic work. During the course of his seven-year stint in Central America,

Gasperini took over 5,000 slide transparencies, depicting active war zones, political leaders, and scenes from daily life. In 1990, Gasperini agreed to supply his original color transparencies to The Center for Humanities, Inc. (Center) for use in an educational videotape, Conflict in Central America. Gasperini selected 300 of his slides for the Center; its videotape included 110 of them. The Center agreed to return the original transparencies, but upon the completion of the project, it could not find them.

Gasperini commenced suit in the United States District Court for the Southern District of New York, invoking the court's diversity jurisdiction pursuant to 28 U.S.C. § 1332.[1] He alleged several state-law claims for relief, including breach of contract, conversion, and negligence. The Center conceded liability for the lost transparencies and the issue of damages was tried before a jury.

[1] Plaintiff Gasperini, petitioner here, is a citizen of California; defendant Center, respondent here, is incorporated, and has its principal place of business, in New York.

At trial, Gasperini's expert witness testified that the "industry standard" within the photographic publishing community valued a lost transparency at $1,500. This industry standard, the expert explained, represented the average license fee a commercial photograph could earn over the full course of the photographer's copyright, *i.e.*, in Gasperini's case, his lifetime plus 50 years. Gasperini estimated that his earnings from photography totaled just over $10,000 for the period from 1984 through 1993. He also testified that he intended to produce a book containing his best photographs from Central America.

After a three-day trial, the jury awarded Gasperini $450,000 in compensatory damages. This sum, the jury foreperson announced, "is [$]1500 each, for 300 slides." Moving for a new trial under Federal Rule of Civil Procedure 59, the Center attacked the verdict on various grounds, including excessiveness. Without comment, the District Court denied the motion.

The Court of Appeals for the Second Circuit vacated the judgment entered on the jury's verdict. Mindful that New York law governed the controversy, the Court of Appeals endeavored to apply CPLR § 5501(c), which instructs that, when a jury returns an itemized verdict, as the jury did in this case, the New York Appellate Division "shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." […] Surveying Appellate Division decisions that reviewed damage awards for lost transparencies, the Second Circuit concluded that testimony on industry standard alone was insufficient to justify a verdict; prime among other factors warranting consideration were the uniqueness of the slides' subject matter and the photographer's earning level.

Guided by Appellate Division rulings, the Second Circuit held that the $450,000 verdict "materially deviates from what is reasonable compensation." Some of Gasperini's transparencies, the Second Circuit recognized, were unique, notably those capturing combat situations in which Gasperini was the only photographer present. But others "depicted either generic scenes or events at which other professional photojournalists were present." No more than 50 slides merited a $1,500 award, the court concluded, after "[g]iving Gasperini every benefit of the doubt." Absent evidence showing significant earnings from photographic endeavors or concrete plans to publish a book,

the court further determined, any damage award above $100 each for the remaining slides would be excessive. Remittiturs "presen[t] difficult problems for appellate courts," the Second Circuit acknowledged, for court of appeals judges review the evidence from "a cold paper record." Nevertheless, the Second Circuit set aside the $450,000 verdict and ordered a new trial, unless Gasperini agreed to an award of $100,000.

This case presents an important question regarding the standard a federal court uses to measure the alleged excessiveness of a jury's verdict in an action for damages based on state law. We therefore granted certiorari.

II

Before 1986, state and federal courts in New York generally invoked the same judge-made formulation in responding to excessiveness attacks on jury verdicts: courts would not disturb an award unless the amount was so exorbitant that it "shocked the conscience of the court." […]

In both state and federal courts, trial judges made the excessiveness assessment in the first instance, and appellate judges ordinarily deferred to the trial court's judgment.

In 1986, as part of a series of tort reform measures, New York codified a standard for judicial review of the size of jury awards. Placed in CPLR § 5501(c), the prescription reads:

> In reviewing a money judgment… in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.[4]

As stated in Legislative Findings and Declarations accompanying New York's adoption of the "deviates materially" formulation, the lawmakers found the "shock the conscience" test an insufficient check on damage awards; the legislature therefore installed a standard "invit[ing] more careful appellate scrutiny." At the same time, the legislature instructed the Appellate Division, in amended § 5522, to state the reasons for the court's rulings on the size of verdicts, and the factors the court considered in complying with § 5501(c).[5] In his signing statement, then-Governor Mario Cuomo emphasized that the CPLR amendments were meant to rachet up the review standard: "This will assure greater scrutiny of the amount of verdicts and promote greater stability in the tort system and greater fairness for similarly situated defendants throughout the State."

New York state-court opinions confirm that § 5501(c)'s "deviates materially" standard calls for closer surveillance than "shock the conscience" oversight.

Although phrased as a direction to New York's intermediate appellate courts, § 5501(c)'s "deviates materially" standard, as construed by New York's courts, instructs state trial judges as well.

[4] In full, CPLR § 5501(e) provides:

"The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal. In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation."

[5] CPLR § 5522(b) provides:

"In an appeal from a money judgment in an action … in which it is contended that the award is excessive or inadequate, the appellate division shall set forth in its decision the reasons therefor, including the factors it considered in complying with subdivision (c) of section fifty-five hundred one of this chapter."

To determine whether an award "deviates materially from what would be reasonable compensation," New York state courts look to awards approved in similar cases.

III

In cases like Gasperini's, in which New York law governs the claims for relief, does New York law also supply the test for federal-court review of the size of the verdict? The Center answers yes. The "deviates materially" standard, it argues, is a substantive standard that must be applied by federal appellate courts in diversity cases. The Second Circuit agreed. Gasperini, emphasizing that § 5501(c) trains on the New York Appellate Division, characterizes the provision as procedural, an allocation of decisionmaking authority regarding damages, not a hard cap on the amount recoverable. Correctly comprehended, Gasperini urges, § 5501(c)'s direction to the Appellate Division cannot be given effect by federal appellate courts without violating the Seventh Amendment's Reexamination Clause.

As the parties' arguments suggest, CPLR § 5501(c), appraised under *Erie* and [its] path, is both "substantive" and "procedural": "substantive" in that §5501(c)'s "deviates materially" standard controls how much a plaintiff can be awarded; "procedural" in that § 5501(c) assigns decisionmaking authority to New York's Appellate Division. Parallel application of § 5501(c) at the federal appellate level would be out of sync with the federal system's division of trial and appellate court functions, an allocation weighted by the Seventh Amendment. The dispositive question, therefore, is whether federal courts can give effect to the substantive thrust of § 5501(c) without untoward alteration of the federal scheme for the trial and decision of civil cases.

A

[…] Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.

Classification of a law as "substantive" or "procedural" for *Erie* purposes is sometimes a challenging endeavor. *Guaranty Trust Co. v. York*, an early interpretation of *Erie*, propounded an "outcome-determination" test: "[D]oes it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?" Ordering application of a state statute of limitations to an equity proceeding in federal court, the Court said in *Guaranty Trust*: "[W]here a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." A later pathmarking case, qualifying *Guaranty Trust*, explained that the "outcome-determination" test must not be applied mechanically to sweep in all manner of variations; instead, its application must be guided by "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*.

Informed by these decisions, we address the question whether New York's "deviates materially" standard, codified in CPLR § 5501(c), is outcome affective in this sense: Would "application of the [standard] … have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would [unfairly discriminate against citizens of the forum State, or] be likely to cause a plaintiff to choose the federal court"?

We start from a point the parties do not debate. Gasperini acknowledges that a statutory cap on damages would supply substantive law for *Erie* purposes. Although CPLR § 5501(c) is less readily classified, it was designed to provide an analogous control.

[…] We think it a fair conclusion that CPLR § 5501(c) differs from a statutory cap principally "in that the maximum amount recoverable is not set forth by statute, but rather is determined by case law." In sum, § 5501(c) contains a procedural instruction, but the State's objective is manifestly substantive.

It thus appears that if federal courts ignore the change in the New York standard and persist in applying the "shock the conscience" test to damage awards on claims governed by New York law, "'substantial' variations between state and federal [money judgments]" may be expected. We therefore agree with the Second Circuit that New York's check on excessive damages implicates what we have called *Erie*'s "twin aims." Just as the *Erie* principle precludes a federal court from giving a state-created claim "longer life … than [the claim] would have had in the state court," so *Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court.

B

CPLR § 5501(c), as earlier noted, is phrased as a direction to the New York Appellate Division. Acting essentially as a surrogate for a New York appellate forum, the Court of Appeals reviewed Gasperini's award to determine if it "deviate[d] materially" from damage awards the Appellate Division permitted in similar circumstances. The Court of Appeals performed this task without benefit of an opinion from the District Court, which had denied "without comment" the Center's Rule 59 motion. Concentrating on the authority § 5501(e) gives to the Appellate Division, Gasperini urges that the provision shifts fact-finding responsibility from the jury and the trial judge to the appellate court. Assigning such responsibility to an appellate court, he maintains, is incompatible with the Seventh Amendment's Reexamination Clause, and therefore, Gasperini concludes, § 5501(c) cannot be given effect in federal court. Brief for Petitioner 19-20. Although we reach a different conclusion than Gasperini, we agree that the Second Circuit did not attend to "[a]n essential characteristic of [the federal court] system," *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, when it used § 5501(c) as "the standard for [federal] appellate review."

That "essential characteristic" was described in *Byrd*, a diversity suit for negligence in which a pivotal issue of fact would have been tried by a judge were the case in state court. The *Byrd* Court held that, despite the state practice, the plaintiff was entitled to a jury trial in federal court.

In so ruling, the Court said that the *Guaranty Trust* "outcome-determination" test was an insufficient guide in cases presenting countervailing federal interests. The Court described the countervailing federal interests present in *Byrd* this way:

The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.

The Seventh Amendment, which governs proceedings in federal court, but not in state court, bears not only on the allocation of trial functions between judge and jury, the issue in *Byrd*; it also controls the allocation of authority to review verdicts, the issue of concern here. The Amendment reads:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Byrd involved the first Clause of the Amendment, the "trial by jury" Clause. This case involves the second, the "re-examination" Clause. In keeping with the historic understanding, the Reexamination Clause does not inhibit the authority of trial judges to grant new trials "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a). That authority is large. *See* 6A Moore's Federal Practice ¶ 59.05[2], pp. 59-44 to 59-46 (2d ed. 1996) ("The power of the English common law trial courts to grant a new trial for a variety of reasons with a view to the attainment of justice was well established prior to the establishment of our Government."). […]

In contrast, appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive is a relatively late, and less secure, development. […]

Before today, we have not "expressly [held] that the Seventh Amendment allows appellate review of a district court's denial of a motion to set aside an award as excessive." […]

We now […] explicit[ly hold that] "[n]othing in the Seventh Amendment … precludes appellate review of the trial judge's denial of a motion to set aside [a jury verdict] as excessive."

C

In *Byrd*, the Court faced a one-or-the-other choice: trial by judge as in state court, or trial by jury according to the federal practice. In the case before us, a choice of that order is not required, for the principal state and federal interests can be accommodated. […]

New York's dominant interest can be respected, without disrupting the federal system, once it is recognized that the federal district court is capable of performing the checking function, *i.e.*, that court can apply the State's "deviates materially" standard in line with New York case law evolving under CPLR § 5501(c). We recall, in this regard, that the "deviates materially" standard serves as the guide to be applied in trial as well as appellate courts in New York.

Within the federal system, practical reasons combine with Seventh Amendment constraints to lodge in the district court, not the court of appeals, primary responsibility for application of §5501(c)'s "deviates materially" check. Trial judges have the "unique opportunity to consider the evidence in the living courtroom context," while appellate judges see only the "cold paper record."

District court applications of the "deviates materially" standard would be subject to appellate review under the standard the Circuits now employ when inadequacy or excessiveness is asserted on appeal: abuse of discretion. […]

IV

It does not appear that the District Court checked the jury's verdict against the relevant New York decisions demanding more than "industry standard" testimony to support an award of the size the jury returned in this case. As the Court of Appeals recognized, the uniqueness of the photographs and the plaintiff's earnings as photographer—past and reasonably projected—are factors relevant to appraisal of the award. Accordingly, we vacate the judgment of the Court of Appeals and instruct that court to remand the case to the District Court so that the trial judge, revisiting his ruling on the new trial motion, may test the jury's verdict against CPLR §5501(c)'s "deviates materially" standard.

It is so ordered.

Justice Scalia, with whom The Chief Justice and Justice Thomas join, dissenting.

Today the Court overrules a longstanding and well-reasoned line of precedent that has for years prohibited federal appellate courts from reviewing refusals by district courts to set aside civil jury awards as contrary to the weight of the evidence. One reason is given for overruling these cases: that the Courts of Appeals have, for some time now, decided to ignore them. Such unreasoned capitulation to the nullification of what was long regarded as a core component of the Bill of Rights—the Seventh Amendment's prohibition on appellate reexamination of civil jury awards—is wrong. It is not for us, much less for the Courts of Appeals, to decide that the Seventh Amendment's restriction on federal-court review of jury findings has outlived its usefulness.

The Court also holds today that a state practice that relates to the division of duties between state judges and juries must be followed by federal courts in diversity cases. On this issue, too, our prior cases are directly to the contrary.

As I would reverse the judgment of the Court of Appeals, I respectfully dissent.

I

[…]

A

Granting appellate courts authority to decide whether an award is "excessive or inadequate" in the manner of CPLR § 5501(c) may reflect a sound understanding of the capacities of modern juries and trial judges. That is to say, the people of the State of New York may well be correct that such a rule contributes to a more just legal system. But the practice of *federal* appellate reexamination of facts found by a jury is precisely what the People of the several States considered *not* to be good legal policy in 1791. Indeed, so fearful were they of such a practice that they constitutionally prohibited it by means of the Seventh Amendment.

That Amendment was Congress's response to one of the principal objections to the proposed Constitution raised by the Anti-Federalists during the ratification debates: its failure to ensure, the right to trial by jury in civil actions in federal court. The desire for an explicit constitutional guarantee against reexamination of jury findings was explained by Justice Story, sitting as Circuit Justice in 1812, as having been specifically prompted by Article III's conferral of "appellate Jurisdiction, both as to Law and Fact" upon the Supreme Court. "[O]ne of the most powerful objections urged against [the Constitution]," he recounted, was that this authority "would enable that court, with or without a new jury, to re-examine the whole facts, which had been settled by a previous jury."

The second clause of the Amendment responded to that concern by providing that "[i]n [sjuits at common law … no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const., Amdt. 7. The Reexamination Clause put to rest "apprehensions" of "new trials by the appellate courts," by adopting, in broad fashion, "the rules of the common law" to govern federal-court interference with jury determinations. The content of that law was familiar and fixed. It quite plainly barred reviewing courts from entertaining claims that the jury's verdict was contrary to the evidence.

[…]

II

The Court's holding that federal courts of appeals may review district-court denials of motions for new trials for error of fact is not the only novel aspect of today's decision. The Court also directs that the case be remanded to the District Court, so that it may "test the jury's verdict against CPLR § 5501(c)'s 'deviates materially' standard." This disposition contradicts the principle that "[t]he proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is … a matter of federal law."

The Court acknowledges that state procedural rules cannot, as a general matter, be permitted to interfere with the allocation of functions in the federal court system. Indeed, it is at least partly for this reason that the Court rejects direct

application of § 5501(c) at the appellate level as inconsistent with an " 'essential characteristic' " of the federal court system—by which the Court presumably means abuse-of-discretion review of denials of motions for new trials. But the scope of the Court's concern is oddly circumscribed. The "essential characteristic" of the federal jury, and, more specifically, the role of the federal trial court in reviewing jury judgments, apparently counts for little. The Court approves the "accommodat[ion]" achieved by having district courts review jury verdicts under the "deviates materially" standard, because it regards that as a means of giving effect to the State's purposes "without disrupting the federal system." But changing the standard by which trial judges review jury verdicts *does* disrupt the federal system, and is plainly inconsistent with the "strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal court." *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.* The Court's opinion does not even acknowledge, let alone address, this dislocation.

[…]

It seems to me quite wrong to regard [§ 5501(c)] as a "substantive" rule for *Erie* purposes. The "analog[y]" to "a statutory cap on damages" fails utterly. There is an absolutely fundamental distinction between a *rule of law* such as that, which would ordinarily be imposed upon the jury in the trial court's instructions, and a *rule of review*, which simply determines how closely the jury verdict will be scrutinized for compliance with the instructions. A tighter standard for reviewing jury determinations can no more plausibly be called a "substantive" disposition than can a tighter appellate standard for reviewing trial-court determinations. The one, like the other, provides additional assurance *that the law has been complied with*; but the other, like the one, *leaves the law unchanged.*

The Court commits the classic *Erie* mistake of regarding whatever changes the outcome as substantive. That is not the only factor to be considered. *See Byrd* ("[W]ere 'outcome' the only consideration, a strong case might appear for saying that the federal court should follow the state practice. But there are affirmative countervailing considerations at work here"). Outcome determination "was never intended to serve as a talisman," *Hanna v. Plumer*, and does not have the power to convert the most classic elements of the *process* of assuring that the law is observed into the substantive law itself. The right to have a jury make the findings of fact, for example, is generally thought to favor plaintiffs, and that advantage is often thought significant enough to be the basis for forum selection. But no one would argue that *Erie* confers a right to a jury in federal court wherever state courts would provide it; or that, were it not for the Seventh Amendment, *Erie* would require federal courts to dispense with the jury whenever state courts do so.

[…]

[I]n my view, one does not even reach the *Erie* question in this case. The standard to be applied by a district court in ruling on a motion for a new trial is set forth in Rule 59 of the Federal Rules of Civil Procedure, which provides that "[a] new trial may be granted … for any of the reasons for which new trials have

heretofore been granted in actions at law *in the courts of the United States*." (emphasis added.) That is undeniably a federal standard. Federal District Courts in the Second Circuit have interpreted that standard to permit the granting of new trials where " 'it is quite clear that the jury has reached a seriously erroneous result' " and letting the verdict stand would result in a " 'miscarriage of justice.' " Assuming (as we have no reason to question) that this is a correct interpretation of what Rule 59 requires, it is undeniable that the Federal Rule is " 'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to 'control the issue' before the court, thereby leaving no room for the operation of that law." It is simply not possible to give controlling effect both to the federal standard and the state standard in reviewing the jury's award. That being so, the court has no choice but to apply the Federal Rule, which is an exercise of what we have called Congress's "power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either," *Hanna*.

* * *

[…]

When there is added to the revision of the Seventh Amendment the Court's precedent-setting disregard of Congress's instructions in Rule 59, one must conclude that this is a bad day for the Constitution's distinctive Article III courts in general, and for the role of the jury in those courts in particular. I respectfully dissent.

[…]

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co

559 U.S. 393 (2010)

Justice SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II-A, an opinion with respect to Parts II-B and II-D, in which THE CHIEF JUSTICE, Justice THOMAS, and Justice SOTOMAYOR join, and an opinion with respect to Part II-C, in which THE CHIEF JUSTICE and Justice THOMAS join.

New York law prohibits class actions in suits seeking penalties or statutory minimum damages.[1] We consider whether this precludes a federal district court sitting in diversity from entertaining a class action under Federal Rule of Civil Procedure 23.

I

The petitioner's complaint alleged the following: Shady Grove Orthopedic Associates, P. A., provided medical care to Sonia E. Galvez for injuries she suffered in an automobile accident. As partial payment for that care, Galvez assigned to Shady Grove her rights to insurance benefits under a policy issued in New York by Allstate Insurance Co. Shady Grove tendered a claim for the assigned benefits to Allstate, which under New York law had 30 days to pay the claim or deny it. See N.Y. Ins. Law Ann. § 5106(a). Allstate apparently

paid, but not on time, and it refused to pay the statutory interest that accrued on the overdue benefits (at two percent per month).

Shady Grove filed this diversity suit in the Eastern District of New York to recover the unpaid statutory interest. Alleging that Allstate routinely refuses to pay interest on overdue benefits, Shady Grove sought relief on behalf of itself and a class of all others to whom Allstate owes interest. The District Court dismissed the suit for lack of jurisdiction. It reasoned that N.Y. Civ. Prac. Law Ann. § 901(b), which precludes a suit to recover a "penalty" from proceeding as a class action, applies in diversity suits in federal court, despite Federal Rule of Civil Procedure 23. Concluding that statutory interest is a "penalty" under New York law, it held that § 901(b) prohibited the proposed class action. And, since Shady Grove conceded that its individual claim (worth roughly $500) fell far short of the amount-in-controversy requirement for individual suits under 28 U.S.C. § 1332(a), the suit did not belong in federal court.

The Second Circuit affirmed. The court did not dispute that a federal rule adopted in compliance with the Rules Enabling Act, 28 U.S.C. § 2072, would control if it conflicted with § 901(b). But there was no conflict because (as we will describe in more detail below) the Second Circuit concluded that Rule 23 and § 901(b) address different issues. Finding no federal rule on point, the Court of Appeals held that § 901(b) is "substantive" within the meaning of *Erie R. Co. v. Tompkins*, and thus must be applied by federal courts sitting in diversity.

We granted certiorari.

II

The framework for our decision is familiar. We must first determine whether Rule 23 answers the question in dispute. *Burlington Northern R. Co. v. Woods*. If it does, it governs—New York's law notwithstanding—unless it exceeds statutory authorization or Congress's rulemaking power. We do not wade into *Erie*'s murky waters unless the federal rule is inapplicable or invalid.

A

The question in dispute is whether Shady Grove's suit may proceed as a class action. Rule 23 provides an answer. It states that "[a] class action may be maintained" if two conditions are met: The suit must satisfy the criteria set forth in subdivision (a) (*i.e.*, numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b). Fed. R. Civ. P. 23(b). By its terms this creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action. (The Federal Rules regularly use "may" to confer categorical permission, as do federal statutes that establish procedural entitlements.) Thus, Rule 23 provides a one-size-fits-all formula for deciding the class-action question. Because § 901(b) attempts to answer the same question—*i.e.*, it states that Shady Grove's suit "may *not* be maintained as a class action" (emphasis added) because of the relief it seeks—it cannot apply in diversity suits unless Rule 23 is ultra vires.

[1] N.Y. Civ. Prac. Law Ann. § 901 provides:

(a) One or more members of a class may sue or be sued as representative parties on behalf of all if: the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; there are questions of law or fact common to the class which predominate over any questions affecting only individual members; the claims or defenses of the representative parties are typical of the claims or defenses of the class; the representative parties will fairly and adequately protect the interests of the class; and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(b) Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action. […]

The Second Circuit believed that § 901(b) and Rule 23 do not conflict because they address different issues. Rule 23, it said, concerns only the criteria for determining whether a given class can and should be certified; section 901(b), on the other hand, addresses an antecedent question: whether the particular type of claim is eligible for class treatment in the first place—a question on which Rule 23 is silent. Allstate embraces this analysis.

We disagree. To begin with, the line between eligibility and certifiability is entirely artificial. Both are preconditions for maintaining a class action. Allstate suggests that eligibility must depend on the "particular cause of action" asserted, instead of some other attribute of the suit. But that is not so. Congress could, for example, provide that only claims involving more than a certain number of plaintiffs are "eligible" for class treatment in federal court. In other words, relabeling Rule 23(a)'s prerequisites "eligibility criteria" would obviate Allstate's objection—a sure sign that its eligibility-certifiability distinction is made-to-order.

There is no reason, in any event, to read Rule 23 as addressing only whether claims made eligible for class treatment by some *other* law should be certified as class actions. Allstate asserts that Rule 23 neither explicitly nor implicitly empowers a federal court "to certify a class in each and every case" where the Rule's criteria are met. But that is *exactly* what Rule 23 does: It says that if the prescribed preconditions are satisfied "[a] class action *may be maintained*" (emphasis added)—not "*a class action may be permitted*." Courts do not maintain actions; litigants do. The discretion suggested by Rule 23's "may" is discretion residing in the plaintiff: He may bring his claim in a class action if he wishes. And like the rest of the Federal Rules of Civil Procedure, Rule 23 *automatically* applies "in all civil actions and proceedings in the United States district courts," Fed. Rule Civ. Proc. 1.

Allstate points out that Congress has carved out some federal claims from Rule 23's reach, *see, e.g.*, 8 U.S.C. § 1252(e)(1)(B)—which shows, Allstate contends, that Rule 23 does not authorize class actions for all claims, but rather leaves room for laws like § 901(b). But Congress, unlike New York, has ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit—either by directly amending the rule or by enacting a separate statute overriding it in certain instances. The fact that Congress has created specific exceptions to Rule 23 hardly proves that the Rule does not apply generally. In fact, it proves the opposite. If Rule 23 did *not* authorize class actions across the board, the statutory exceptions would be unnecessary.

Allstate next suggests that the structure of § 901 shows that Rule 23 addresses only certifiability. Section 901(a), it notes, establishes class-certification criteria roughly analogous to those in Rule 23 (wherefore it agrees *that* subsection is preempted). But § 901(b)'s rule barring class actions for certain claims is set off as its own subsection, and where it applies § 901(a) does not. This shows, according to Allstate, that § 901(b) concerns a separate subject. Perhaps it does concern a subject separate from the subject of § 901(a). But the question before us is whether it concerns a subject separate from the subject of *Rule 23*—and for purposes of answering *that* question the way New York has structured its

statute is immaterial. Rule 23 permits all class actions that meet its requirements, and a State cannot limit that permission by structuring one part of its statute to track Rule 23 and enacting another part that imposes additional requirements. Both of § 901's subsections undeniably answer the same question as Rule 23: whether a class action may proceed for a given suit.

[…]

We must therefore confront head-on whether Rule 23 falls within the statutory authorization.

B

Erie involved the constitutional power of federal courts to supplant state law with judge-made rules. In that context, it made no difference whether the rule was technically one of substance or procedure; the touchstone was whether it "significantly affect[s] the result of a litigation." *Guaranty Trust Co. v. York*. That is not the test for either the constitutionality or the statutory validity of a Federal Rule of Procedure. Congress has undoubted power to supplant state law, and undoubted power to prescribe rules for the courts it has created, so long as those rules regulate matters "rationally capable of classification" as procedure. *Hanna*. In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure subject to its review, 28 U.S.C. § 2072(a), but with the limitation that those rules "shall not abridge, enlarge or modify any substantive right," § 2072(b).

We have long held that this limitation means that the Rule must "really regulat[e] procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them," *Sibbach*; *see Hanna*; *Burlington*. The test is not whether the rule affects a litigant's substantive rights; most procedural rules do. What matters is what the rule itself regulates: If it governs only "the manner and the means" by which the litigants' rights are "enforced," it is valid; if it alters "the rules of decision by which [the] court will adjudicate [those] rights," it is not.

Applying that test, we have rejected every statutory challenge to a Federal Rule that has come before us. We have found to be in compliance with § 2072(b) rules prescribing methods for serving process, *Hanna* (Fed. Rule Civ. Proc. 4(d)(1)), and requiring litigants whose mental or physical condition is in dispute to submit to examinations, *see Sibbach* (Fed. Rule Civ. Proc. 35). Likewise, we have upheld rules authorizing imposition of sanctions upon those who file frivolous appeals, *see Burlington* (Fed. Rule App. Proc. 38), or who sign court papers without a reasonable inquiry into the facts asserted, *see Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.* (Fed. Rule Civ. Proc. 11). Each of these rules had some practical effect on the parties' rights, but each undeniably regulated only the process for enforcing those rights; none altered the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either.

Applying that criterion, we think it obvious that rules allowing multiple claims (and claims by or against multiple parties) to be litigated together are also valid. *See, e.g.*, Fed. Rules Civ. Proc. 18 (joinder of claims), 20 (joinder of parties), 42(a) (consolidation of actions). Such rules neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed. For the same reason, Rule 23—at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class action—falls within § 2072(b)'s authorization. A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.

Allstate contends that the authorization of class actions is not substantively neutral: Allowing Shady Grove to sue on behalf of a class "transform[s][the] dispute over a five *hundred* dollar penalty into a dispute over a five *million* dollar penalty." Allstate's aggregate liability, however, does not depend on whether the suit proceeds as a class action. Each of the 1,000-plus members of the putative class could (as Allstate acknowledges) bring a freestanding suit asserting his individual claim. It is undoubtedly true that some plaintiffs who would not bring individual suits for the relatively small sums involved will choose to join a class action. That has no bearing, however, on Allstate's or the plaintiffs' legal rights. The likelihood that some (even many) plaintiffs will be induced to sue by the availability of a class action is just the sort of "incidental effec[t]" we have long held does not violate § 2072(b).

Allstate argues that Rule 23 violates § 2072(b) because the state law it displaces, § 901(b), creates a right that the Federal Rule abridges—namely, a "substantive right … not to be subjected to aggregated class-action liability" in a single suit. To begin with, we doubt that that is so. Nothing in the text of § 901(b) (which is to be found in New York's procedural code) confines it to claims under New York law; and of course New York has no power to alter substantive rights and duties created by other sovereigns. As we have said, the *consequence* of excluding certain class actions may be to cap the damages a defendant can face in a single suit, but the law itself alters only procedure. In that respect, § 901(b) is no different from a state law forbidding simple joinder. As a fallback argument, Allstate argues that even if § 901(b) is a procedural provision, it was enacted "for *substantive reasons*." Its end was not to improve "the conduct of the litigation process itself" but to alter "the outcome of that process."

The fundamental difficulty with both these arguments is that the substantive nature of New York's law, or its substantive purpose, *makes no difference.* A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes). […]

In sum, it is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule. We have held since *Sibbach*, and reaffirmed repeatedly, that the validity

of a Federal Rule depends entirely upon whether it regulates procedure. *See Sibbach*; *Hanna*; *Burlington*. If it does, it is authorized by § 2072 and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights.

C

[…]

D

We must acknowledge the reality that keeping the federal-court door open to class actions that cannot proceed in state court will produce forum shopping. That is unacceptable when it comes as the consequence of judge-made rules created to fill supposed "gaps" in positive federal law. *See Hanna*. For where neither the Constitution, a treaty, nor a statute provides the rule of decision or authorizes a federal court to supply one, "state law must govern because there can be no other law." But divergence from state law, with the attendant consequence of forum shopping, is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure. Congress itself has created the possibility that the same case may follow a different course if filed in federal instead of state court. The short of the matter is that a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping. To hold otherwise would be to "disembowel either the Constitution's grant of power over federal procedure" or Congress's exercise of it.

* * *

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

Justice STEVENS, concurring in part and concurring in the judgment.

The New York law at issue, N.Y. CPLR § 901(b), is a procedural rule that is not part of New York's substantive law. Accordingly, I agree with Justice SCALIA that Federal Rule of Civil Procedure 23 must apply in this case and join Parts I and II-A of the Court's opinion. But I also agree with Justice GINSBURG that there are some state procedural rules that federal courts must apply in diversity cases because they function as a part of the State's definition of substantive rights and remedies.

I

[…]

Although the Enabling Act and the Rules of Decision Act "say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law," the inquiries are not the same. The Enabling Act does not invite federal courts to engage in the "relatively unguided *Erie* choice," but instead instructs only that federal rules cannot "abridge, enlarge or modify any substantive right," § 2072(b). […]

Congress has thus struck a balance: "[H]ousekeeping rules for federal courts" will generally apply in diversity cases, notwithstanding that some federal rules "will inevitably differ" from state rules. But not every federal "rul[e] of practice or procedure," § 2072(a), will displace state law. To the contrary, federal rules must be interpreted with some degree of "sensitivity to important state interests and regulatory policies," *Gasperini v. Center for Humanities, Inc.*, and applied to diversity cases against the background of Congress' command that such rules not alter substantive rights and with consideration of "the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts," *Hanna*. This can be a tricky balance to implement.

[…]

Applying this balance, therefore, requires careful interpretation of the state and federal provisions at issue. "The line between procedural and substantive law is hazy," *Erie R. Co. v. Tompkins* (Reed, J., concurring), and matters of procedure and matters of substance are not "mutually exclusive categories with easily ascertainable contents," *Sibbach* (Frankfurter, J., dissenting). Rather, "[r]ules which lawyers call procedural do not always exhaust their effect by regulating procedure," *Cohen*, and in some situations, "procedure and substance are so interwoven that rational separation becomes well-nigh impossible," *id.* (Rutledge, J., dissenting). A "state procedural rule, though undeniably 'procedural' in the ordinary sense of the term," may exist "to influence substantive outcomes," and may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy. Such laws, for example, may be seemingly procedural rules that make it significantly more difficult to bring or to prove a claim, thus serving to limit the scope of that claim. Such "procedural rules" may also define the amount of recovery. *See, e.g.*, *Gasperini*.

In our federalist system, Congress has not mandated that federal courts dictate to state legislatures the form that their substantive law must take. And were federal courts to ignore those portions of substantive state law that operate as procedural devices, it could in many instances limit the ways that sovereign States may define their rights and remedies. When a State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies, federal courts must recognize and respect that choice.

II

When both a federal rule and a state law appear to govern a question before a federal court sitting in diversity, our precedents have set out a two-step framework for federal courts to negotiate this thorny area. At both steps of the inquiry, there is a critical question about what the state law and the federal rule mean.

The court must first determine whether the scope of the federal rule is "'sufficiently broad'" to "'control the issue'" before the court, "thereby leaving no room for the operation" of seemingly conflicting state law. If the federal rule does not apply or can operate alongside the state rule, then there

is no "Ac[t] of Congress" governing that particular question, 28 U.S.C. § 1652, and the court must engage in the traditional Rules of Decision Act inquiry under *Erie* and its progeny. In some instances, the "plain meaning" of a federal rule will not come into " 'direct collision' " with the state law, and both can operate. In other instances, the rule "when fairly construed," *Burlington Northern R. Co.*, with "sensitivity to important state interests and regulatory policies," *Gasperini*, will not collide with the state law.

If, on the other hand, the federal rule is "sufficiently broad to control the issue before the Court," such that there is a "direct collision," the court must decide whether application of the federal rule "represents a valid exercise" of the "rulemaking authority … bestowed on this Court by the Rules Enabling Act." *Burlington Northern R. Co.* That Act requires, *inter alia*, that federal rules "not abridge, enlarge or modify *any* substantive right." 28 U.S.C. § 2072(b) (emphasis added). Unlike Justice SCALIA, I believe that an application of a federal rule that effectively abridges, enlarges, or modifies a state-created right or remedy violates this command. Congress may have the constitutional power "to supplant state law" with rules that are "rationally capable of classification as procedure," but we should generally presume that it has not done so. Indeed, the mandate that federal rules "shall not abridge, enlarge or modify any substantive right" evinces the opposite intent, as does Congress' decision to delegate the creation of rules to this Court rather than to a political branch.

Thus, the second step of the inquiry may well bleed back into the first. When a federal rule appears to abridge, enlarge, or modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result. *See, e.g.*, *Semtek Int'l Inc. v. Lockheed Martin Corp.* (avoiding an interpretation of Federal Rule of Civil Procedure 41(b) that "would arguably violate the jurisdictional limitation of the Rules Enabling Act" contained in § 2072(b)). And when such a "saving" construction is not possible and the rule would violate the Enabling Act, federal courts cannot apply the rule. *See* 28 U.S.C. § 2072(b) (mandating that federal rules "shall not" alter "*any* substantive right" (emphasis added)). A federal rule, therefore, cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right. And absent a governing federal rule, a federal court must engage in the traditional Rules of Decision Act inquiry, under the *Erie* line of cases. This application of the Enabling Act shows "sensitivity to important state interests" and "regulatory policies," but it does so as Congress authorized, by ensuring that federal rules that ordinarily "prescribe general rules of practice and procedure," § 2072(a), do "not abridge, enlarge or modify any substantive right," § 2072(b).

Justice SCALIA believes that the sole Enabling Act question is whether the federal rule "really regulates procedure," which means, apparently, whether it regulates "the manner and the means by which the litigants' rights are enforced." I respectfully disagree. This interpretation of the Enabling Act is consonant with the Act's first limitation to "general rules of practice and procedure," § 2072(a). But it ignores the second limitation that such rules also "not

abridge, enlarge or modify *any* substantive right," § 2072(b) (emphasis added), and in so doing ignores the balance that Congress struck between uniform rules of federal procedure and respect for a State's construction of its own rights and remedies. It also ignores the separation-of-powers presumption, and federalism presumption, that counsel against judicially created rules displacing state substantive law.

Although the plurality appears to agree with much of my interpretation of § 2072, it nonetheless rejects that approach […].

[…]

III

Justice GINSBURG views the basic issue in this case as whether and how to apply a federal rule that dictates an answer to a traditionally procedural question (whether to join plaintiffs together as a class), when a state law that "defines the dimensions" of a state-created claim dictates the opposite answer. As explained above, I readily acknowledge that if a federal rule displaces a state rule that is "'procedural' in the ordinary sense of the term," but sufficiently interwoven with the scope of a substantive right or remedy, there would be an Enabling Act problem, and the federal rule would have to give way. In my view, however, this is not such a case.

[…]

Because Rule 23 governs class certification, the only decision is whether certifying a class in this diversity case would "abridge, enlarge or modify" New York's substantive rights or remedies. § 2072(b). Although one can argue that class certification would enlarge New York's "limited" damages remedy, such arguments rest on extensive speculation about what the New York Legislature had in mind when it created § 901(b). But given that there are two plausible competing narratives, it seems obvious to me that we should respect the plain textual reading of § 901(b), a rule in New York's procedural code about when to certify class actions brought under any source of law, and respect Congress' decision that Rule 23 governs class certification in federal courts. In order to displace a federal rule, there must be more than just a possibility that the state rule is different than it appears.

Accordingly, I concur in part and concur in the judgment.

Justice GINSBURG, with whom Justice KENNEDY, Justice BREYER, and Justice ALITO join, dissenting.

The Court today approves Shady Grove's attempt to transform a $500 case into a $5,000,000 award, although the State creating the right to recover has proscribed this alchemy. If Shady Grove had filed suit in New York state court, the 2% interest payment authorized by New York Ins. Law Ann. § 5106(a) as a penalty for overdue benefits would, by Shady Grove's own measure, amount to no more than $500. By instead filing in federal court based on the parties' diverse citizenship and requesting class certification, Shady Grove hopes to recover, for the class, statutory damages of more than $5,000,000. The New York

Legislature has barred this remedy, instructing that, unless specifically permitted, "an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action." N.Y. CPLR § 901(b). The Court nevertheless holds that Federal Rule of Civil Procedure 23, which prescribes procedures for the conduct of class actions in federal courts, preempts the application of § 901(b) in diversity suits.

The Court reads Rule 23 relentlessly to override New York's restriction on the availability of statutory damages. Our decisions, however, caution us to ask, before undermining state legislation: Is this conflict really necessary? Had the Court engaged in that inquiry, it would not have read Rule 23 to collide with New York's legitimate interest in keeping certain monetary awards reasonably bounded. I would continue to interpret Federal Rules with awareness of, and sensitivity to, important state regulatory policies. Because today's judgment radically departs from that course, I dissent.

I

A

[…]

B

In our prior decisions in point, many of them not mentioned in the Court's opinion, we have avoided immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing federal interest. […]

In pre-*Hanna* decisions, the Court vigilantly read the Federal Rules to avoid conflict with state laws. […]

[I]n *Ragan v. Merchants Transfer & Warehouse Co.*, the Court ruled that state law determines when a diversity suit commences for purposes of tolling the state limitations period. Although Federal Rule 3 specified that "[a] civil action is commenced by filing a complaint with the court," we held that the Rule did not displace a state law that tied an action's commencement to service of the summons. The "cause of action [wa]s created by local law," the Court explained, therefore "the measure of it [wa]s to be found only in local law."

Similarly, in *Cohen v. Beneficial Industrial Loan Corp.*, the Court held applicable in a diversity action a state statute requiring plaintiffs, as a prerequisite to pursuit of a stockholder's derivative action, to post a bond as security for costs. At the time of the litigation, Rule 23, now Rule 23.1, addressed a plaintiff's institution of a derivative action in federal court. Although the Federal Rule specified prerequisites to a stockholder's maintenance of a derivative action, the Court found no conflict between the Rule and the state statute in question; the requirements of both could be enforced, the Court observed. Burdensome as the security-for-costs requirement may be, *Cohen* made plain, suitors could not escape the upfront outlay by resorting to the federal court's diversity jurisdiction.

In all of these cases, the Court stated in *Hanna*, "the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law." In *Hanna* itself, the Court found the clash "unavoidable"; the petitioner had effected service of process as prescribed by Federal Rule 4(d)(1), but that "how-to" method did not satisfy the special Massachusetts law applicable to service on an executor or administrator. Even as it rejected the Massachusetts prescription in favor of the federal procedure, however, "[t]he majority in *Hanna* recognized … that federal rules … must be interpreted by the courts applying them, and that the process of interpretation can and should reflect an awareness of legitimate state interests."

Following *Hanna*, we continued to "interpre[t] the federal rules to avoid conflict with important state regulatory policies." In *Walker*, the Court took up the question whether *Ragan* should be overruled; we held, once again, that Federal Rule 3 does not directly conflict with state rules governing the time when an action commences for purposes of tolling a limitations period. Rule 3, we said, addresses only "the date from which various timing requirements of the Federal Rules begin to run," and does not "purpor[t] to displace state tolling rules." Significant state policy interests would be frustrated, we observed, were we to read Rule 3 as superseding the state rule, which required actual service on the defendant to stop the clock on the statute of limitations.

We were similarly attentive to a State's regulatory policy in *Gasperini.* That diversity case concerned the standard for determining when the large size of a jury verdict warrants a new trial. Federal and state courts alike had generally employed a "shock the conscience" test in reviewing jury awards for excessiveness. Federal courts did so pursuant to Federal Rule 59(a) which, as worded at the time of *Gasperini*, instructed that a trial court could grant a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a). In an effort to provide greater control, New York prescribed procedures under which jury verdicts would be examined to determine whether they "deviate[d] materially from what would be reasonable compensation." (quoting CPLR § 5501(c)). This Court held that Rule 59(a) did not inhibit federal-court accommodation of New York's invigorated test.

Most recently, in *Semtek*, we addressed the claim-preclusive effect of a federal-court judgment dismissing a diversity action on the basis of a California statute of limitations. The case came to us after the same plaintiff renewed the same fray against the same defendant in a Maryland state court. (Plaintiff chose Maryland because that State's limitations period had not yet run.) We held that Federal Rule 41(b), which provided that an involuntary dismissal "operate[d] as an adjudication on the merits," did not bar maintenance of the renewed action in Maryland. To hold that Rule 41(b) precluded the Maryland courts from entertaining the case, we said, "would arguably violate the jurisdictional limitation of the Rules Enabling Act," and "would in many cases violate [*Erie*'s] federalism principle."

In sum, both before and after *Hanna*, the above-described decisions show, federal courts have been cautioned by this Court to "interpre[t] the Federal Rules … with sensitivity to important state interests," *Gasperini*, and a will "to avoid conflict with important state regulatory policies," *id.* The Court veers away from that approach—and conspicuously, its most recent reiteration in *Gasperini*—in favor of a mechanical reading of Federal Rules, insensitive to state interests and productive of discord.

C

Our decisions instruct over and over again that, in the adjudication of diversity cases, state interests—whether advanced in a statute, *e.g.*, *Cohen*, or a procedural rule, *e.g.*, *Gasperini*—warrant our respectful consideration. Yet today, the Court gives no quarter to New York's limitation on statutory damages and requires the lower courts to thwart the regulatory policy at stake: To prevent excessive damages, New York's law controls the penalty to which a defendant may be exposed in a single suit. The story behind § 901(b)'s enactment deserves telling.

In 1975, the Judicial Conference of the State of New York proposed a new class-action statute designed "to set up a flexible, functional scheme" that would provide "an effective, but controlled group remedy." Judicial Conference Report on CPLR. As originally drafted, the legislation addressed only the procedural aspects of class actions; it specified, for example, five prerequisites for certification, eventually codified at § 901(a), that closely tracked those listed in Rule 23. *See* CPLR § 901(a) (requiring, for class certification, numerosity, predominance, typicality, adequacy of representation, and superiority).

While the Judicial Conference proposal was in the New York Legislature's hopper, "various groups advocated for the addition of a provision that would prohibit class action plaintiffs from being awarded a statutorily-created penalty … except when expressly authorized in the pertinent statute." These constituents "feared that recoveries beyond actual damages could lead to excessively harsh results." "They also argued that there was no need to permit class actions … [because] statutory penalties … provided an aggrieved party with a sufficient economic incentive to pursue a claim." Such penalties, constituents observed, often far exceed a plaintiff's actual damages. "When lumped together," they argued, "penalties and class actions produce overkill."

Aiming to avoid "annihilating punishment of the defendant," the New York Legislature amended the proposed statute to bar the recovery of statutory damages in class actions. In his signing statement, Governor Hugh Carey stated that the new statute "empowers the court to prevent abuse of the class action device and provides *a controlled remedy*." (emphasis added).

"[T]he final bill … was the result of a compromise among competing interests." Section 901(a) allows courts leeway in deciding whether to certify a class, but § 901(b) rejects the use of the class mechanism to pursue the particular remedy of statutory damages. The limitation was not designed with the fair conduct or efficiency of litigation in mind. Indeed, suits seeking statutory damages are arguably *best* suited to the class device because individual proof of actual

damages is unnecessary. New York's decision instead to block class-action proceedings for statutory damages therefore makes scant sense, except as a means to a manifestly substantive end: Limiting a defendant's liability in a single lawsuit in order to prevent the exorbitant inflation of penalties—remedies the New York Legislature created with individual suits in mind.

D

Shady Grove contends—and the Court today agrees—that Rule 23 unavoidably preempts New York's prohibition on the recovery of statutory damages in class actions. The Federal Rule, the Court emphasizes, states that Shady Grove's suit "may be" maintained as a class action, which conflicts with § 901(b)'s instruction that it "may not" so proceed. Accordingly, the Court insists, § 901(b) "cannot apply in diversity suits unless Rule 23 is ultra vires." Concluding that Rule 23 does not violate the Rules Enabling Act, the Court holds that the federal provision controls Shady Grove's ability to seek, on behalf of a class, a statutory penalty of over $5,000,000.

The Court, I am convinced, finds conflict where none is necessary. Mindful of the history behind § 901(b)'s enactment, the thrust of our precedent, and the substantive-rights limitation in the Rules Enabling Act, I conclude, as did the Second Circuit and every District Court to have considered the question in any detail, that Rule 23 does not collide with § 901(b). As the Second Circuit well understood, Rule 23 prescribes the considerations relevant to class certification and post-certification proceedings—but it does not command that a particular remedy be available when a party sues in a representative capacity. Section 901(b), in contrast, trains on that latter issue. Sensibly read, Rule 23 governs procedural aspects of class litigation, but allows state law to control the size of a monetary award a class plaintiff may pursue.

In other words, Rule 23 describes a method of enforcing a claim for relief, while § 901(b) defines the dimensions of the claim itself. In this regard, it is immaterial that § 901(b) bars statutory penalties in wholesale, rather than retail, fashion. The New York Legislature could have embedded the limitation in every provision creating a cause of action for which a penalty is authorized; § 901(b) operates as shorthand to the same effect. It is as much a part of the delineation of the claim for relief as it would be were it included claim by claim in the New York Code.

The Court single-mindedly focuses on whether a suit "may" or "may not" be maintained as a class action. Putting the question that way, the Court does not home in on the reason *why*. Rule 23 authorizes class treatment for suits satisfying its prerequisites because the class mechanism generally affords a fair and efficient way to aggregate claims for adjudication. Section 901(b) responds to an entirely different concern; it does not allow class members to recover statutory damages because the New York Legislature considered the result of adjudicating such claims *en masse* to be exorbitant. The fair and efficient *conduct* of class litigation is the legitimate concern of Rule 23; the *remedy* for an infraction of state law, however, is the legitimate concern of the State's lawmakers and not of the federal rulemakers.

Suppose, for example, that a State, wishing to cap damages in class actions at $1,000,000, enacted a statute providing that "a suit to recover more than $1,000,000 may not be maintained as a class action." Under the Court's reasoning—which attributes dispositive significance to the words "may not be maintained"—Rule 23 would preempt this provision, nevermind that Congress, by authorizing the promulgation of rules of procedure for federal courts, surely did not intend to displace state-created ceilings on damages. The Court suggests that the analysis might differ if the statute "limit[ed] the remedies available in an existing class action," such that Rule 23 might not conflict with a state statute prescribing that "no more than $1,000,000 may be recovered in a class action." There is no real difference in the purpose and intended effect of these two hypothetical statutes. The notion that one directly impinges on Rule 23's domain, while the other does not, fundamentally misperceives the office of Rule 23.

The absence of an inevitable collision between Rule 23 and § 901(b) becomes evident once it is comprehended that a federal court sitting in diversity can accord due respect to both state and federal prescriptions. Plaintiffs seeking to vindicate claims for which the State has provided a statutory penalty may pursue relief through a class action if they forgo statutory damages and instead seek actual damages or injunctive or declaratory relief; any putative class member who objects can opt out and pursue actual damages, if available, and the statutory penalty in an individual action. In this manner, the Second Circuit explained, "Rule 23's procedural requirements for class actions can be applied along with the substantive requirement of CPLR 901(b)." In sum, while phrased as responsive to the question whether certain class actions may begin, § 901(b) is unmistakably aimed at controlling how those actions must end. On that remedial issue, Rule 23 is silent.

Any doubt whether Rule 23 leaves § 901(b) in control of the remedial issue at the core of this case should be dispelled by our *Erie* jurisprudence, including *Hanna*, which counsels us to read Federal Rules moderately and cautions against stretching a rule to cover every situation it could conceivably reach. The Court states that "[t]here is no reason … to read Rule 23 as addressing only whether claims made eligible for class treatment by some *other* law should be certified as class actions." To the contrary, *Palmer*, *Ragan*, *Cohen*, *Walker*, *Gasperini*, and *Semtek* provide good reason to look to the law that creates the right to recover. That is plainly so on a more accurate statement of what is at stake: Is there any reason to read Rule 23 as authorizing a claim for relief when the State that created the remedy disallows its pursuit on behalf of a class? None at all is the answer our federal system should give.

Notably, New York is not alone in its effort to contain penalties and minimum recoveries by disallowing class relief; Congress, too, has precluded class treatment for certain claims seeking a statutorily designated minimum recovery. *See, e.g.*, [Truth in Lending Act] ("[I]n the case of a class action… no minimum recovery shall be applicable."); [Electronic Fund Transfer Act] (same); [Expedited Fund Availability Act] (same). Today's judgment denies to the States the full power Congress has to keep certain monetary awards within reasonable

bounds. States may hesitate to create determinate statutory penalties in the future if they are impotent to prevent federal-court distortion of the remedy they have shaped.

By finding a conflict without considering whether Rule 23 rationally should be read to avoid any collision, the Court unwisely and unnecessarily retreats from the federalism principles undergirding *Erie*. Had the Court reflected on the respect for state regulatory interests endorsed in our decisions, it would have found no cause to interpret Rule 23 so woodenly—and every reason not to do so.

II

Because I perceive no unavoidable conflict between Rule 23 and § 901(b), I would decide this case by inquiring "whether application of the [state] rule would have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would be likely to cause a plaintiff to choose the federal court."

Seeking to pretermit that inquiry, Shady Grove urges that the class-action bar in § 901(b) must be regarded as "procedural" because it is contained in the CPLR, which "govern[s] the *procedure* in civil judicial proceedings *in all courts of the state*." (quoting CPLR § 101). Placement in the CPLR is hardly dispositive. The provision held "substantive" for *Erie* purposes in *Gasperini* is also contained in the CPLR (§ 5501(c)), as are limitations periods, prescriptions plainly "substantive" for *Erie* purposes however they may be characterized for other purposes, *see York*.

Shady Grove also ranks § 901(b) as "procedural" because "nothing in [the statute] suggests that it is limited to rights of action based on New York state law, as opposed to federal law or the law of other states"; instead it "applies to actions seeking penalties under *any* statute."

It is true that § 901(b) is not specifically *limited* to claims arising under New York law. But neither is it expressly *extended* to claims arising under foreign law. The rule prescribes, without elaboration either way, that "an action to recover a penalty… may not be maintained as a class action." We have often recognized that "general words" appearing in a statute may, in fact, have limited application; "[t]he words 'any person or persons,' " for example, "are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them."

Moreover, Shady Grove overlooks the most likely explanation for the absence of limiting language: New York legislators make law with New York plaintiffs and defendants in mind, *i.e.*, as if New York were the universe.

The point was well put by Brainerd Currie in his seminal article on governmental interest analysis in conflict-of-laws cases. The article centers on a now-archaic Massachusetts law that prevented married women from binding themselves by contract as sureties for their husbands. Discussing whether the Mas-

sachusetts prescription applied to transactions involving foreign factors (a foreign forum, foreign place of contracting, or foreign parties), Currie observed:

> When the Massachusetts legislature addresses itself to the problem of married women as sureties, the undeveloped image in its mind is that of *Massachusetts* married women, husbands, creditors, transactions, courts, and judgments. In the history of Anglo-American law the domestic case has been normal, the conflict-of-laws case marginal."

Married Women's Contracts: A Study in Conflict-of-Laws Method, 25 U. Chi. L. Rev. 227, 231 (1958) (emphasis added).

Shady Grove's suggestion that States must specifically limit their laws to domestic rights of action if they wish their enactments to apply in federal diversity litigation misses the obvious point: State legislators generally do not focus on an interstate setting when drafting statutes.

[…]

In short, Shady Grove's effort to characterize § 901(b) as simply "procedural" cannot successfully elide this fundamental norm: When no federal law or rule is dispositive of an issue, and a state statute is outcome affective in the sense our cases on *Erie* (pre and post-*Hanna*) develop, the Rules of Decision Act commands application of the State's law in diversity suits. As this case starkly demonstrates, if federal courts exercising diversity jurisdiction are compelled by Rule 23 to award statutory penalties in class actions while New York courts are bound by § 901(b)'s proscription, "substantial variations between state and federal [money judgments] may be expected." *Gasperini*. The "variation" here is indeed "substantial." Shady Grove seeks class relief that is *ten thousand times* greater than the individual remedy available to it in state court. As the plurality acknowledges, *ante* at 1448, forum shopping will undoubtedly result if a plaintiff need only file in federal instead of state court to seek a massive monetary award explicitly barred by state law. The "accident of diversity of citizenship," *Klaxon Co. v. Stentor Elec. Mfg. Co.*, should not subject a defendant to such augmented liability.

It is beyond debate that "a statutory cap on damages would supply substantive law for *Erie* purposes." *Gasperini*. *See also id.* (Stevens, J., dissenting) ("A state-law ceiling on allowable damages … is a substantive rule of decision that federal courts must apply in diversity cases governed by New York law."); *id.* (Scalia, J., dissenting) ("State substantive law controls what injuries are compensable and in what amount."). In *Gasperini*, we determined that New York's standard for measuring the alleged excessiveness of a jury verdict was designed to provide a control analogous to a damages cap. The statute was framed as "a procedural instruction," we noted, "but the State's objective [wa]s manifestly substantive."

Gasperini's observations apply with full force in this case. By barring the recovery of statutory damages in a class action, § 901(b) controls a defendant's maximum liability in a suit seeking such a remedy. The remedial provision

could have been written as an explicit cap: "In any class action seeking statutory damages, relief is limited to the amount the named plaintiff would have recovered in an individual suit." That New York's Legislature used other words to express the very same meaning should be inconsequential.

[…]

III

The Court's erosion of *Erie*'s federalism grounding impels me to point out the large irony in today's judgment. Shady Grove is able to pursue its claim in federal court only by virtue of the recent enactment of the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1332(d). In CAFA, Congress opened federal-court doors to state-law-based class actions so long as there is minimal diversity, at least 100 class members, and at least $5,000,000 in controversy. By providing a federal forum, Congress sought to check what it considered to be the overreadiness of some state courts to certify class actions. In other words, Congress envisioned fewer—not more—class actions overall. Congress surely never anticipated that CAFA would make federal courts a mecca for suits of the kind Shady Grove has launched: class actions seeking state-created penalties for claims arising under state law—claims that would be barred from class treatment in the State's own courts.[15]

[15] It remains open to Congress, of course, to exclude from federal-court jurisdiction under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), claims that could not be maintained as a class action in state court.

*** * ***

I would continue to approach *Erie* questions in a manner mindful of the purposes underlying the Rules of Decision Act and the Rules Enabling Act, faithful to precedent, and respectful of important state interests. I would therefore hold that the New York Legislature's limitation on the recovery of statutory damages applies in this case, and would affirm the Second Circuit's judgment.

Part III.

Supplement

Federal Rules of Civil Procedure

Scope of Rules; Form of Action

Rule 1 — Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Rule 2 — One Form of Action

There is one form of action—the civil action.

Commencing an Action; Service of Process, Pleadings, Motions, and Orders

Rule 3 — Commencing an Action

A civil action is commenced by filing a complaint with the court.

Rule 4 — Summons

(a) Contents; Amendments.

(1) Contents. A summons must:

(A) name the court and the parties;

(B) be directed to the defendant;

(C) state the name and address of the plaintiff's attorney or—if unrepresented—of the plaintiff;

(D) state the time within which the defendant must appear and defend;

(E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;

(F) be signed by the clerk; and

(G) bear the court's seal.

(2) Amendments. The court may permit a summons to be amended.

(b) Issuance. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons—or a copy of a summons that is addressed to multiple defendants—must be issued for each defendant to be served.

(c) Service.

(1) In General. A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.

(2) By Whom. Any person who is at least 18 years old and not a party may serve a summons and complaint.

(3) By a Marshal or Someone Specially Appointed. At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915 or as a seaman under 28 U.S.C. § 1916.

(d) Waiving Service.

(1) Requesting a Waiver. An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

(A) be in writing and be addressed:

(i) to the individual defendant; or

(ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;

(B) name the court where the complaint was filed;

(C) be accompanied by a copy of the complaint, 2 copies of the waiver form appended to this Rule 4, and a prepaid means for returning the form;

(D) inform the defendant, using the form appended to this Rule 4, of the consequences of waiving and not waiving service;

(E) state the date when the request is sent;

(F) give the defendant a reasonable time of at least 30 days after the request was sent—or at least 60 days if sent to the defendant outside any judicial district of the United States—to return the waiver; and

(G) be sent by first-class mail or other reliable means.

(2) Failure to Waive. If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(3) Time to Answer After a Waiver. A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent—or until 90 days after it was sent to the defendant outside any judicial district of the United States.

(4) Results of Filing a Waiver. When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver.

(5) Jurisdiction and Venue Not Waived. Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

(e) Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

(f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

(g) Serving a Minor or an Incompetent Person. A minor or an incompetent person in a judicial district of the United States must be served by following state law for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person who is not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).

(h) Serving a Corporation, Partnership, or Association. Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

(1) in a judicial district of the United States:

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and—if the agent is one authorized by statute and the statute so requires—by also mailing a copy of each to the defendant; or

(2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) United States. To serve the United States, a party must:

(A)

(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought—or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk—or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) Agency; Corporation; Officer or Employee Sued in an Official Capacity. To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the

summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) Officer or Employee Sued Individually. To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(4) Extending Time. The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under Rule 4(i)(3), if the party has served the United States officer or employee.

(j) Serving a Foreign, State, or Local Government.

(1) Foreign State. A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.

(2) State or Local Government. A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:

(A) delivering a copy of the summons and of the complaint to its chief executive officer; or

(B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

(k) Territorial Limits of Effective Service.

(1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or

(C) when authorized by a federal statute.

(2) Federal Claim Outside State-Court Jurisdiction. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.

(l) Proving Service.

(1) Affidavit Required. Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit.

(2) Service Outside the United States. Service not within any judicial district of the United States must be proved as follows:

(A) if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or

(B) if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee.

(3) Validity of Service; Amending Proof. Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended.

(m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).

(n) Asserting Jurisdiction over Property or Assets.

(1) Federal Law. The court may assert jurisdiction over property if authorized by a federal statute. Notice to claimants of the property must be given as provided in the statute or by serving a summons under this rule.

(2) State Law. On a showing that personal jurisdiction over a defendant cannot be obtained in the district where the action is brought by reasonable efforts to serve a summons under this rule, the court may assert jurisdiction over the defendant's assets found in the district. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by state law in that district.

Rule 4.1 – Serving Other Process

a) In General. Process—other than a summons under Rule 4 or a subpoena under Rule 45—must be served by a United States marshal or deputy marshal or by a person specially appointed for that purpose. It may be served anywhere within the territorial limits of the state where the district court is located and, if authorized by a federal statute, beyond those limits. Proof of service must be made under Rule 4(l).

(b) Enforcing Orders: Committing for Civil Contempt. An order committing a person for civil contempt of a decree or injunction issued to enforce federal law may be served and enforced in any district. Any other order in a civil-contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.

Rule 5 – Serving and Filing Pleadings and Other Papers

(a) Service: When Required.

(1) In General. Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

(2) If a Party Fails to Appear. No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4.

(3) Seizing Property. If an action is begun by seizing property and no person is or need be named as a defendant, any service required before the filing of an appearance, answer, or claim must be made on the person who had custody or possession of the property when it was seized.

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) Service in General. A paper is served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address—in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the filer or sender learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(3) Using Court Facilities. [Abrogated (Apr._, 2018, eff. Dec. 1, 2018)]

(c) Serving Numerous Defendants.

(1) In General. If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that:

(A) defendants' pleadings and replies to them need not be served on other defendants;

(B) any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and

(C) filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties.

(2) Notifying Parties. A copy of every such order must be served on the parties as the court directs.

(d) Filing.

(1) Required Filings; Certificate of Service.

(A) Papers after the Complaint. Any paper after the complaint that is required to be served—must be filed no later than a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(B) Certificate of Service. No certificate of service is required when a paper is served by filing it with the court's electronic-filing system. When a paper that is required to be served is served by other means:

(i) if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service; and

(ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by court order or by local rule.

(2) Nonelectronic Filing. A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) Electronic Filing and Signing.

(A) By a Represented Person—Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) By an Unrepresented Person—When Allowed or Required. A person not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) Signing. A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

(D) Same as a Written Paper. A paper filed electronically is a written paper for purposes of these rules.

(4) Acceptance by the Clerk. The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

Rule 5.1 — Constitutional Challenge to a Statute-Notice, Certification, and Intervention

(a) Notice by a Party. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly:

(1) file a notice of constitutional question stating the question and identifying the paper that raises it, if:

(A) a federal statute is questioned and the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity; or

(B) a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity; and

(2) serve the notice and paper on the Attorney General of the United States if a federal statute is questioned—or on the state attorney general if a state statute is questioned—either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.

(b) Certification by the Court. The court must, under 28 U.S.C. § 2403, certify to the appropriate attorney general that a statute has been questioned.

(c) Intervention; Final Decision on the Merits. Unless the court sets a later time, the attorney general may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier. Before the time

to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.

(d) No Forfeiture. A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.

Rule 5.2 – Privacy Protection for Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 5.2(c) or (d); and

(6) a pro se filing in an action brought under 28 U.S.C. § §2241, 2254, or 2255.

(c) Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

(A) the docket maintained by the court; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.

Rule 6 — Computing and Extending Time; Time for Motion Papers

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) Period Stated in Days or a Longer Unit. When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) Period Stated in Hours. When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) Inaccessibility of the Clerk's Office. Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) "Last Day" Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) "Next Day" Defined. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) "Legal Holiday" Defined. "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located.

(b) Extending Time.

(1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) Exceptions. A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

(c) Motions, Notices of Hearing, and Affidavits.

(1) In General. A written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing, with the following exceptions:

(A) when the motion may be heard ex parte;

(B) when these rules set a different time; or

(C) when a court order—which a party may, for good cause, apply for ex parte—sets a different time.

(2) Supporting Affidavit. Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 7 days before the hearing, unless the court permits service at another time.

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

Pleadings and Motions

Rule 7 - Pleadings Allowed; Form of Motions and Other Papers

(a) Pleadings. Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

(3) an answer to a counterclaim designated as a counterclaim;

(4) an answer to a crossclaim;

(5) a third-party complaint;

(6) an answer to a third-party complaint; and

(7) if the court orders one, a reply to an answer.

(b) Motions and Other Papers.

(1) In General. A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) state with particularity the grounds for seeking the order; and

(C) state the relief sought.

(2) Form. The rules governing captions and other matters of form in pleadings apply to motions and other papers.

Rule 7.1 — Disclosure Statement

(a) Who Must File; Contents.

(1) Nongovernmental Corporations. A nongovernmental corporate party or a nongovernmental corporation that seeks to intervene must file a statement that:

(A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(B) states that there is no such corporation.

(2) Parties or Intervenors in a Diversity Case. In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders otherwise, file a disclosure statement. The statement must name—and identify the citizenship of—every individual or entity whose citizenship is attributed to that party or intervenor:

(A) when the action is filed in or removed to federal court, and

(B) when any later event occurs that could affect the court's jurisdiction under § 1332(a).

(b) Time to File; Supplemental Filing. A party, intervenor, or proposed intervenor must:

(1) file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and

(2) promptly file a supplemental statement if any required information changes.

Rule 8 – General Rules of Pleading

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) Defenses; Admissions and Denials.

(1) In General. In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) Denials—Responding to the Substance. A denial must fairly respond to the substance of the allegation.

(3) General and Specific Denials. A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) Denying Part of an Allegation. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) Lacking Knowledge or Information. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) Effect of Failing to Deny. An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is

required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) Affirmative Defenses.

(1) In General. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) Mistaken Designation. If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) In General. Each allegation must be simple, concise, and direct. No technical form is required.

(2) Alternative Statements of a Claim or Defense. A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) Inconsistent Claims or Defenses. A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

Rule 9 – Pleading Special Matters

(a) Capacity or Authority to Sue; Legal Existence.

(1) In General. Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

(2) Raising Those Issues. To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(c) Conditions Precedent. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

(d) Official Document or Act. In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.

(f) Time and Place. An allegation of time or place is material when testing the sufficiency of a pleading.

(g) Special Damages. If an item of special damage is claimed, it must be specifically stated.

(h) Admiralty or Maritime Claim.

> (1) How Designated. If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.
>
> (2) Designation for Appeal. A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. § 1292(a)(3).

Rule 10 – Form of Pleadings

(a) Caption; Names of Parties. Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.

(b) Paragraphs; Separate Statements. A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—must be stated in a separate count or defense.

(c) Adoption by Reference; Exhibits. A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.

Rule 11 – Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

> (1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.
>
> (2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may

award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) Requirements for an Order. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

Rule 12 – Defenses and Objections: When and How Presented; Notion for Judgement on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) In General. Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) United States and Its Agencies, Officers, or Employees Sued in an Official Capacity. The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) United States Officers or Employees Sued in an Individual Capacity. A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) Effect of a Motion. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

(1) Right to Join. A motion under this rule may be joined with any other motion allowed by this rule.

(2) Limitation on Further Motions. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) When Some Are Waived. A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) When to Raise Others. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) Lack of Subject-Matter Jurisdiction. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Rule 13 – Counterclaim and Crossclaim

(a) Compulsory Counterclaim.

(1) In General. A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

(2) Exceptions. The pleader need not state the claim if:

(A) when the action was commenced, the claim was the subject of another pending action; or

(B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.

(b) Permissive Counterclaim. A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.

(c) Relief Sought in a Counterclaim. A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.

(d) Counterclaim Against the United States. These rules do not expand the right to assert a counterclaim—or to claim a credit—against the United States or a United States officer or agency.

(e) Counterclaim Maturing or Acquired After Pleading. The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.

(f) [Abrogated.]

(g) Crossclaim Against a Coparty. A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

(h) Joining Additional Parties. Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.

(i) Separate Trials; Separate Judgments. If the court orders separate trials under Rule 42(b), it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

Rule 14 – Third-Party Practice

(a) When a Defending Party May Bring in a Third Party.

(1) Timing of the Summons and Complaint. A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's

leave if it files the third-party complaint more than 14 days after serving its original answer.

(2) Third-Party Defendant's Claims and Defenses. The person served with the summons and third-party complaint—the "third-party defendant":

> (A) must assert any defense against the third-party plaintiff's claim under Rule 12;
>
> (B) must assert any counterclaim against the third-party plaintiff under Rule 13a, and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g);
>
> (C) may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and
>
> (D) may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

(3) Plaintiff's Claims Against a Third-Party Defendant. The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant must then assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g).

(4) Motion to Strike, Sever, or Try Separately. Any party may move to strike the third-party claim, to sever it, or to try it separately.

(5) Third-Party Defendant's Claim Against a Nonparty. A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.

(6) Third-Party Complaint In Rem. If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem. In that event, a reference in this rule to the "summons" includes the warrant of arrest, and a reference to the defendant or third-party plaintiff includes, when appropriate, a person who asserts a right under Supplemental Rule C(6)(a)(i) in the property arrested.

(b) When a Plaintiff May Bring in a Third Party. When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

(c) Admiralty or Maritime Claim.

(1) Scope of Impleader. If a plaintiff asserts an admiralty or maritime claim under Rule 9(h), the defendant or a person who asserts a right under Supplemental Rule C(6)(a)(i) may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or partly liable—either to the plaintiff or to the third-party plaintiff—for remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences.

(2) Defending Against a Demand for Judgment for the Plaintiff. The third-party plaintiff may demand judgment in the plaintiff's favor against the third-party defendant. In that event, the third-party defendant must defend under Rule 12 against the plaintiff's claim as well as the third-party plaintiff's claim; and the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff.

Rule 15 – Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) Time to Respond. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) Based on an Objection at Trial. If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) For Issues Tried by Consent. When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) Notice to the United States. When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Rule 16 – Pretrial Conferences; Scheduling; Management

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating settlement.

(b) Scheduling.

(1) Scheduling Order. Except in categories of actions exempted by local rule, the district judge—or a magistrate judge when authorized by local rule—must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference.

(2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.

(3) Contents of the Order.

(A) Required Contents. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) Permitted Contents. The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure, discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information

is produced, including agreements reached under Federal Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

(vi) set dates for pretrial conferences and for trial; and

(vii) include other appropriate matters.

(4) Modifying a Schedule. A schedule may be modified only for good cause and with the judge's consent.

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1) Attendance. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) Matters for Consideration. At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a magistrate judge or a master;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

(f) Sanctions.

(1) In General. On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)–(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate—or does not participate in good faith—in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) Imposing Fees and Costs. Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses—including attorney's fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

Parties

Rule 17 – Plaintiff and Defendant; Capacity; Public Officers

(a) Real Party in Interest.

(1) Designation in General. An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a guardian;

(D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

(2) Action in the Name of the United States for Another's Use or Benefit. When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.

(3) Joinder of the Real Party in Interest. The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

(b) Capacity to Sue or Be Sued. Capacity to sue or be sued is determined as follows:

(1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;

(2) for a corporation, by the law under which it was organized; and

(3) for all other parties, by the law of the state where the court is located, except that:

(A) a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and

(B) 28 U.S.C. § §754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.

(c) Minor or Incompetent Person.

(1) With a Representative. The following representatives may sue or defend on behalf of a minor or an incompetent person:

(A) a general guardian;

(B) a committee;

(C) a conservator; or

(D) a like fiduciary.

(2) Without a Representative. A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.

(d) Public Officer's Title and Name. A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added.

Rule 18 – Joinder of Claims

(a) In General. A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.

(b) Joinder of Contingent Claims. A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a

conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money.

Rule 19 – Required Joinder of Parties

(a) Persons Required to Be Joined if Feasible.

(1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) Joinder by Court Order. If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) Venue. If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) Pleading the Reasons for Nonjoinder. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) Exception for Class Actions. This rule is subject to Rule 23.

Rule 20 – Permissive Joinder of Parties

(a) Persons Who May Join or Be Joined.

(1) Plaintiffs. Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

(2) Defendants. Persons—as well as a vessel, cargo, or other property subject to admiralty process in rem—may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

(3) Extent of Relief. Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

(b) Protective Measures. The court may issue orders—including an order for separate trials—to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

Rule 21 – Misjoinder and Nonjoinder of Parties

Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

Rule 22 – Interpleader

(a) Grounds.

> (1) By a Plaintiff. Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though:
>
> > (A) the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical; or
> >
> > (B) the plaintiff denies liability in whole or in part to any or all of the claimants.
>
> (2) By a Defendant. A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim.

(b) Relation to Other Rules and Statutes. This rule supplements—and does not limit—the joinder of parties allowed by Rule 20. The remedy this rule provides is in addition to—and does not supersede or limit—the remedy provided by 28 U.S.C. § §1335, 1397, and 2361. An action under those statutes must be conducted under these rules.

Rule 23 – Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) Notice to the Class.

(A) Information That Parties Must Provide to the Court. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) Grounds for a Decision to Give Notice. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) Approval of the Proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) Identifying Agreements. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) New Opportunity to Be Excluded. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Class-Member Objections.

(A) In General. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) Court Approval Required for Payment in Connection with an Objection. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) Procedure for Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

Rule 23.1 – Derivative Actions

(a) Prerequisites. This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.

(b) Pleading Requirements. The complaint must be verified and must:

> (1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law;
>
> (2) allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and
>
> (3) state with particularity:
>
> > (A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and
> >
> > (B) the reasons for not obtaining the action or not making the effort.

(c) Settlement, Dismissal, and Compromise. A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.

Rule 23.2 – Actions Relating to Unincorporated Associations

This rule applies to an action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties. The action may be maintained only if it appears that those parties will fairly and adequately protect the interests of the association and its members. In conducting the action, the court may issue any appropriate orders corresponding with those in Rule 23(d), and the procedure for settlement, voluntary dismissal, or compromise must correspond with the procedure in Rule 23(e).

Rule 24 – Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

Rule 25 – Substitution of Parties

(a) Death.

> (1) Substitution if the Claim Is Not Extinguished. If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.
>
> (2) Continuation Among the Remaining Parties. After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record.
>
> (3) Service. A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.

(b) Incompetency. If a party becomes incompetent, the court may, on motion, permit the action to be continued by or against the party's representative. The motion must be served as provided in Rule 25(a)(3).

(c) Transfer of Interest. If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3).

(d) Public Officers; Death or Separation from Office. An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.

Disclosures and Discovery

Rule 26 – Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

> (1) Initial Disclosure.

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) Time for Initial Disclosures—In General. A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) Time for Initial Disclosures—For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's

employee regularly involve giving expert testimony. The report must contain:

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
>
> (ii) the facts or data considered by the witness in forming them;
>
> (iii) any exhibits that will be used to summarize or support them;
>
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
>
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
>
> (vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

> (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
>
> (ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

> (i) at least 90 days before the date set for trial or for the case to be ready for trial; or
>
> (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(3) Pretrial Disclosures.

(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving

the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable..

(2) Limitations on Frequency and Extent.

> (A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.
>
> (B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.
>
> (C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
>
> > (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
> >
> > (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
> >
> > (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) Trial Preparation: Materials.

> (A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(4) Trial Preparation: Experts.

(A) Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) Ordering Discovery. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) Awarding Expenses. Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Early Rule 34 Requests.

(A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) When Considered Served. The request is considered to have been served at the first Rule 26(f) conference.

(3) Sequence. Unlessthe parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) In General. A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) Expert Witness. For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) Conference Timing. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) Conference Content; Parties' Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) Expedited Schedule. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) Failure to Sign. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

Rule 27 – Depositions to Perpetuate Testimony

(a) Before an Action Is Filed.

(1) Petition. A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show:

(A) that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought;

(B) the subject matter of the expected action and the petitioner's interest;

(C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;

(D) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and

(E) the name, address, and expected substance of the testimony of each deponent.

(2) Notice and Service. At least 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved

person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.

(3) Order and Examination. If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under these rules, and the court may issue orders like those authorized by Rules 34 and 35. A reference in these rules to the court where an action is pending means, for purposes of this rule, the court where the petition for the deposition was filed.

(4) Using the Deposition. A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed district-court action involving the same subject matter if the deposition either was taken under these rules or, although not so taken, would be admissible in evidence in the courts of the state where it was taken.

(b) Pending Appeal.

(1) In General. The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court.

(2) Motion. The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. The motion must show:

(A) the name, address, and expected substance of the testimony of each deponent; and

(B) the reasons for perpetuating the testimony.

(3) Court Order. If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending district-court action.

(c) Perpetuation by an Action. This rule does not limit a court's power to entertain an action to perpetuate testimony.

Rule 28 – Persons Before Whom Depositions May Be Taken

(a) Within the United States.

(1) In General. Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before:

(A) an officer authorized to administer oaths either by federal law or by the law in the place of examination; or

(B) a person appointed by the court where the action is pending to administer oaths and take testimony.

(2) Definition of "Officer." The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a).

(b) In a Foreign Country.

(1) In General. A deposition may be taken in a foreign country:

(A) under an applicable treaty or convention;

(B) under a letter of request, whether or not captioned a "letter rogatory";

(C) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or

(D) before a person commissioned by the court to administer any necessary oath and take testimony.

(2) Issuing a Letter of Request or a Commission. A letter of request, a commission, or both may be issued:

(A) on appropriate terms after an application and notice of it; and

(B) without a showing that taking the deposition in another manner is impracticable or inconvenient.

(3) Form of a Request, Notice, or Commission. When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken.

(4) Letter of Request—Admitting Evidence. Evidence obtained in response to a letter of request need not be excluded merely because

> it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.

(c) Disqualification. A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.

Rule 29 – Stipulations About Discovery Procedure

Unless the court orders otherwise, the parties may stipulate that:

(a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition; and

(b) other procedures governing or limiting discovery be modified—but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

Rule 30 – Depositions by Oral Examination

(a) When a Deposition May Be Taken.

> (1) Without Leave. A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.
>
> (2) With Leave. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):
>
> > (A) if the parties have not stipulated to the deposition and:
> >
> > > (i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;
> > >
> > > (ii) the deponent has already been deposed in the case; or
> > >
> > > (iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United

States and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.

(b) Notice of the Deposition; Other Formal Requirements.

(1) Notice in General. A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) Producing Documents. If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

(3) Method of Recording.

(A) Method Stated in the Notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) Additional Method. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) By Remote Means. The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(5) Officer's Duties.

(A) Before the Deposition. Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

(i) the officer's name and business address;

(ii) the date, time, and place of the deposition;

(iii) the deponent's name;

(iv) the officer's administration of the oath or affirmation to the deponent; and

(v) the identity of all persons present.

(B) Conducting the Deposition; Avoiding Distortion. If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)–(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) After the Deposition. At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(1) Examination and Cross-Examination. The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) Objections. An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(3) Participating Through Written Questions. Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) Duration. Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) Sanction. The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) Motion to Terminate or Limit.

(A) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) Order. The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) Award of Expenses. Rule 37(a)(5) applies to the award of expenses.

(e) Review by the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.

(1) Certification and Delivery. The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) Documents and Tangible Things.

(A) Originals and Copies. Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.

(B) Order Regarding the Originals. Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) Copies of the Transcript or Recording. Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) Notice of Filing. A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

Rule 31 – Depositions by Written Questions

(a) When a Deposition May Be Taken.

(1) Without Leave. A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) With Leave. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take a deposition before the time specified in Rule 26(d); or

(B) if the deponent is confined in prison.

(3) Service; Required Notice. A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.

(4) Questions Directed to an Organization. A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6).

(5) Questions from Other Parties. Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.

(b) Delivery to the Officer; Officer's Duties. The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to:

(1) take the deponent's testimony in response to the questions;

(2) prepare and certify the deposition; and

(3) send it to the party, attaching a copy of the questions and of the notice.

(c) Notice of Completion or Filing.

(1) Completion. The party who noticed the deposition must notify all other parties when it is completed.

(2) Filing. A party who files the deposition must promptly notify all other parties of the filing.

Rule 32 — Using Depositions in Court Proceedings

(a) Using Depositions.

(1) In General. At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2) through (8).

(2) Impeachment and Other Uses. Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(3) Deposition of Party, Agent, or Designee. An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) Unavailable Witness. A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used.

(5) Limitations on Use.

(A) Deposition Taken on Short Notice. A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place—and this motion was still pending when the deposition was taken.

(B) Unavailable Deponent; Party Could Not Obtain an Attorney. A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must

not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(6) Using Part of a Deposition. If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(7) Substituting a Party. Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(8) Deposition Taken in an Earlier Action. A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

(b) Objections to Admissibility. Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) Form of Presentation. Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(d) Waiver of Objections.

(1) To the Notice. An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) To the Officer's Qualification. An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or

(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) To the Taking of the Deposition.

(A) Objection to Competence, Relevance, or Materiality. An objection to a deponent's competence—or to the competence, relevance, or> materiality of testimony—is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) Objection to an Error or Irregularity. An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(ii) it is not timely made during the deposition.

(C) Objection to a Written Question. An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.

(4) To Completing and Returning the Deposition. An objection to how the officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

Rule 33 – Interrogatories to Parties

(a) In General.

(1) Number. Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2).

(2) Scope. An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

(b) Answers and Objections.

(1) Responding Party. The interrogatories must be answered:

(A) by the party to whom they are directed; or

(B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.

(2) Time to Respond. The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(3) Answering Each Interrogatory. Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) Objections. The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

(5) Signature. The person who makes the answers must sign them, and the attorney who objects must sign any objections.

(c) Use. An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence.

(d) Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

Rule 34 – Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) Contents of the Request. The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) Responses and Objections.

(A) Time to Respond. The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) Objections. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

(D) Responding to a Request for Production of Electronically Stored Information. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.

(E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(c) Nonparties. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

Rule 35 – Physical and Mental Examinations

(a) Order for an Examination.

(1) In General. The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) Motion and Notice; Contents of the Order. The order:

(A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(b) Examiner's Report.

(1) Request by the Party or Person Examined. The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined.

(2) Contents. The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) Request by the Moving Party. After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) Waiver of Privilege. By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition.

(5) Failure to Deliver a Report. The court on motion may order—on just terms—that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial.

(6) Scope. This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

Rule 36 – Requests for Admission

(a) Scope and Procedure.

(1) Scope. A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

(2) Form; Copy of a Document. Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) Time to Respond; Effect of Not Responding. A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

(4) Answer. If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(5) Objections. The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial.

(6) Motion Regarding the Sufficiency of an Answer or Objection. The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

(b) Effect of an Admission; Withdrawing or Amending It. A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice

the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

Rule 37 – Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) In General. On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) Appropriate Court. A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) Specific Motions.

(A) To Compel Disclosure. If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

(C) Related to a Deposition. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) Payment of Expenses; Protective Orders.

(A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) If the Motion Is Denied. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) If the Motion Is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order.

(1) Sanctions Sought in the District Where the Deposition Is Taken. If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails

to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) Sanctions Sought in the District Where the Action Is Pending.

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) For Not Producing a Person for Examination. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)—(vi), unless the disobedient party shows that it cannot produce the other person.

(C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the

failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).

(2) Failure to Admit. If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) In General.

(A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) Unacceptable Excuse for Failing to Act. A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) Types of Sanctions. Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)—(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Trials

Rule 38 — Right to a Jury Trial; Demand

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.

(b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by:

> (1) serving the other parties with a written demand—which may be included in a pleading—no later than 14 days after the last pleading directed to the issue is served; and
>
> (2) filing the demand in accordance with Rule 5(d).

(c) Specifying Issues. In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may—within 14 days after being served with the demand or within a shorter time ordered by the court—serve a demand for a jury trial on any other or all factual issues triable by jury.

(d) Waiver; Withdrawal. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

(e) Admiralty and Maritime Claims. These rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim under Rule 9(h).

Rule 39 — Trial by Jury or by the Court

(a) When a Demand Is Made. When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless:

> (1) the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record; or
>
> (2) the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.

(b) When No Demand Is Made. Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.

(c) Advisory Jury; Jury Trial by Consent. In an action not triable of right by a jury, the court, on motion or on its own:

(1) may try any issue with an advisory jury; or

(2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial.

Rule 40 – Scheduling Cases for Trial

Each court must provide by rule for scheduling trials. The court must give priority to actions entitled to priority by a federal statute.

Rule 41 – Dismissal of Actions

(a) Voluntary Dismissal.

(1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) *By Court Order; Effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

Rule 42 – Consolidation; Separate Trials

(a) Consolidation. If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

Rule 43 – Taking Testimony

(a) In Open Court. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(b) Affirmation Instead of an Oath. When these rules require an oath, a solemn affirmation suffices.

(c) Evidence on a Motion. When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(d) Interpreter. The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

Rule 44 – Proving an Official Record

(a) Means of Proving.

(1) Domestic Record. Each of the following evidences an official record—or an entry in it—that is otherwise admissible and is kept within the United States, any state, district, or commonwealth, or any territory subject to the administrative or judicial jurisdiction of the United States:

(A) an official publication of the record; or

(B) a copy attested by the officer with legal custody of the record—or by the officer's deputy—and accompanied by a certificate that the officer has custody. The certificate must be made under seal:

(i) by a judge of a court of record in the district or political subdivision where the record is kept; or

(ii) by any public officer with a seal of office and with official duties in the district or political subdivision where the record is kept.

(2) Foreign Record.

(A) In General. Each of the following evidences a foreign official record—or an entry in it—that is otherwise admissible:

(i) an official publication of the record; or

(ii) the record—or a copy—that is attested by an authorized person and is accompanied either by a final certification of genuineness or by a certification under a treaty or convention to which the United States and the country where the record is located are parties.

(B) Final Certification of Genuineness. A final certification must certify the genuineness of the signature and official position of the attester or of any foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation. A final certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States.

(C) Other Means of Proof. If all parties have had a reasonable opportunity to investigate a foreign record's authenticity and accuracy, the court may, for good cause, either:

(i) admit an attested copy without final certification; or

(ii) permit the record to be evidenced by an attested summary with or without a final certification.

(b) Lack of a Record. A written statement that a diligent search of designated records revealed no record or entry of a specified tenor is admissible as evidence that the records contain no such record or entry. For domestic records, the statement must be authenticated under Rule 44(a)(1). For foreign records, the statement must comply with (a)(2)(C)(ii).

(c) Other Proof. A party may prove an official record—or an entry or lack of an entry in it—by any other method authorized by law.

Rule 44.1 – Determining Foreign Law

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

Rule 45 – Subpoena

(a) In General.

(1) Form and Contents.

(A) Requirements—In General. Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(d) and (e).

(B) Command to Attend a Deposition—Notice of the Recording Method. A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information. A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) Command to Produce; Included Obligations. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials.

(2) Issuing Court. A subpoena must issue from the court where the action is pending.

(3) Issued by Whom. The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court.

(4) Notice to Other Parties Before Service. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party.

(b) Service.

(1) By Whom and How; Tendering Fees. Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

(2) Service in the United States. A subpoena may be served at any place within the United States.

(3) Service in a Foreign Country. 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) Proof of Service. Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Place of Compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(f) Transferring a Subpoena-Related Motion. When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances. Then, if the attorney for a person subject to a subpoena is authorized to practice in the court where the motion was made, the attorney may file papers and appear on the motion as an officer

of the issuing court. To enforce its order, the issuing court may transfer the order to the court where the motion was made.

(g) Contempt. The court for the district where compliance is required — and also, after a motion is transferred, the issuing court — may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

Rule 46 – Objecting to a Ruling or Order

A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made.

Rule 47 – Selecting Jurors

(a) Examining Jurors. The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.

(b) Peremptory Challenges. The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870.

(c) Excusing a Juror. During trial or deliberation, the court may excuse a juror for good cause.

Rule 48 – Number of Jurors; Verdict; Polling

(a) Number of Jurors. A jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).

(b) Verdict. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.

(c) Polling. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.

Rule 49 – Special Verdict; General Verdict and Questions

(a) Special Verdict.

(1) In General. The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. The court may do so by:

(A) submitting written questions susceptible of a categorical or other brief answer;

(B) submitting written forms of the special findings that might properly be made under the pleadings and evidence; or

(C) using any other method that the court considers appropriate.

(2) Instructions. The court must give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue.

(3) Issues Not Submitted. A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.

(b) General Verdict with Answers to Written Questions.

(1) In General. The court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide. The court must give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and must direct the jury to do both.

(2) Verdict and Answers Consistent. When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers.

(3) Answers Inconsistent with the Verdict. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may:

(A) approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict;

(B) direct the jury to further consider its answers and verdict; or

(C) order a new trial.

(4) Answers Inconsistent with Each Other and the Verdict. When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial.

Rule 50 – Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

(a) Judgment as a Matter of Law.

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) In General. If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) Effect of a Conditional Ruling. Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

Rule 51 – Instructions to the Jury; Objections; Preserving a Claim of Error

(a) Requests.

(1) Before or at the Close of the Evidence. At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.

(2) After the Close of the Evidence. After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

(c) Objections.

(1) How to Make. A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

(2) When to Make. An objection is timely if:

(A) a party objects at the opportunity provided under Rule 51(b)(2); or

(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.

(1) Assigning Error. A party may assign as error:

(A) an error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction, if that party properly requested it and—unless the court rejected the request in a definitive ruling on the record—also properly objected.

(2) Plain Error. A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

Rule 52 – Findings and Conclusions by the Court; Judgment on Partial Findings

(a) Findings and Conclusions.

(1) In General. In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58

(2) For an Interlocutory Injunction. In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) For a Motion. The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

(4) Effect of a Master's Findings. A master's findings, to the extent adopted by the court, must be considered the court's findings.

(5) Questioning the Evidentiary Support. A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) Setting Aside the Findings. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) Amended or Additional Findings. On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

(c) Judgment on Partial Findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

Rule 53 – Masters

(a) Appointment.

(1) Scope. Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:

(i) some exceptional condition; or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.

(2) Disqualification. A master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 28 U.S.C. § 455, unless the parties, with the court's approval, consent to the appointment after the master discloses any potential grounds for disqualification.

(3) Possible Expense or Delay. In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) Order Appointing a Master.

(1) Notice. Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment.

(2) Contents. The appointing order must direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances, if any, in which the master may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

(3) Issuing. The court may issue the order only after:

(A) the master files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455; and

(B) if a ground is disclosed, the parties, with the court's approval, waive the disqualification.

(4) Amending. The order may be amended at any time after notice to the parties and an opportunity to be heard.

(c) Master's Authority.

(1) In General. Unless the appointing order directs otherwise, a master may:

(A) regulate all proceedings;

(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

(2) Sanctions. The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(d) Master's Orders. A master who issues an order must file it and promptly serve a copy on each party. The clerk must enter the order on the docket.

(e) Master's Reports. A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise.

(f) Action on the Master's Order, Report, or Recommendations.

(1) Opportunity for a Hearing; Action in General. In acting on a master's order, report, or recommendations, the court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.

(2) Time to Object or Move to Adopt or Modify. A party may file objections to—or a motion to adopt or modify—the master's order, report, or recommendations no later than 21 days after a copy is served, unless the court sets a different time.

(3) Reviewing Factual Findings. The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:

(A) the findings will be reviewed for clear error; or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(4) Reviewing Legal Conclusions. The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) Reviewing Procedural Matters. Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(g) Compensation.

(1) Fixing Compensation. Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard.

(2) Payment. The compensation must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) Allocating Payment. The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(h) Appointing a Magistrate Judge. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.

Judgment

Rule 54 – Judgment; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just

reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) Demand for Judgment; Relief to Be Granted. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs; Attorney's Fees.

> (1) Costs Other Than Attorney's Fees. Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.
>
> (2) Attorney's Fees.
>
> > (A) Claim to Be by Motion. A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.
> >
> > (B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:
> >
> > > (i) be filed no later than 14 days after the entry of judgment;
> > >
> > > (ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;
> > >
> > > (iii) state the amount sought or provide a fair estimate of it; and
> > >
> > > (iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.
> >
> > (C) Proceedings. Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge. By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) Exceptions. Subparagraphs (A)–(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927.

Rule 55 – Default; Default Judgment

(a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

(b) Entering a Default Judgment.

(1) By the Clerk. If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

(2) By the Court. In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals—preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;

(B) determine the amount of damages;

(C) establish the truth of any allegation by evidence; or

(D) investigate any other matter.

(c) Setting Aside a Default or a Default Judgment. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

(d) Judgment Against the United States. A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.

Rule 56 – Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

> (1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> > (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
> >
> > (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.
>
> (2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.
>
> (3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.
>
> (4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party;or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

Rule 57 – Declaratory Judgment

These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201. Rules 38 and 39 govern a demand for a jury trial. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action.

Rule 58 – Entering Judgment

(a) Separate Document. Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:

(1) for judgment under Rule 50(b);

(2) to amend or make additional findings under Rule 52(b);

(3) for attorney's fees under Rule 54;

(4) for a new trial, or to alter or amend the judgment, under Rule 59; or

(5) for relief under Rule 60.

(b) Entering Judgment.

(1) Without the Court's Direction. Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(A) the jury returns a general verdict;

(B) the court awards only costs or a sum certain; or

(C) the court denies all relief.

(2) Court's Approval Required. Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(A) the jury returns a special verdict or a general verdict with answers to written questions; or

(B) the court grants other relief not described in this subdivision (b).

(c) Time of Entry. For purposes of these rules, judgment is entered at the following times:

(1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or

(2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs:

(A) it is set out in a separate document; or

(B) 150 days have run from the entry in the civil docket.

(d) Request for Entry. A party may request that judgment be set out in a separate document as required by Rule 58(a).

(e) Cost or Fee Awards. Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4 (a)(4) as a timely motion under Rule 59.

Rule 59 – New Trial; Altering or Amending a Judgment

(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Rule 60 – Relief from a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

> (1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.
>
> (2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

Rule 61 – Harmless Error

Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

Rule 62 – Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay. Except as provided in Rule 62(c) and (d), execution on a judgment and proceedings to enforce it are stayed for 30 days after its entry, unless the court orders otherwise.

(b) Stay by Bond or Other Security. At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or other security.

(c) Stay of an Injunction, Receivership, or Patent Accounting Order. Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or receivership; or

(2) a judgment or order that directs an accounting in an action for patent infringement.

(d) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

(e) Stay Without Bond on an Appeal by the United States, Its Officers, or Its Agencies. The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government.

(f) Stay in Favor of a Judgment Debtor Under State Law. If a judgment is a lien on the judgment debtor's property under the law of the state where the court is located, the judgment debtor is entitled to the same stay of execution the state court would give.

(g) Appellate Court's Power Not Limited. This rule does not limit the power of the appellate court or one of its judges or justices:

(1) to stay proceedings—or suspend, modify, restore, or grant an injunction—while an appeal is pending; or

(2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

(h) Stay with Multiple Claims or Parties. A court may stay the enforcement of a final judgment entered under Rule 54(b) until it enters a later judgment or judgments, and may prescribe terms necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

Rule 62.1 – Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.

Rule 63 – Judge's Inability to Proceed

If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

Provisional and Final Remedies

Rule 64 – Seizing a Person or Property

(a) Remedies Under State Law—In General. At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.

(b) Specific Kinds of Remedies. The remedies available under this rule include the following—however designated and regardless of whether state procedure requires an independent action:

- arrest;
- attachment;
- garnishment;
- replevin;
- sequestration; and
- other corresponding or equivalent remedies.

Rule 65 – Injunctions and Restraining Orders

(a) Preliminary Injunction.

(1) Notice. The court may issue a preliminary injunction only on notice to the adverse party.

(2) Consolidating the Hearing with the Trial on the Merits. Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible

at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) Temporary Restraining Order.

(1) Issuing Without Notice. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) Contents; Expiration. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) Expediting the Preliminary-Injunction Hearing. If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) Motion to Dissolve. On 2 days' notice to the party who obtained the order without notice—or on shorter notice set by the court—the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) Security. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

(d) Contents and Scope of Every Injunction and Restraining Order.

(1) Contents. Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.

(2) Persons Bound. The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(e) Other Laws Not Modified. These rules do not modify the following:

(1) any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee;

(2) 28 U.S.C. § 2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or

(3) 28 U.S.C. § 2284, which relates to actions that must be heard and decided by a three-judge district court.

(f) Copyright Impoundment. This rule applies to copyright-impoundment proceedings.

Rule 65.1 – Proceedings Against a Security Provider

Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given with one or more security providers, each provider submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the security. The security provider's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly send a copy of each to every security provider whose address is known.

Rule 66 – Receivers

These rules govern an action in which the appointment of a receiver is sought or a receiver sues or is sued. But the practice in administering an estate by a receiver or a similar court-appointed officer must accord with the historical practice in federal courts or with a local rule. An action in which a receiver has been appointed may be dismissed only by court order.

Rule 67 – Deposit into Court

(a) Depositing Property. If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party—on notice to every other party and by leave of court—may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must deliver to the clerk a copy of the order permitting deposit.

(b) Investing and Withdrawing Funds. Money paid into court under this rule must be deposited and withdrawn in accordance with 28 U.S.C. § §2041 and 2042 and any like statute. The money must be deposited in an interest-bearing account or invested in a court-approved, interest-bearing instrument.

Rule 68 – Offer of Judgment

(a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) Offer After Liability is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.

(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

Rule 69 – Execution

(a) In General.

(1) Money Judgment; Applicable Procedure. A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

(2) Obtaining Discovery. In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located.

(b) Against Certain Public Officers. When a judgment has been entered against a revenue officer in the circumstances stated in 28 U.S.C. § 2006, or against an officer of Congress in the circumstances stated in 2 U.S.C. § 118, the judgment must be satisfied as those statutes provide.

Rule 70 – Enforcing a Judgement for a Specific Act

(a) Party's Failure to Act; Ordering Another to Act. If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done—at the disobedient party's expense—by another person appointed by the court. When done, the act has the same effect as if done by the party.

(b) Vesting Title. If the real or personal property is within the district, the court—instead of ordering a conveyance—may enter a judgment divesting any party's title and vesting it in others. That judgment has the effect of a legally executed conveyance.

(c) Obtaining a Writ of Attachment or Sequestration. On application by a party entitled to performance of an act, the clerk must issue a writ of attachment or sequestration against the disobedient party's property to compel obedience.

(d) Obtaining a Writ of Execution or Assistance. On application by a party who obtains a judgment or order for possession, the clerk must issue a writ of execution or assistance.

(e) Holding in Contempt. The court may also hold the disobedient party in contempt.

Rule 71 – Enforcing Relief For or Against a Nonparty

When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.

Special Proceedings

Rule 71.1 – Condemning Real or Personal Property

(a) Applicability of Other Rules. These rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise.

(b) Joinder of Properties. The plaintiff may join separate pieces of property in a single action, no matter whether they are owned by the same persons or sought for the same use.

(c) Complaint.

> (1) Caption. The complaint must contain a caption as provided in Rule 10(a). The plaintiff must, however, name as defendants both the property—designated generally by kind, quantity, and location—and at least one owner of some part of or interest in the property.
>
> (2) Contents. The complaint must contain a short and plain statement of the following:
>
> > (A) the authority for the taking;
> >
> > (B) the uses for which the property is to be taken;
> >
> > (C) a description sufficient to identify the property;
> >
> > (D) the interests to be acquired; and
> >
> > (E) for each piece of property, a designation of each defendant who has been joined as an owner or owner of an interest in it.
>
> (3) Parties. When the action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and whose names are then known. But before any hearing on compensation, the plaintiff must add as defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records, considering both the property's character and value and the interests to be acquired. All others may be made defendants under the designation "Unknown Owners."

(4) Procedure. Notice must be served on all defendants as provided in Rule 71.1(d), whether they were named as defendants when the action commenced or were added later. A defendant may answer as provided in Rule 71.1(e). The court, meanwhile, may order any distribution of a deposit that the facts warrant.

(5) Filing; Additional Copies. In addition to filing the complaint, the plaintiff must give the clerk at least one copy for the defendants' use and additional copies at the request of the clerk or a defendant.

(d) Process.

(1) Delivering Notice to the Clerk. On filing a complaint, the plaintiff must promptly deliver to the clerk joint or several notices directed to the named defendants. When adding defendants, the plaintiff must deliver to the clerk additional notices directed to the new defendants.

(2) Contents of the Notice.

(A) Main Contents. Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

(i) that the action is to condemn property;

(ii) the interest to be taken;

(iii) the authority for the taking;

(iv) the uses for which the property is to be taken;

(v) that the defendant may serve an answer on the plaintiff's attorney within 21 days after being served with the notice;

(vi) that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation; and

(vii) that a defendant who does not serve an answer may file a notice of appearance.

(B) Conclusion. The notice must conclude with the name, telephone number, and e-mail address of the plaintiff's attorney and an address within the district in which the action is brought where the attorney may be served.

(3) Serving the Notice.

(A) Personal Service. When a defendant whose address is known resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States, personal service of the notice (without a copy of the complaint) must be made in accordance with Rule 4.

(B) Service by Publication.

(i) A defendant may be served by publication only when the plaintiff's attorney files a certificate stating that the attorney believes the defendant cannot be personally served, because after diligent inquiry within the state where the complaint is filed, the defendant's place of residence is still unknown or, if known, that it is beyond the territorial limits of personal service. Service is then made by publishing the notice—once a week for at least 3 successive weeks—in a newspaper published in the county where the property is located or, if there is no such newspaper, in a newspaper with generalccirculation where the property is located. Before the last publication, a copy of the notice must also be mailed to every defendant who cannot be personally served but whose place of residence is then known. Unknown owners may be served by publication in the same manner by a notice addressed to "Unknown Owners."

(ii) Service by publication is complete on the date of the last publication. The plaintiff's attorney must prove publication and mailing by a certificate, attach a printed copy of the published notice, and mark on the copy the newspaper's name and the dates of publication.

(4) Effect of Delivery and Service. Delivering the notice to the clerk and serving it have the same effect as serving a summons under Rule 4.

(5) Amending the Notice; Proof of Service and Amending the Proof. Rule 4(a)(2) governs amending the notice. Rule 4(l) governs proof of service and amending it.

(e) Appearance or Answer.

(1) Notice of Appearance. A defendant that has no objection or defense to the taking of its property may serve a notice of appearance

designating the property in which it claims an interest. The defendant must then be given notice of all later proceedings affecting the defendant.

(2) Answer. A defendant that has an objection or defense to the taking must serve an answer within 21 days after being served with the notice. The answer must:

(A) identify the property in which the defendant claims an interest;

(B) state the nature and extent of the interest; and

(C) state all the defendant's objections and defenses to the taking.

(3) Waiver of Other Objections and Defenses; Evidence on Compensation. A defendant waives all objections and defenses not stated in its answer. No other pleading or motion asserting an additional objection or defense is allowed. But at the trial on compensation, a defendant—whether or not it has previously appeared or answered—may present evidence on the amount of compensation to be paid and may share in the award.

(f) Amending Pleadings. Without leave of court, the plaintiff may—as often as it wants—amend the complaint at any time before the trial on compensation. But no amendment may be made if it would result in a dismissal inconsistent with Rule 71.1(i)(1) or (2). The plaintiff need not serve a copy of an amendment, but must serve notice of the filing, as provided in Rule 5(b), on every affected party who has appeared and, as provided in Rule 71.1(d), on every affected party who has not appeared. In addition, the plaintiff must give the clerk at least one copy of each amendment for the defendants' use, and additional copies at the request of the clerk or a defendant. A defendant may appear or answer in the time and manner and with the same effect as provided in Rule 71.1(e).

(g) Substituting Parties. If a defendant dies, becomes incompetent, or transfers an interest after being joined, the court may, on motion and notice of hearing, order that the proper party be substituted. Service of the motion and notice on a nonparty must be made as provided in Rule 71.1(d)(3).

(h) Trial of the Issues.

(1) Issues Other Than Compensation; Compensation. In an action involving eminent domain under federal law, the court tries all issues, including compensation, except when compensation must be determined:

(A) by any tribunal specially constituted by a federal statute to determine compensation; or

(B) if there is no such tribunal, by a jury when a party demands one within the time to answer or within any additional time the court sets, unless the court appoints a commission.

(2) Appointing a Commission; Commission's Powers and Report.

(A) Reasons for Appointing. If a party has demanded a jury, the court may instead appoint a three-person commission to determine compensation because of the character, location, or quantity of the property to be condemned or for other just reasons.

(B) Alternate Commissioners. The court may appoint up to two additional persons to serve as alternate commissioners to hear the case and replace commissioners who, before a decision is filed, the court finds unable or disqualified to perform their duties. Once the commission renders its final decision, the court must discharge any alternate who has not replaced a commissioner.

(C) Examining the Prospective Commissioners. Before making its appointments, the court must advise the parties of the identity and qualifications of each prospective commissioner and alternate, and may permit the parties to examine them. The parties may not suggest appointees, but for good cause may object to a prospective commissioner or alternate.

(D) Commission's Powers and Report. A commission has the powers of a master under Rule 53(c). Its action and report are determined by a majority. Rule 53(d), (e), and (f) apply to its action and report.

(i) Dismissal of the Action or a Defendant.

(1) Dismissing the Action.

(A) By the Plaintiff. If no compensation hearing on a piece of property has begun, and if the plaintiff has not acquired title or a lesser interest or taken possession, the plaintiff may, without a court order, dismiss the action as to that property by filing a notice of dismissal briefly describing the property.

(B) By Stipulation. Before a judgment is entered vesting the plaintiff with title or a lesser interest in or possession of property, the plaintiff and affected defendants may, without a court order, dismiss the action in whole or in part by filing a stipulation of dismissal. And if the parties

so stipulate, the court may vacate a judgment already entered.

(C) By Court Order. At any time before compensation has been determined and paid, the court may, after a motion and hearing, dismiss the action as to a piece of property. But if the plaintiff has already taken title, a lesser interest, or possession as to any part of it, the court must award compensation for the title, lesser interest, or possession taken.

(2) Dismissing a Defendant. The court may at any time dismiss a defendant who was unnecessarily or improperly joined.

(3) Effect. A dismissal is without prejudice unless otherwise stated in the notice, stipulation, or court order.

(j) Deposit and Its Distribution.

(1) Deposit. The plaintiff must deposit with the court any money required by law as a condition to the exercise of eminent domain and may make a deposit when allowed by statute.

(2) Distribution; Adjusting Distribution. After a deposit, the court and attorneys must expedite the proceedings so as to distribute the deposit and to determine and pay compensation. If the compensation finally awarded to a defendant exceeds the amount distributed to that defendant, the court must enter judgment against the plaintiff for the deficiency. If the compensation awarded to a defendant is less than the amount distributed to that defendant, the court must enter judgment against that defendant for the overpayment.

(k) Condemnation Under a State's Power of Eminent Domain. This rule governs an action involving eminent domain under state law. But if state law provides for trying an issue by jury—or for trying the issue of compensation by jury or commission or both—that law governs.

(l) Costs. Costs are not subject to Rule 54(d).

Rule 72 – Magistrate Judges: Pretrial Order

(a) Nondispositive Matters. When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

(b) Dispositive Motions and Prisoner Petitions.

(1) Findings and Recommendations. A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement. A record must be made of all evidentiary proceedings and may, at the magistrate judge's discretion, be made of any other proceedings. The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly mail a copy to each party.

(2) Objections. Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.

(3) Resolving Objections. The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

Rule 73 – Magistrate Judges: Trial by Consent; Appeal

(a) Trial by Consent. When authorized under 28 U.S.C. § 636(c), a magistrate judge may, if all parties consent, conduct a civil action or proceeding, including a jury or nonjury trial. A record must be made in accordance with 28 U.S.C. § 636(c)(5).

(b) Consent Procedure.

(1) In General. When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent under 28 U.S.C. § 636(c). To signify their consent, the parties must jointly or separately file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral.

(2) Reminding the Parties About Consenting. A district judge, magistrate judge, or other court official may remind the parties of the magistrate judge's availability, but must also advise them

that they are free to withhold consent without adverse substantive consequences.

(3) Vacating a Referral. On its own for good cause—or when a party shows extraordinary circumstances—the district judge may vacate a referral to a magistrate judge under this rule.

(c) Appealing a Judgment. In accordance with 28 U.S.C. § 636(c)(3), an appeal from a judgment entered at a magistrate judge's direction may be taken to the court of appeals as would any other appeal from a district-court judgment.

Rule 74 – [Abrogated (Apr. 11, 1997, eff. Dec. 1, 1997),]

Rule 75 - [Abrogated (Apr. 11, 1997, eff. Dec. 1, 1997),]

Rule 76 - [Abrogated (Apr. 11, 1997, eff. Dec. 1, 1997),]

[Rule 71A. Renumbered Rule 71.1]

District Courts and Clerks: Conducting Business; Issuing Orders

Rule 77 – Conducting Business; Clerk's Authority; Notice of an Order or Judgement

(a) When Court Is Open. Every district court is considered always open for filing any paper, issuing and returning process, making a motion, or entering an order.

(b) Place for Trial and Other Proceedings. Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing—other than one ex parte—may be conducted outside the district unless all the affected parties consent.

(c) Clerk's Office Hours; Clerk's Orders.

(1) Hours. The clerk's office—with a clerk or deputy on duty—must be open during business hours every day except Saturdays, Sundays, and legal holidays. But a court may, by local rule or order, require that the office be open for specified hours on Saturday or a particular legal holiday other than one listed in Rule 6(a)(6)(A).

(2) Orders. Subject to the court's power to suspend, alter, or rescind the clerk's action for good cause, the clerk may:

(A) issue process;

(B) enter a default;

(C) enter a default judgment under Rule 55(b)(1); and

(D) act on any other matter that does not require the court's action.

(d) Serving Notice of an Order or Judgment.

(1) Service. Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. The clerk must record the service on the docket. A party also may serve notice of the entry as provided in Rule 5(b).

(2) Time to Appeal Not Affected by Lack of Notice. Lack of notice of the entry does not affect the time for appeal or relieve—or authorize the court to relieve—a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure (4)(a).

Rule 78 – Hearing Motions; Submission on Briefs

(a) Providing a Regular Schedule for Oral Hearings. A court may establish regular times and places for oral hearings on motions.

(b) Providing for Submission on Briefs. By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings.

Rule 79 – Records Kept by the Clerk

(a) Civil Docket.

(1) In General. The clerk must keep a record known as the "civil docket" in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States. The clerk must enter each civil action in the docket. Actions must be assigned consecutive file numbers, which must be noted in the docket where the first entry of the action is made.

(2) Items to be Entered. The following items must be marked with the file number and entered chronologically in the docket:

(A) papers filed with the clerk;

(B) process issued, and proofs of service or other returns showing execution; and

(C) appearances, orders, verdicts, and judgments.

(3) Contents of Entries; Jury *Trial* Demanded. Each entry must briefly show the nature of the paper filed or writ issued, the substance of each proof of service or other return, and the substance and date of entry of each order and judgment. When a jury trial has been properly demanded or ordered, the clerk must enter the word "jury" in the docket.

(b) Civil Judgments and Orders. The clerk must keep a copy of every final judgment and appealable order; of every order affecting title to or a lien on real or personal property; and of any other order that the court directs to be kept. The clerk must keep these in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

(c) Indexes; Calendars. Under the court's direction, the clerk must:

(1) keep indexes of the docket and of the judgments and orders described in Rule 79(b); and

(2) prepare calendars of all actions ready for trial, distinguishing jury trials from nonjury trials.

(d) Other Records. The clerk must keep any other records required by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

Rule 80 – Stenographic Transcript as Evidence

If stenographically reported testimony at a hearing or trial is admissible in evidence at a later trial, the testimony may be proved by a transcript certified by the person who reported it.

General Provisions

Rule 81 – Applicability of the Rules in General; Removed Actions

(a) Applicability to Particular Proceedings.

(1) *Prize* Proceedings. These rules do not apply to prize proceedings in admiralty governed by 10 U.S.C. § § 7651–7681.

(2) Bankruptcy. These rules apply to bankruptcy proceedings to the extent provided by the Federal Rules of Bankruptcy Procedure.

(3) Citizenship. These rules apply to proceedings for admission to citizenship to the extent that the practice in those proceedings is not specified in federal statutes and has previously conformed to the practice in civil actions. The provisions of 8 U.S.C. § 1451 for service by publication and for answer apply in proceedings to cancel citizenship certificates.

(4) Special Writs. These rules apply to proceedings for habeas corpus and for quo warranto to the extent that the practice in those proceedings:

(A) is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases; and

(B) has previously conformed to the practice in civil actions.

(5) Proceedings Involving a Subpoena. These rules apply to proceedings to compel testimony or the production of documents through a subpoena issued by a United States officer or agency under a federal statute, except as otherwise provided by statute, by local rule, or by court order in the proceedings.

(6) Other Proceedings. These rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures:

(A) 7 U.S.C. § § 292, 499g(c), for reviewing an order of the Secretary of Agriculture;

(B) 9 U.S.C., relating to arbitration;

(C) 15 U.S.C. § 522, for reviewing an order of the Secretary of the Interior;

(D) 15 U.S.C. § 715d(c), for reviewing an order denying a certificate of clearance;

(E) 29 U.S.C. § § 159, 160, for enforcing an order of the National Labor Relations Board;

(F) 33 U.S.C. § § 918, 921, for enforcing or reviewing a compensation order under the Longshore and Harbor Workers' Compensation Act; and

(G) 45 U.S.C. § 159, for reviewing an arbitration award in a railway-labor dispute.

(b) Scire Facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules.

(c) Removed Actions.

(1) Applicability. These rules apply to a civil action after it is removed from a state court.

(2) Further Pleading. After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:

(A) 21 days after receiving—through service or otherwise—a copy of the initial pleading stating the claim for relief;

(B) 21 days after being served with the summons for an initial pleading on file at the time of service; or

(C) 7 days after the notice of removal is filed.

(3) Demand for a Jury *Trial*.

(A) As Affected by State Law. A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

(B) Under *Rule 38*. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after: > > (i) it files a notice of removal; or > > (ii) it is served with a notice of removal filed by another party.

(d) Law Applicable.

(1) "State Law" Defined. When these rules refer to state law, the term "law" includes the state's statutes and the state's judicial decisions.

(2) "State" Defined. The term "state" includes, where appropriate, the District of Columbia and any United States commonwealth or territory.

(3) "Federal Statute" Defined in the District of Columbia. In the United States District Court for the District of Columbia, the term "federal statute" includes any Act of Congress that applies locally to the District.

Rule 82 – Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C § 1390.

Rule 83 – Rules by District Courts; Judge's Directives

(a) Local Rules.

(1) In General. After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. A local rule must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. § §2072 and 2075, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(2) Requirement of Form. A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.

(b) Procedure When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. § §2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Rule 84 – Abrogated, eff. Dec, 2015

Rule 85 – Title

These rules may be cited as the Federal Rules of Civil Procedure.

Rule 86 – Effective Dates

(a) In General. These rules and any amendments take effect at the time specified by the Supreme Court, subject to 28 U.S.C. § 2074. They govern:

(1) proceedings in an action commenced after their effective date; and

(2) proceedings after that date in an action then pending unless:

(A) the Supreme Court specifies otherwise; or

(B) the court determines that applying them in a particular action would be infeasible or work an injustice.

(b) December 1, 2007 Amendments. If any provision in Rules 1–5.1, 6–73, or 77–86 conflicts with another law, priority in time for the purpose of 28 U.S.C. § 2072(b) is not affected by the amendments taking effect on December 1, 2007

Rule 87. Civil Rules Emergency

(a) Conditions for an Emergency. The Judicial Conference of the United States may declare a Civil Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.

(b) Declaring an Emergency.

(1) Content. The declaration:

(A) must designate the court or courts affected;

(B) adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them; and

(C) must be limited to a stated period of no more than 90 days.

(2) Early Termination. The Judicial Conference may terminate a declaration for one or more courts before the termination date.

(3) Additional Declarations. The Judicial Conference may issue additional declarations under this rule.

(c) Emergency Rules.

(1) Emergency Rules 4(e), (h)(1), (i), and (j)(2) and for serving a minor incompetent person. The court may by order authorize service on a defendant described in Rule 4(e), (h)(1), (i), or (j)(2)—or on a minor or incompetent person in a judicial district of the United States—by a method that is reasonably calculated to give notice. A method of service may be completed under the order after the declaration ends unless the court, after notice and an opportunity to be heard, modifies or rescinds the order.

(2) Emergency Rule 6(b)(2).

(A) Extension of Time to File Certain Motions. A court may, by order, apply Rule 6(b)(1)(A) to extend for a period of no more than 30 days after an entry of the order the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

(B) Effect on Time to Appeal. Unless the time to appeal would otherwise be longer:

(i) if the court denies an extension, the time to file an appeal runs for all parties from the date the order denying the motion to extend is entered;

(ii) if the court grants an extension, a motion authorized by the court and filed within the extended period is, for purposes of Appellate Rule 4(a)(4)(A), filed "within the time allowed by" the Federal Rules of Civil Procedre; and

(iii) if the court grants an extension and no motion authorized by the court is made within the extended period, the time to file an appeal runs for all parties from the expiration of the extended period.

(C) Declaration Ends. An act authorized by an order under this emergency rule may be completed under the order after the emergency declaration ends.

Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions

[Omitted.]

Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g)

[Omitted.]

Selected Federal Statutes

28 U.S.C. § 1291, Final Decisions of District Courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292, Interlocutory Decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
>
> (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of

the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) Of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) Of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)

(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)

(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

28 U.S.C. § 1331, Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332, Diversity of Citizenship; Amount in Controversy; Costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) Citizens of different States;

(2) Shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) Citizens of different States and in which citizens or subjects of a foreign state are additional parties

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)

(1) In this subsection—

(A) The term "class" means all of the class members in a class action;

(B) The term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) The term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action and

(D) The term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) Any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) Any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) Any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

(A) Whether the claims asserted involve matters of national or interstate interest;

(B) Whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) Whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) Whether the action was brought in a forum with a distinct nexus with the class members the alleged harm, or the defendants;

(E) Whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) Whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

(A)

(i) Over a class action in which—

(I) Greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) At least 1 defendant is a defendant—

(aa) From whom significant relief is sought by members of the plaintiff class;

(bb) Whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) Who is a citizen of the State in which the action was originally filed; and

(III) Principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) During the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) Two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which—

(A) The primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) The number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff class shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

> (A) Concerning a covered security as defined under 16(f)(3) [1] of the Securities Act of 1933 (15 U.S.C. 78p(f)(3) [2]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));
>
> (B) That relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or
>
> (C) That relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder)

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)

> (A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.
>
> (B)

(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

(I) All of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) The claims are joined upon motion of a defendant;

(III) All of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) The claims have been consolidated or coordinated solely for pretrial proceedings.

(C)

(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply—

(I) To cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) If plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1335, Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in subsection (a) or (d) of section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if

(2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

28 U.S.C. § 1367, Supplemental Jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

> (1) The claim raises a novel or complex issue of State law,
>
> (2) The claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) The district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) In exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1391, Venue Generally

(a) Applicability of Section.—Except as otherwise provided by law—

> (1) This section shall govern the venue of all civil actions brought in district courts of the United States; and
>
> (2) The proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature.

(b) Venue in general.—A civil action may be brought in—

> (1) A judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
>
> (2) A judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

(3) If there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

(c) Residency—For All Venue Purposes—

(1) A natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled;

(2) An entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business; and

(3) A defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.

(d) Residency of corporations in States with multiple districts.—

For purposes of venue under this chapter, in a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporations hall be deemed to reside in the district within which it has the most significant contacts.

(e) Actions Where Defendant Is Officer or Employee of the United States.—

(1) In general.—

A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

(2) Service.—

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

(f) Civil Actions Against a Foreign State.—A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) In any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) In any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) In any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) In the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

(g) Multiparty, Multiforum Litigation.—

A civil action in which jurisdiction of the district court is based upon section 1369 of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.

28 U.S.C. § 1404, Change of Venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) Transfers from a district court of the United States to the District Court of Guam, the District Court for the Northern Mariana Islands, or the District Court of the Virgin Islands shall not be permitted under this section. As otherwise used in this section, the term "district court" includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term "district" includes the territorial jurisdiction of each such court.

28 U.S.C. § 1406, Cure or Waiver of Defects

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

(c) As used in this section, the term "district court" includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term "district" includes the territorial jurisdiction of each such court.

28 U.S.C. § 1407, Multidistrict Litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the Judicial Panel on Multidistrict Litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated; Provided, however, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the

judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by—

> (i) The judicial panel on multidistrict litigation upon its own initiative, or
>
> (ii) Motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an

order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. "Antitrust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936(49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

(h) Notwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act.

28 U.S.C. § 1441, Removal of Civil Actions

(a) Generally.—

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Removal Based on Diversity of Citizenship.—

> (1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.
>
> (2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Joinder of Federal Law Claims and State Law Claims.—

> (1) If a civil action includes—
>
> > (A) A claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and
> >
> > (B) A claim not within the original or supplemental jurisdiction of the district court or a claim that has been

made nonremovable by statute, the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).

(2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).

(d) Actions Against Foreign States.—

Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) Multiparty, Multiforum Jurisdiction.—

(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

(A) The action could have been brought in a United States district court under section 1369 of this title; or

(B) The defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) [1] has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to

the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) Derivative Removal Jurisdiction.—

The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1446, Procedure For Removal of Civil Actions

(a) Generally.—

A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) Requirements; Generally.—

(1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(2)

(A) When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

(B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.

(C) If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

(3) Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) Requirements; Removal Based on Diversity of Citizenship.—

(1) A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.

(2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that—

(A) the notice of removal may assert the amount in controversy if the initial pleading seeks—

(i) nonmonetary relief; or

(ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and

(B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

(3)

(A) If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an "other paper" under subsection (b)(3).

(B) If the notice of removal is filed more than 1 year after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith under paragraph (1).

(d) Notice to Adverse Parties and State Court.—

Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) Counterclaim in 337 Proceeding.—

With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

(g) Where the civil action or criminal prosecution that is removable under section 1442(a) is a proceeding in which a judicial order for testimony or documents is sought or issued or sought to be enforced, the 30-day requirement of subsection (b) of this section and paragraph (1) of section 1455(b) is satisfied

if the person or entity desiring to remove the proceeding files the notice of removal not later than 30 days after receiving, through service, notice of any such proceeding.

28 U.S.C. § 1447, Procedure After Removal Generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

28 U.S.C. § 1453, Removal of Class Actions

(a) Definitions.—

In this section, the terms "class", "class action", "class certification order", and "class member" shall have the meanings given such terms under section 1332(d)(1).

(b) In General.—

A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(c) Review of Remand Orders.—

(1) In general.—

Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

(2) Time period for judgment.—

If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) Extension of time period.—The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) Denial of appeal.—

If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

(d) Exception.—This section shall not apply to any class action that solely involves—

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[1]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

28 U.S.C. § 1652, State Laws as Rules of Decision (The Rules of Decision Act)

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1927, Counsel's Liability for Excessive Costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 2072, Rules of Procedure and Evidence; Power to Prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

U.S. Constitution

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I

Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2

1: The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

2: No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

3: Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four,

Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4: When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

5: The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3

1: The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

2: Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

3: No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

4: The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

5: The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

6: The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

7: Judgment in Cases of impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4

1: The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

2: The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5

1: Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

2: Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

3: Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

4: Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6

1: The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

2: No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7

1: All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

2: Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

3: Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8

1: The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

2: To borrow Money on the credit of the United States;

3: To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

4: To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

5: To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

6: To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

7: To establish Post Offices and post Roads;

8: To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

9: To constitute Tribunals inferior to the supreme Court;

10: To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

11: To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

12: To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

13: To provide and maintain a Navy;

14: To make Rules for the Government and Regulation of the land and naval Forces;

15: To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

16: To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

17: To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

18: To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9

1: The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

2: The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

3: No Bill of Attainder or ex post facto Law shall be passed.

4: No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

5: No Tax or Duty shall be laid on Articles exported from any State.

6: No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

7: No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

8: No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10

1: No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

2: No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

3: No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II

Section 1

1: The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

2: Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

3: The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

4: The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

5: No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

6: In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

7: The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

8: Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2

1: The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

2: He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

3: The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III

Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2

1: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; —between Citizens of different States, —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

2: In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

3: The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3

1: Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

2: The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article IV

Section 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2

1: The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

2: A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

3: No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3

1: New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

2: The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article VI

1: All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

2: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3: The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the

press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 2

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment 3

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 7

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment 9

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment 11

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment 12

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. —The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment 13

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Congress shall have power to enforce this article by appropriate legislation.

Amendment 14

1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2: Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3: No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4: The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment 15

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

The Congress shall have power to enforce this article by appropriate legislation.

Amendment 16

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment 17

1: The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

2: When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

3: This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment 18

1: After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

2: The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

3: This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment 19

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Amendment 20

1: The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

2: The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

3: If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

4: The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

5: Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

6: This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment 21

1: The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

2: The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

3: This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment 22

1: No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this article shall not apply to any person holding the office of President when this article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this article becomes operative from holding the office of President or acting as President during the remainder of such term.

2: This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several states within seven years from the date of its submission to the states by the Congress.

Amendment 23

1: The District constituting the seat of government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a state, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

2: The Congress shall have power to enforce this article by appropriate legislation.

Amendment 24

1: The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax.

2: The Congress shall have power to enforce this article by appropriate legislation.

Amendment 25

1: In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

2: Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

3: Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

4: Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting

President; otherwise, the President shall resume the powers and duties of his office.

Amendment 26

1: The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age.

2: The Congress shall have the power to enforce this article by appropriate legislation.

Amendment 27

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.